

The Development of Asset Forfeiture Law in the United States

by Stefan D. Cassella¹

Introduction

Asset forfeiture came into prominence as a law enforcement tool in the United States during the 1990's. At the beginning of that decade, the Department of Justice – the principal federal law enforcement agency – was forfeiting approximately \$200 million per year in criminal assets, mostly from drug cases. By the end of the decade, it was forfeiting over \$600 million per year in assets involved in an enormous variety of serious crimes.²

In short, in the last decade, asset forfeiture became institutionalized as an essential weapon in the arsenal that the federal law enforcement agencies in the United States could bring to bear on the perpetrators of crime. But the statutes, procedures and policies that govern the application of the forfeiture laws did not spring full-grown from a single Act of Congress. Nor were the various statutes that were enacted piecemeal over many years accepted by the courts without skepticism or controversy. To the contrary, laws and concepts that were slowly developed throughout the 19th and 20th Centuries were greatly expanded in the last 20 years, applied in new contexts, and subjected to close scrutiny by a skeptical judiciary. Only now, after more than a dozen constitutional challenges in the Supreme Court of the United States and the enactment of comprehensive reform legislation, can it be said that most of the major issues have

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² Statistics provided by the Asset Forfeiture Management Staff of the U.S. Department of Justice. As a result of amendments made by the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), Pub. L. 106-85, 114 Stat. 202, the United States now has criminal and civil forfeiture authority for well over 250 federal, state and foreign crimes.

been settled. Many issues remain, but to a large extent when the practitioners of forfeiture law go to federal court today, they are litigating over the details.

Though the history may be different, the concepts and issues over which the courts in the United States have wrestled will seem familiar to a foreign audience, for they are the same concepts and the same issues that courts in other countries that have adopted civil and criminal forfeiture laws more recently are wrestling with today. What is the “instrumentality” of an offense? Why is a civil forfeiture case brought against the property itself and not against the owner? Does civil forfeiture constitute double jeopardy? Do third parties have a constitutional right to the protection of their interests? Does a property owner have a right to prior notice before his property is seized? Can one use forfeitable property to secure the right to counsel? Does the protection against unreasonable searches and apply in civil forfeiture cases? Is there a constitutional duty on the courts to ensure that forfeitures are proportional to the underlying crime?

Most of these issues were resolved, to one extent or another, in cases decided by the Supreme Court in the past decade. The result is that we now have a coherent body of law describing how civil and criminal forfeitures are supposed to work in the United States, and how they are limited by the constitutional protections embodied in the Bill of Rights.

The purpose of this article is to trace the evolution of the asset forfeiture laws in the United States to see how concepts at first perceived as foreign or even antithetical to well-settled norms of legal practice came to be accepted as integral to the fabric of federal criminal law.\

I.

The First Forfeiture Statutes: What does it mean to file an action *in rem*?

Asset forfeiture has an ancient tradition in the United States, dating back to the English common law.³ The First Congress, in 1789, enacted statutes authorizing the seizure and forfeiture of ships and cargos involved in customs offenses, and later statutes authorized the forfeiture of ships engaged in piracy and slave trafficking.⁴ Typical was the Act of 3 March 1819, which authorized the forfeiture of any vessel from which any “piratical aggression” was attempted or perpetrated.⁵

All of these early statutes allowed the Government to forfeit the property by filing a civil lawsuit against the property itself, rather than by filing an action – civil or criminal – against the property owner. In other words, the Government could proceed against the property without having to wait until the owner was identified, apprehended and convicted.⁶ The notion was that the property itself was the offender, and thus could be named as the defendant *in rem* in a civil case.⁷

³ See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-83 (1974) (tracing the asset forfeitures laws back to the enforcement of English statutes and common law by the colonies before the adoption of the U.S. Constitution, and tracing the common law concept of forfeiture, in turn, back to Biblical times); *Austin v. United States*, 509 U.S. 602, 611-13 (1993) (same).

⁴ See *United States v. A Parcel of Land . . . 92 Buena Vista Ave.*, 507 U.S. 111, 119-20 (1993) (citing the early statutes); *Calero-Toledo*, 416 U.S. at 683 (same); *United States v. Bajakajian*, 524 U.S. 321, 340-41 (1998) (same); *id.* at 345-46 (Kennedy, J., dissenting) (same); *Austin*, 509 U.S. at 613-14 (same); *United States v. Ursery*, 518 U.S. 267, 274 (1996) (same).

⁵ *The Palmyra*, 25 U.S. (12 Wheat.) 1, 8 (1827).

⁶ The *in rem* nature of civil forfeiture actions in the United States is generally reflected in the case caption: hence, *United States v. A Parcel of Land*, *supra*, wherein the land itself is the defendant *in rem*, and the owner is not a party to the action at all unless he chooses to contest the forfeiture by filing a claim.

⁷ See *The Palmyra*, 25 U.S. at 14 (“The thing is here primarily considered as the offender, or rather the offense is attached primarily to the thing. . . . [Thus,] the proceeding *in rem* stands independent of, and wholly unaffected by any criminal

This was a matter of convenience and necessity. Frequently, in cases involving smuggling, piracy and slave trafficking, the ship or its cargo might be found within the jurisdiction of the United States, but the property owner either remained abroad or could not be found at all.⁸ Thus, only by styling the action as a proceeding *in rem* against the property could the Government hope to prevent the property from being used again to commit another offense, or in the case of a customs offense, only by bringing an *in rem* action could the Government hope to recover the duties that were owed on the imported goods.⁹

Styling the case as an action against the property, however, meant that the role of the owner in the commission of the offense was irrelevant. Not only was it unnecessary to convict the owner of the underlying crime before a court could assert jurisdiction over the property, but because the property itself was the offender, it was unnecessary to show that *the owner* had any role in the offense at all.¹⁰ For example,

proceeding *in personam*.”); *see also Calero-Toledo*, 416 U.S. at 684; *Bennis v. Michigan*, 516 U.S. 442, 447 (1996).

⁸ *See Austin*, 509 U.S. at 615 n.9 (“The fictions of *in rem* forfeiture were developed primarily to expand the reach of the courts, which, particularly in admiralty proceedings, might have lacked *in personam* jurisdiction over the owner of the property.”) (citations omitted); *Bennis*, 516 U.S. at 472 (1996) (Kennedy, J. dissenting) (*in rem* forfeiture evolved “from the necessity of finding some source of compensation for injuries done by a vessel whose responsible owners were often half a world away and beyond the practical reach of the law and its processes.”)

⁹ *Bennis*, 516 U.S. at 461 n.5 (Stevens, J. dissenting); *Harmony v. United States*, 43 U.S. (2 How.) 210, 238 (1844) (treating the property as the offender, without regard to the owner’s conduct, seen “as the only adequate means of suppressing the offense or wrong”). *See also Bajakajian*, 524 U.S. at 340 and 344 n.17 (noting that *in rem* forfeiture of smuggled goods served to “vindicate the Government’s underlying property right in customs duties”); *United States v. 1960 Bags of Coffee*, 12 U.S. (8 Cranch) 398, 405 (1814) (forfeiting cargo transferred in violation of the Non-Intercourse Act of 1809), cited in *Calero-Toledo*, 416 U.S. at 684 n.24.

¹⁰ *See The Palmyra*, note , *supra*.

in *Harmony v. United States*,¹¹ a pirate case involving the Act of 3 March 1819, the Supreme Court said, “The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner.”¹² It was enough to show that *someone* had committed the crime and used the defendant property to commit it.

The notion that the property itself could be considered guilty of the offense sounds strange to the modern ear. Today we would say that the property is subject to forfeiture not because the property itself is something wrong, but because it was the “instrumentality” of the offense; but that term did not come into common usage in forfeiture cases for a surprisingly long time.¹³

***In rem* forfeiture in the 20th Century: Forfeiting the instruments of crime**

The concept of *in rem* forfeiture continued to evolve throughout the 19th and early 20th Centuries, with the focus increasingly on property used to commit violations of the laws relating to taxation on alcohol and distilled spirits.¹⁴ In a series of cases between the 1870's and 1920's, the Supreme Court consistently

¹¹ 43 U.S. (2 How.) 210, 233-34 (1844).

¹² Quoted in *Bennis*, 516 U.S. at 461 n.5 (Stevens, J., dissenting); see also *United States v. United States Coin and Currency*, 401 U.S. 715, 719-20 (1971) (discussing the early cases); *The Brig Ann*, 13 U.S. (9 Cranch) 289 (1815).

¹³ As noted in the text, the term “guilty instrument” appeared in *Harmony* as long ago as 1844. In that case, the Court also observed, “It is true that inanimate matter can commit no offence. But this body is animated and put in action by the crew, who are guided by the master.” 43 U.S. at 234. But the Supreme Court nevertheless considers the term “instrumentality” to be of recent vintage. See *Bajakajian*, 524 U.S. at 333 n.8 (noting that the term “instrumentality” relates back only to Justice Scalia’s concurring opinion in *Austin v. United States*, 509 U.S. at 627-28 (Scalia, J., concurring in part and concurring in judgment)).

¹⁴ In the early 20th Century, the federal government in the United States relied on taxes on liquor, customs on tobacco for as much as 75 percent of its total revenue. *United States v. James Daniel Good Real Property*, 510 U.S. 43, 60 (1993).

upheld the notion that such property could be forfeited without regard to the role of the property owner in the commission of the offense.

For example, in *Dobbins's Distillery v. United States*,¹⁵ the Court upheld the forfeiture of land and buildings used in connection with the operation of a tax-delinquent distillery, even though the property was in the control of a lessee when the offense occurred.¹⁶ And in *J.W. Goldsmith, Jr.-Grant Co. v. United States*,¹⁷ and *Van Oster v. Kansas*,¹⁸ the Court upheld the forfeiture of automobiles used to transport bootleg whiskey or other illegal spirits by persons other than the vehicles' owners.¹⁹ To be sure, the Court continued to rely on the legal fiction that the property itself was the wrongdoer,²⁰ but in these cases it was increasingly clear that the property was subject to forfeiture because it was the instrument by which the offense was committed, and that it was necessary to confiscate such property to remove it from circulation or to recover taxes or other payments to which the Government was entitled.²¹

¹⁵ 96 U.S. 395 (1878).

¹⁶ See *James Daniel Good*, 510 U.S. at 60, 75 (Rehnquist, C.J. dissenting); *Austin*, 509 U.S. at 624 (Scalia, J. concurring); *Bennis*, 516 U.S. at 447; *Calero-Toledo*, 416 U.S. at 685; *92 Buena Vista*, 507 U.S. at 120 & n.14. See also *United States v. Stowell*, 133 U.S. 1 (1890) (forfeiture of land and buildings in connection with the operation of an illegal brewery). Nearly a century later, the Government was still using civil forfeiture to recover property from a person who failed to pay taxes. See *United States v. United States Coin and Currency*, 401 U.S. 715 (1971) (civil forfeiture action against money used in violation of internal revenue statute requiring gamblers to register and pay taxes).

¹⁷ 254 U.S. 505 (1921).

¹⁸ 272 U.S. 465 (1926).

¹⁹ See *Bennis*, 516 U.S. at 998-99; *Calero-Toledo*, 416 U.S. at 686. See also *United States v. One Ford Coupe Automobile*, 272 U.S. 321 (1926).

²⁰ See, e.g., *Dobbins's Distillery*, 96 U.S. at 400 (quoting *The Palmyra*).

²¹ See *Austin*, 509 U.S. at 615 (describing the dual rationale for the forfeitures in such cases as *Dobbins's Distillery* and *J.W. Goldsmith, Jr.-Grant Co.*); *Calero-Toledo*, 416 U.S. at 686-87 (listing the purposes served by the forfeiture of instrumentalities);

The Late 20th Century: Expanding forfeiture for drug offenses

By the middle of the 20th Century, Congress had enacted statutes authorizing the forfeiture of property involved in a much wider variety of crimes including counterfeiting, gambling, alien smuggling and drug trafficking.²² Initially, these forfeiture statutes closely paralleled the early statutes used to enforce the customs, piracy, and revenue laws, in that they were limited to the instrumentalities of the crime.²³ But a dramatic expansion of the forfeiture laws occurred in 1978 and 1984 when Congress amended the drug forfeiture statutes, first to allow the forfeiture of the *proceeds* of the offense, and then to permit the forfeiture of property used to *facilitate* it.²⁴

The idea of forfeiting the proceeds of crime was entirely new, and the notion of forfeiting facilitating property meant that the Government could confiscate not only the instrument actually used to commit the offense – like an automobile used to transport bootleg whiskey – but also any property that made the crime easier to commit or harder

Bajakajian, 524 U.S. at 333 n.8 (noting that although the term “instrumentality” is of “recent vintage,” “it fairly characterizes property that historically was subject to forfeiture because it was the actual means by which an offense was committed”), citing *J.W. Goldsmith, Jr.-Grant Co.*

²² See, e.g., *United States v. United States Coin and Currency*, 410 U.S. 715 (1971) (forfeiture action against property involved in gambling offense).

²³ See *92 Buena Vista*, 507 U.S. at 121-22 (noting that the drug forfeiture statutes were initially limited to “the instruments by which [the drugs] were manufactured and distributed,” but then were expanded to include proceeds and property “used in the commission” of the offense).

²⁴ See 21 U.S.C. 881(a)(6) (enacted 1978) (authorizing forfeiture of the proceeds of a drug offense); 21 U.S.C. 881(a)(7) (enacted 1984) (authorizing forfeiture of real property used or intended to be used to commit or to facilitate the commission of a drug offense); *James Daniel Good*, 510 U.S. at 53 (noting addition of authority to forfeit real property to the drug forfeiture statute in 1984).

to detect.²⁵ Thus, for example, the Government could use the facilitation theory to forfeit the *location* where an offense took place – such as the building where the drugs were stored, where laundered money was counted, or where gambling bets were tallied – even though the location was not the *instrument* by which the offense was committed. Accordingly, courts today more frequently talk in terms of the forfeiture of “facilitating property” instead of “instrumentalities,” though the broader term fairly encompasses the narrower one as well.

By the 1990's, civil forfeiture authority had not only been expanded to cover proceeds and facilitating property, but had also been extended to most federal crimes. Today, there is still no single over-arching statute authorizing forfeiture in all federal cases, but there is forfeiture authority for virtually all serious offenses, including money laundering, car-jacking, espionage, child pornography bank fraud, and most other “white collar” crimes. Thus, the ancient practice of *in rem* forfeiture that was originally used to confiscate pirate ships and whiskey stills in rare cases, came to be used thousands of times a year to forfeit houses, farms, businesses and bank accounts in the most commonly-occurring cases.

Along the way, the legal fiction that the property itself had done something wrong, or even that it was the instrument by which the crime was committed, had given way to more modern notions of *in rem* forfeiture. Today, it is understood that proceedings *in rem* are simply structures that allow the Government to quiet title to criminally-tainted property in a single proceeding in which all interested persons are required to file claims contesting the forfeiture at one time.²⁶ As it has always been, the civil forfeiture is entirely independent of, and wholly unaffected by, any criminal

²⁵ See *United States v. Schifferli*, 895 F.2d 987 (4th Cir. 1990) (facilitating property is anything that makes the offense easier to commit or harder to detect).

²⁶ See *Urserly*, 518 U.S. at 295-96 (Kennedy, J. concurring).

proceeding, and the role of the property owner in the commission of the offense is irrelevant.²⁷ It is only necessary that the Government prove, by a preponderance of the evidence, that the property was derived from, used to commit, or used to facilitate the commission of a criminal offense. Thus, though the rationale, the scope and the application all have changed, *in rem* forfeiture continues to serve a vital purpose in allowing the Government to take criminally-tainted property out of circulation, abate nuisances, discourage certain types of unregulated commerce, and encourage property owners to take care in managing their property,²⁸ when the owner cannot be identified, is deceased or is beyond the reach of the court, or either negligently or purposefully allowed another to use his property to commit a criminal offense.^{29 30}

²⁷ See *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984) (acquittal on gun violation 922 does not bar civil forfeiture); *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232 (1972) (acquittal on criminal smuggling charge does not bar later civil forfeiture); *United States v. One "Piper" Aztec "F" Deluxe Model 250 PA 23 Aircraft*, ___ F.3d ___, 2003 WL 751584 (3rd Cir. March 5, 2003) (that claimant's criminal conviction for alien smuggling was overturned has no effect on civil forfeiture); *United States v. \$734,578.82 in U.S. Currency*, 298 F.3d 641 (3d Cir. 2002) (civil forfeiture is an *in rem* action against the property itself; the forfeiture is "not conditioned on the culpability of the owner of the defendant property"); *United States v. 1988 Oldsmobile Cutlass Supreme*, 983 F.2d 670 (5th Cir. 1993) (acquittal of claimant does not undermine finding of forfeitability in civil forfeiture case).

²⁸ See *Urserly*, 518 U.S. at 290-91 (listing the benefits of civil forfeiture).

²⁹ The adaptation of ancient forms to modern purposes was described eloquently by Justice Oliver Wendell Holmes in *The Common Law*:

The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries the custom, belief, or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career. The old form receives a new content, and in time even the form modifies itself to fit the meaning which it has received.

The Common Law 5 (1881), quote in *Calero-Toledo*, 416 U.S. at 681.

At the same time, by the 1990's Congress had resurrected and begun to apply the old English common law notion of criminal forfeiture to a wide variety of crimes.³¹ In so doing, it gave the Government the option of seeking the forfeiture of the proceeds and other property involved in a criminal offense from the property owner himself if he was named as the defendant in a criminal case, or of pursuing the property directly in a civil case when the circumstances warranted that approach.³²

As the Supreme Court has noted, these changes “marked an important expansion of government power,”³³ and led directly to a series of challenges to the forfeiture statutes on a variety of constitutional grounds. Whereas the forfeiture of pirate ships and other instruments of crime in an *in rem* proceeding had survived constitutional challenge for 200 years, the forfeiture of vehicles, houses, businesses and bank accounts as property used to facilitate an offense, and as property representing criminal proceeds, subjected the ancient practice to new scrutiny, and led the Supreme Court to devote an unprecedented amount of attention to this one area of the criminal law in a relatively short period of time. Issues of constitutional dimension that had been percolating in the courts for years, or that had lain moribund for decades, were suddenly at the cutting edge of the most vibrant and rapidly changing area of the criminal law.

³⁰ There are cases, of course, that directly parallel the 19th Century scenario in which the pirate ship was in the jurisdiction of the federal court but the owner was not. A airplane seized in Tennessee with a cargo of cocaine belonging to a South American drug lord is one example. A bank account in New York belonging to a Brazilian money launderer would be another.

³¹ See *Bajakajian*, 524 U.S. at 332 n.7 (noting that Congress “resurrected” the English common law of criminal forfeiture in 1970 as part of the RICO statute).

³² In 2000, Congress completed a 30-year expansion of criminal forfeiture authority by providing that the Government may seek criminal forfeiture as part of the prosecution for any offense for which civil forfeiture is authorized. See 28 U.S.C. § 2461(c).

³³ 92 *Buena Vista*, 507 U.S. at 121.

The rest of this article focuses on the constitutional challenges that were made to the forfeiture statutes in the 1980's and 1990's and how the Supreme Court resolved them.

II.

The Supreme Court's Forfeiture Decisions

In reviewing the Supreme Court's attempts to address and resolve the myriad constitutional issues concerning asset forfeiture that arose over the past two decades, it is tempting to try to construct a seamless historical narrative in which each case followed one upon the other, leading logically and inexorably to the set of rules that we have today as if according to some preordained plan. But there was nothing neat or orderly about the development of constitutional doctrine as it applied to asset forfeiture, and nothing inevitable about the set of rules that would emerge. Rather, like any historical development that is driven by contingencies, personalities and random events, the resolution of the constitutional issues addressed by the Supreme Court with regard to asset forfeiture was a tangled and incoherent experience in which shifting court majorities, the unique facts of the cases, and the order in which the cases arose, played a major role in the outcome. One would not be too far off the mark to say that the justices were "making it up as they went along."³⁴

In short, it is simply not possible to treat each case as if it were part of an unfolding plan, the structure and logic of which could have been perceived from the beginning. The law doesn't develop that way. Legal concepts evolve over time, making it impossible to explain the reasoning and outcome of every case in terms of the concepts and principles that emerged later in the game. Justice Anthony Kennedy

³⁴ The foregoing paragraph borrows liberally from Joseph Ellis who, in his best-selling account of the American Revolution, observes that all attempts to treat historical developments in terms of a seamless narrative leading to a foregone conclusion are "latter-day constructions" that ignore the contingencies and "inherent messiness" that attend the unfolding of history. *Founding Brothers*, Vintage Books (New York 2002) at p. 216.

warned against attempting to do this in his concurring opinion in one of the leading forfeiture cases involving the Excessive Fines Clause of the Eighth Amendment. “In recounting the law’s history,” he wrote, “we risk anachronism if we attribute to an earlier time an intent to employ legal concepts that had not yet evolved.”³⁵

If we totally deconstruct the history, however, and simply recite the outcome of the cases in serial fashion without reference to any evolving theme or pattern, we might as well be riding piggy-pack on the lab rat on its way through the maze. The twists and turns in the development of the law are of historical interest, to be sure, but just as one cannot discern the flow of history from a correspondent’s reports on the daily ebb and flow of events on the battlefield, one cannot make any sense of the constitutional parameters of forfeiture law without taking a step back to view the result from some historical perspective.

The goal, then, is to find a middle ground between constructing an historical narrative that artificially attempts to fit every false start or discarded notion in the development of the law into a coherent, preordained scheme, and an unstructured raft trip through every whirl and eddy in the flow of the law that leaves the reader in equal parts dizzy and uninformed. With the benefit of hindsight and historical perspective, we should draw from the cases decided over the past 20 years the broad principles that have emerged without attempting to suggest that those principles can explain the result in every case decided since the First Congress met in 1789. And we should review the seminal cases with just enough reference to the facts, circumstances and legal rationale of each to aid in understanding how the law developed without getting lost in the details. What follows is my poor attempt to do that.

The discussion begins with the Supreme Court’s attempt to apply the Due Process Clause of the Fifth Amendment to a number of aspects of forfeiture law,

³⁵ *Austin v. United States*, 509 U.S. at 628-29 (Kennedy, J. concurring).

including the rights of innocent third parties to protect their property from forfeiture, the right of all property owners to notice and an opportunity to be heard before their property is forfeited, and the right to have the Government proceed with a forfeiture action without undue delay once the action is commenced. Next we will turn to the requirement found in the Excessive Fines Clause of the Eighth Amendment that all forfeitures must be proportional to the gravity of the underlying offense, and to the debate the raged in the 1990s over the application of the Double Jeopardy Clause of the Fifth Amendment to civil forfeitures.

Finally, the discussion will conclude with a review of how the Fourth Amendment protections against illegal searches and seizures applies to forfeiture law, and how the forfeiture of a criminal defendant's property comports with the Sixth Amendment right to counsel.

A.

Does the Due Process Clause of the Fifth Amendment Protect Innocent Owners?

A recurring question throughout the 200 years of development of civil forfeiture law was whether the forfeiture of property without regard to the innocence of the owner violated the Due Process Clause of the Fifth Amendment.³⁶

By the 1990's, of course, a long line of cases had firmly established that property used to commit a criminal offense could be forfeited in a civil *in rem* proceeding without regard to the innocence of the actual owner of the property. The rationale was that it was in the public interest for the Government to remove the instruments of crime from circulation, and to encourage property owners to take greater care lest their property be used for an unlawful purpose. Yet from the earliest days, the Supreme Court had found

³⁶ The Due Process Clause provides that "No person shall be . . . deprived of life, liberty, or property, without due process of law."

reasons to create exceptions to the rule or to question its fairness when applied to truly innocent persons.

In *Harmony*, for example, while the Supreme Court did hold that a pirate vessel was subject to forfeiture regardless of the innocence of the owner, because that was the “only adequate means of suppressing the offence or wrong or ensuring an indemnity to the injured party,”³⁷ the same rule did not apply to the ship’s cargo. “The cargo is not generally deemed to be involved in the same confiscation as the ship,” the Court said, “unless the owner thereof co-operates in or authorizes the unlawful act.”³⁸ Similarly, in *Peisch v. Ware*,³⁹ decided in 1808, the Government sought to forfeit a ship’s cargo on the ground that the duty on the imported goods had not been paid. But the Supreme Court held that because the cargo had been taken from the ship following a shipwreck before the ship’s owners had had the opportunity to comply with the customs laws, the forfeiture would not be appropriate.⁴⁰

In *United States v. Stowell*,⁴¹ decided in 1890, the Court upheld the forfeiture of a distillery that was operated in violation of the revenue laws without the knowledge of the owner. But the court held that the forfeiture did not extend to the interest of a wholly innocent lienholder who held a mortgage on the property.⁴²

³⁷ 43 U.S. at 233.

³⁸ 43 U.S. at 237.

³⁹ 8 U.S. (4 Cranch.) 347, 363-64 (1808).

⁴⁰ See *Bennis*, 516 U.S. at 467 n.12 (Stevens, J. dissenting); but see *J.W. Goldsmith Jr.-Grant*, 254 U.S. at 512 (expressly reserving opinion on whether forfeiture would apply to property “stolen from the owner or otherwise taken from him without his privity or consent”). The exception for property used to commit an offense only after it was stolen from the owner was codified in some civil forfeiture statutes, such as the pre-CAFRA version of the provision allowing the forfeiture of vessels, vehicles and aircraft used in alien-smuggling, 8 U.S.C. 1324(b).

⁴¹ 133 U.S. 1 (1890).

⁴² 133 U.S. at 20.

In 1921, in *J.W. Goldsmith Jr.-Grant Co.*, the rule that an automobile could be forfeited as the instrument of a criminal offense if the owner was entirely innocent survived a direct assault based on the right to due process under the Fifth Amendment,⁴³ but only after the Court acknowledged that the argument advanced by the skeptics had some force. Forfeiture of the property of a truly innocent owner, the Court said, “seems to violate the justice which should be the foundation of the due process of law required by the Court.”⁴⁴ But the Court held that Congress had a right to impose a duty of “care and responsibility” on property owners in aid of the enforcement of the criminal law,⁴⁵ and that, in any event, the absence of an innocent owner defendant was “too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced.”⁴⁶

Fifty years later, the Court again expressed doubt about the propriety of forfeiting property from an innocent owner. In *United States v. United States Coin and Currency*,⁴⁷ the Court said, “If we were writing on a clean slate, this claim that [a federal statute] operates to deprive totally innocent people of their property would hardly be compelling.”⁴⁸ Such a broad statute, the Court suggested, might “raise serious constitutional questions” under the Due Process Clause of the Fifth Amendment.⁴⁹ But the Court found it unnecessary to reopen the issue in that case.

⁴³ 254 U.S. at 509.

⁴⁴ 254 U.S. at 510.

⁴⁵ *Id.*

⁴⁶ 254 at 511.

⁴⁷ 401 U.S. 715 (1971).

⁴⁸ 401 U.S. at 719.

⁴⁹ 401 U.S. at 720.

The Court revisited the innocent owner question once more in 1974. In *Calero-Toledo v. Pearson Yacht Leasing Co.*,⁵⁰ law enforcement authorities discovered marijuana on board a pleasure yacht that a leasing company had leased to two individuals. The applicable statute provided for the forfeiture of the vessel as property that was used to facilitate the transportation of a controlled substance.⁵¹ But the yacht owner challenged the forfeiture on the ground that it was neither involved in nor aware of the acts giving rise to the forfeiture.⁵²

The Court rejected the notion that any protection for innocent owners should be read into the statute:

Forfeiture of conveyances that have been used – and may be used again – in violation of the narcotics laws fosters the purposes served by the underlying criminal statutes, both by preventing further illicit use of the conveyance and by imposing an economic penalty, thereby rendering illegal behavior unprofitable. To the extent that such forfeiture provisions are applied to lessors, bailors, or secured creditors who are innocent of any wrongdoing, confiscation may have the desirable effect of inducing them to exercise greater care in transferring possession of their property.⁵³

But the Court noted that it would be difficult to reject a constitutional claim of an owner “who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonable could be expected to prevent the proscribed use of his property; for, in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive.”⁵⁴ The

⁵⁰ 416 U.S. 663 (1974).

⁵¹ 416 U.S. at 665-66.

⁵² As will be discussed *infra*, the claimants also alleged that seizure of their property without prior notice and a hearing deprived them of due process of law.

⁵³ 416 U.S. at 686-88.

⁵⁴ 416 U.S. at 689-90.

quoted language came somewhat famously to be known in the United States as the *Calero-Toledo dicta*.

The case that finally caused the Supreme Court to confront the due process issue regarding innocent owners once and for all came before the Court in 1996. In *Bennis v. Michigan*,⁵⁵ police in Detroit, Michigan arrested John Bennis after observing him engaged in a sexual act with a prostitute in an automobile while it was parked on a city street — what one member of the Court euphemistically referred to as an “assination.”⁵⁶ The State also seized the car and brought a civil forfeiture action against it on the ground that it was used to commit the criminal offense.

It happened that the automobile belonged to Mrs. Tina Bennis who asserted that she neither was aware of, nor consented to, the illegal use of her car by her husband. No one doubted that this was true; but the Michigan statute contained no innocent owner provision. Thus, the forfeiture was granted and affirmed by the Michigan Supreme Court, based on the “long and unbroken line of cases” that we have just discussed.⁵⁷ Mrs. Bennis nevertheless petitioned the Supreme Court to review the case on the ground that Michigan had violated her Fifth Amendment right to due process.

When the Supreme Court agreed to review this case, involving as it did a clearly innocent and sympathetic claimant, it was widely assumed by forfeiture practitioners in the United States that the Court was prepared to create an exception to the 200-year old doctrine, perhaps by adopting the *Calero-Toledo dicta* as a firm constitutional rule. But that is not what happened.

⁵⁵ 517 U.S. 442 (1996).

⁵⁶ 517 U.S. at 458 (Stevens, J., dissenting).

⁵⁷ 516 U.S. at 446.

Some justices did seek to distinguish or create an exception to the well-established rule. One suggested that because Mrs. Bennis's car was merely the "location" of Mr. Bennis's offense, it was forfeitable only as facilitating property, not as an instrument of the crime. Because the forfeiture of facilitating property was a departure from the more limited scope of forfeiture statutes throughout most of the 19th and 20th Centuries, he suggested, the general rule against requiring that innocent owners be protected might not apply.⁵⁸ Another justice suggested that the earlier cases might be limited to situations where the owner "was half a world away and beyond the practical reach of the law and its processes,"⁵⁹ or where the property was something less essential than an automobile, "which is a practical necessity in modern life for so many people."⁶⁰

But the majority had no difficulty applying *J.W. Goldsmith Jr.-Grant Co.* and other cases to the facts of Mrs. Bennis's case. Forfeiture, the Court emphasized, prevents the illegal use of property by taking it out of the hands of those who would use it illegally, and deters illegal activity by imposing an economic penalty on those who allow their property to be misused.⁶¹ Accordingly, the Court flatly declined to adopt the *Calero-Toledo dicta* as the constitutional rule.

Thus the constitutional issue was settled: Property used to commit a criminal act may be forfeited in an *in rem* proceeding without violating the due process rights of a completely innocent owner; but that is not the end of the story. Whatever the historical or public policy rationale might have been, the Court's decision in *Bennis* did not sit well with Congress or the public. By 2000, Congress had enacted a "uniform innocent

⁵⁸ 516 U.S. at 463-64 (Stevens, J. dissenting).

⁵⁹ 516 U.S. at 472 (Kennedy, J. dissenting).

⁶⁰ *Id.* at 473.

⁶¹ 516 U.S. at 452-53.

owner defense” that gives property owners in virtually all federal cases except traditional customs cases the right to assert an affirmative defense to a civil forfeiture action. The defense essentially codifies the *Calero-Toledo dicta*.⁶² Ironically, however, the enactment of the federal innocent owner statute would do nothing to assist Mrs. Bennis if her case were to arise again, as that statute applies only to federal forfeitures and thus has no effect on forfeitures under the laws of Michigan or any other State.

B.

Due Process: The right to notice and an opportunity to be heard before property is seized

Another due process issue that the Supreme Court had to address was whether the Government should be permitted to seize property for the purpose of forfeiture without prior notice and an opportunity for a hearing. Two cases provided the answer to that question. In *Calero-Toledo v. Pearson Yacht Leasing Co.*,⁶³ the Court held that moveable, personal property such as a yacht, may be seized without prior notice and held by the Government pending trial on the ultimate disposition of the property in a forfeiture action; but in *United States v. James Daniel Good Real Property*,⁶⁴ the Court held that even the temporary seizure of fixed, real property such as a house, without proper notice and a hearing, violated the Due Process Clause of the Fifth Amendment.

⁶² See 18 U.S.C. § 983(d) (excluding the interest of an innocent owner from forfeiture and defining an innocent owner to be an owner who did not know of the illegal use of his property, took all reasonable steps to stop the illegal use once he learned of it, or acquired the property *after* the illegal use as a bona fide purchaser with reason to know that the property was subject to forfeiture). The latter provision was made necessary by the Supreme Court’s 1993 decision in *92 Buena Vista* which held that absent a specific statutory provision to the contrary, an innocent owner defense would permit a criminal to insulate his property from forfeiture by giving it to an innocent donee.

⁶³ 416 U.S. 663 (1974).

⁶⁴ 510 U.S. 43 (1993).

It is well-established, as a general rule, that individuals must receive notice and an opportunity to be heard before the Government deprives them of their property.⁶⁵ Such a requirement not only comports with notions of “fair play,” but also reduces the chances that a person will be deprived of property by mistake.⁶⁶ But the rule admits a number of exceptions where temporary deprivations are concerned.

In the case of the yacht seized in connection with the drug offense in *Calero-Toledo*,⁶⁷ the Court offered three justifications for the seizure of the property without prior notice. First, the seizure allowed the court to assert *in rem* jurisdiction over the property, thus permitting judicial forfeiture proceedings to begin.⁶⁸ Second, the seizure permitted the Government to secure the property before the owner could frustrate the purpose of the forfeiture action by concealing the property, destroying it, or removing it to another jurisdiction.⁶⁹

Finally, the Court noted that the seizure of property for the purpose of forfeiture is subject to the requirements of the Fourth Amendment,⁷⁰ thus providing a guarantee that a person would not be deprived of his property without a factual basis. A seizure for forfeiture, the Court said, is like the execution of a search warrant or the seizure of evidence in a criminal case — acts which necessarily must occur, in most cases, without prior notice to the property owner. In those cases, the Court said, “[t]he danger

⁶⁵ See *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972).

⁶⁶ 407 U.S. at 80-81.

⁶⁷ See discussion of the facts in *Calero-Toledo*, *supra* at page .

⁶⁸ *Calero-Toledo*, 416 U.S. at 679.

⁶⁹ *Id.*

⁷⁰ The Fourth Amendment provides as follows: “The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and o Warrants shall issue, but upon probable cause . . .

.”

is all too obvious that a criminal will destroy or hide evidence or fruits of his crime if given any prior notice.”⁷¹ But the probable cause requirement ensures that the property will not be seized without good cause.⁷² Accordingly, the Government was able to seize the yacht without prior notice or a hearing as long as it complied with the Fourth Amendment requirements, and as long as the owner was afforded an opportunity to oppose the forfeiture action before the Government obtained formal title to the vessel.

In *James Daniel Good*, the facts were different, and so was the result. In *Good*, a property owner was found guilty in a criminal case of a drug offense that involved keeping 89 pounds of marijuana in his home. When the criminal case was over, the Government commenced a civil forfeiture action against Good’s residence by filing a complaint and obtaining a warrant from a federal magistrate judge that allowed it to take possession of the property while the case was pending. The warrant was issued *ex parte*, thus giving Good no notice of the seizure before it took place.⁷³

As it happened, by this time Good was no longer living in his residence, but had leased it to tenants. Thus, the Government did not take physical possession of the property, but permitted the tenants to remain subject to an occupancy agreement, as long as they paid the rent to the U.S. Marshal. Nevertheless, Good objected to the forfeiture action on the ground that the *ex parte* seizure deprived him of due process of law.⁷⁴

The Government conceded that it had deprived Good of “valuable rights of ownership” that were protected by the Due Process Clause, even though it had not

⁷¹ 416 U.S. at 680 (citation omitted).

⁷² *Id.*

⁷³ *Good*, 510 U.S. at 47.

⁷⁴ *Id.*

taken physical possession of the property.⁷⁵ But it defended the *ex parte* action on two grounds. First, it argued that by obtaining a warrant for the property from a judicial officer in accordance with the Fourth Amendment, it had afforded Good all of the process he was due. And second, relying on *Calero-Toledo*, it argued that the seizure of property for the purpose of forfeiture under the drug laws falls within the exception to the general rule requiring prior notice and an opportunity to be heard.⁷⁶ The Supreme Court did not disturb its ruling in *Calero-Toledo*, but it rejected both arguments as they applied to Good.

The Court acknowledged that the Government had satisfied both the warrant and the probable cause requirements of the Fourth Amendment, but it rejected the notion that compliance with the Fourth Amendment is the “beginning and the end of the constitutional inquiry.” “Though the Fourth Amendment places limits on the Government’s power to seize property for purposes of forfeiture,” the Court said, “it does not provide the sole measure of constitutional protection that must be afforded property owners in forfeiture proceedings.”⁷⁷ In other words, while it was true that, in *Calero-Toledo*, the Court had cited the Government’s compliance with the Fourth Amendment as one of the reasons why the *ex parte* seizure of the yacht fell within the exception to the requirement of prior notice and a hearing, that did not mean that in every case obtaining a warrant based on probable cause would be sufficient to satisfy due process. It was still necessary to demonstrate how providing advance notice would conflict with an important Government or public interest.

In *Calero-Toledo*, that requirement was satisfied by the fact that the property in question was “the sort of property that could be removed to another jurisdiction,

⁷⁵ 510 U.S. at 49, 54.

⁷⁶ 510 U.S. at 49.

⁷⁷ 510 U.S. at 52.

destroyed or concealed, if advance notice were given.”⁷⁸ But there is no such concern when immovable real property is involved. Where moveable personal property presented the Government with a “pressing need for prompt action,” because the property might have disappeared had the Government given advance warning of the forfeiture action,⁷⁹ the real property could not abscond. Thus, the Government could preserve its interest in the property pending conclusion of the forfeiture action through less intrusive means – such as filing a *lis pendens* on the local land records, or obtaining a judicial restraining order – without running the risk of an erroneous deprivation of an important property interest.⁸⁰ Accordingly, the Court held that while moveable property may be seized for forfeiture without prior notice and a meaningful opportunity to be heard, in the absence of exigent circumstances, real property may not.⁸¹

In the wake of *James Daniel Good*, Congress, as part of the general reform of civil forfeiture enacted in 2000, included a statute codifying the rule that real property may not be seized without a prior hearing unless the court finds that exigent circumstances justify such seizure.⁸² Accordingly, when the Government commences a civil forfeiture action against a building or parcel of land today, it merely posts notice of the forfeiture action on the property and provides a copy of that notice to the property owner.⁸³ If the Government desires to take possession of the property before the

⁷⁸ 510 U.S. at 52.

⁷⁹ 510 U.S. at 56-57.

⁸⁰ 510 U.S. at 58-59. The Court also held that seizure was not necessary to give the Court *in rem* jurisdiction over the property. That issue is discussed *infra* at p. ____.

⁸¹ 510 U.S. at 62.

⁸² See 18 U.S.C. § 985.

⁸³ See 18 U.S.C. § 985(c).

forfeiture case is resolved – a rare event, inasmuch as maintaining property while a case is pending can be expensive – it must afford the owner a “*Good* hearing” where the court must find probable cause to believe that the property is subject to forfeiture.⁸⁴

Alternatively, if there are exigent circumstances, the Government may ask the court to authorize an *ex parte* seizure, but must then afford the property owner a prompt post-seizure hearing on the question of probable cause.⁸⁵ Courts uniformly hold, however, that *Calero-Toledo* is still good law regarding the *ex parte* seizure of moveable property.⁸⁶

⁸⁴ See *United States v. One Parcel of Property Located at 194 Quaker Farms Road*, 85 F.3d 985, 988 (2d Cir. 1996) (at a *Good* hearing, the Government must demonstrate probable cause to believe that the property is subject to forfeiture).

⁸⁵ See 18 U.S.C. § 985(d) and (e); *United States v. Certain Real Property...263 Weatherbrook Lane*, 202 F. Supp. 2d 1275 (N.D. Ala. 2002) (once court determines that exigent circumstances justify the *ex parte* seizure of real property, the issue is moot; claimant’s only ground for contesting the “basis for the seizure” in the section 985(e) hearing is the absence of probable cause; he cannot challenge the existence of exigent circumstances); see also *United States v. Real Property Located at 1184 Drycreek Road*, 174 F.3d 720 (6th Cir. 1999) (if property is seized under the exigent circumstances exception to *Good*, there must be a prompt post-seizure hearing to determine if continued control over the property by the Government is justified).

⁸⁶ See *Yskamp v. DEA*, 163 F.3d 767 (3d Cir. 1998) (*Good* does not apply to seizure of charter aircraft); *United States v. One Parcel...Lot 41, Berryhill Farm*, 128 F.3d 1386 (10th Cir. 1997) (*Good* does not apply to furnishings and other personal property found within residence); *United States v. Portrait of Wally*, 2002 WL 553532 (S.D.N.Y. 2002) (*Wally III*) (*Good* does not apply to seizure of artwork); *United States v. One 1988 Prevost Liberty Motor Home*, 952 F. Supp. 1180 (S.D. Tex. 1996) (*Good* does not apply to seizure of motor home used as residence); *United States v. Property Identified as Lot Numbered 718*, 983 F. Supp. 9 (D.D.C. 1997) (*Good* does not apply to cash proceeds of the sale of real property); *United States v. Funds in the Amount of \$228,390*, 1996 WL 284943 (N.D. Ill. 1996) (*Good* does not apply to seizure of money); *Ivester v. Lee*, 991 F. Supp. 113 (E.D. Mo. 1998) (same); *United States v. One 1997 E35 Ford Van*, 50 F. Supp. 2d 789 (N.D. Ill. 1999) (*Good* does not apply to seizure of bank accounts, safe deposit boxes, and vehicle); *In re Indian Gaming Related Cases*, 2000 WL 1257265 (N.D. Cal. 2000) (*Good* does not apply to seizure of gambling machines); *United States v. Real Property Located at Incline Village*, 958 F. Supp. 482 (D. Nev. 1997) (*Good* applies only to real property); *In Re McCorkle*, 972 F. Supp. 1423 (M.D. Fla. 1997) (same).

C.

More due process: Post-seizure notice and delay

The issue the Supreme Court had to resolve in *Calero-Toledo* and *James Daniel Good* was whether a property owner is entitled to notice and a hearing before his property is seized for the purpose of forfeiture. That, of course, is a *pre-seizure* issue. But what happens after the property is seized? What does the Government have to do to make sure that a property owner knows that his property has been taken by the Government, and that he has an opportunity to contest the forfeiture of the property in court? Is it enough to publish notice of the seizure in the newspaper or to send a notice in the mail to the owner's last known address? Or does the Government have to serve the owner personally with a written notice of the forfeiture action? And how long can the Government hold the seized property before commencing the formal forfeiture action? Can it seize the property and hold it indefinitely while it builds its case? Or must the Government act quickly to ensure that the property owner has the opportunity to put the Government to its proof without unnecessary delay?

Post-seizure notice

We know from *Calero-Toledo* and *James Daniel Good* that there are times when the Government is required to give a property owner prior notice that his property is to be seized for forfeiture, and times when it does not. But whatever the Government may be permitted to do regarding the initial seizure of the property, it is absolutely clear that a property owner has the right to proper notice and a hearing before his property can be formally forfeited to the United States. The distinction between the sometimes more liberal rules regarding pre-seizure notice and the more formal post-seizure rules reflects the difference between the terms "seizure" and "forfeiture" as they are used in the United States.

A "seizure" is, at most, a temporary deprivation of property. When property is seized, it falls under the custody and control of the Government, but title to the property

remains with the property owner. Though the Government may maintain possession of seized property pending the entry of a formal forfeiture order, title does not pass to the Government until the forfeiture order is made.⁸⁷ Thus, the failure to provide proper notice to a property owner before his property is seized means only that he may be deprived of an opportunity to contest the Government's effort to take possession of, or exercise control over, his property pending trial.

Failure to provide post-seizure notice to the property owner, however, has much graver consequences. Under federal law, if no one files a claim contesting a forfeiture action within the time period specified by the applicable statute, a forfeiture order is entered by default without any finding by any court that the property was subject to forfeiture. In other words, if no one contests the forfeiture, there is no occasion for any court to determine whether the property was derived from or was otherwise involved in the commission of any crime. The Government simply declares the property forfeited to the United States. Thus, the consequence of failing to provide adequate notice to a property owner of the post-seizure forfeiture proceedings is that he might, through inaction, lose his only opportunity to contest the formal transfer of title to his property to the State.⁸⁸

Given the importance of providing adequate post-seizure notice, it is well-established that the Government must take certain affirmative steps to ensure that the property owner is aware of the pendency of the forfeiture action and of the steps he

⁸⁷ See *United States v. A Group of Islands*, 185 F. Supp. 2d 117, 121 n.7 (D.P.R. 2001) (seizure may be based on probable cause to believe the property will ultimately be proved forfeitable, but it entails only taking possession and control; to become the owner of the property, *i.e.*, to transfer title to the property to the United States, the Government must commence a forfeiture action).

⁸⁸ See *Dusenbery v. United States*, 534 U.S. 161, 178 (2002) (Ginsburg, J. dissenting) (noting that absent adequate notice, the property owner has no opportunity to contest the forfeiture in court, thus allowing the Government to enter a declaration of forfeiture by default pursuant to 19 U.S.C. 1609).

must take to defend his interest. More than 50 years ago, in *Mullane v. Central Hanover Bank & Trust Co.*,⁸⁹ the Supreme Court set forth the standard for the adequacy of the notice in these terms: The Due Process Clause of the Fifth Amendment requires that notice be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” Moreover, “the means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.”⁹⁰

In applying the *Mullane* standard, courts have long held that merely publishing notice of an action in a newspaper or legal gazette is insufficient to satisfy due process, if the names and addresses of interested parties are known. In those cases, the Government must, at the very least, send notice by mail.⁹¹ Indeed, the federal forfeiture statutes themselves require that the Government not only publish notice of a forfeiture action in a “newspaper of general circulation,” but also that it “send written notice of the seizure together with information on the applicable forfeiture procedures to each party who appear[s] to have an interest in the property.”⁹² Nevertheless, in 2002, the Supreme Court was called upon to decide if compliance with these statutory procedures was sufficient to ensure adequate notice to the property owner in a civil forfeiture case.

In *Dusenbery v. United States*,⁹³ the FBI arrested a defendant and subsequently seized currency and other property from the place where he was arrested. In

⁸⁹ 339 U.S. 336 (1950).

⁹⁰ 339 U.S. at 314-15.

⁹¹ See *Dusenbery*, 534 U.S. at 169; *id.* at 176 (Ginsburg, J. dissenting).

⁹² 534 U.S. at 164, citing 19 U.S.C. 1607(a).

⁹³ 534 U.S. 161 (2002).

compliance with the forfeiture statute, the FBI then published notice of the forfeiture action three times in a widely-circulated newspaper and sent direct notice by certified mail to three places: the prison where the defendant was incarcerated, the address where he was arrested, and the address where his mother lived. When no one responded to any of the notices, the FBI declared the property forfeited to the United States.

Nearly five years later, the defendant filed an action to recover his property, alleging that he had never received notice of the forfeiture action, and that his due process rights therefore had been violated. He argued that it was not enough for the Government to send notice to him by mail, or to publish notice in the newspaper as the statute provided. Rather, he insisted that the Government has a duty under the Due Process Clause of the Fifth Amendment to ensure that the notice is actually received. But the Supreme Court disagreed.

All that *Mullane* requires, the Court said, is that the Government take steps that are “reasonably calculated” to apprise a party that an action against his property is pending.⁹⁴ It does not have to make “heroic efforts,” nor does it have to ensure that the notice is actually received.⁹⁵

The fact that the defendant in *Dusenbery* was a prisoner, the court said, did not make any difference. All the Government was required to do was to send the notice to the prison where the defendant was incarcerated, and to show that the prison had in place a routine procedure for the delivery of mail to inmates. The Government did not, as the defendant argued, have to produce documents or log books showing that the defendant had actually signed for his mail.

Delay in commencing the forfeiture action

⁹⁴ 534 U.S. at 170.

⁹⁵ *Id.*

A recurring and related question is whether the Government is required to commence its formal forfeiture action immediately after it seizes the property, or whether there are circumstances that would permit the Government to delay the commencement of the forfeiture case, even though the property remains in the Government's custody. Property owners, of course, argue that due process requires that they be given a prompt opportunity to contest the forfeiture and recover their property – what is often referred to as “getting their day in court.” The Government, on the other hand, argues that sometimes there are extenuating circumstances, such as the need to complete an undercover investigation or to avoid premature disclosure of a court-authorized wiretap, that militate in favor of delaying the onset of formal forfeiture proceedings.

In *United States v. \$8,850 in U.S. Currency*,⁹⁶ customs agents seized a sum of currency from a Ms. Vasquez at the Los Angeles airport and charged her with failing to declare the currency on the appropriate customs form.⁹⁷ Over the ensuing months, the Government first conducted an investigation to determine if Vasquez might have been engaged in drug trafficking, and then brought criminal charges against her for an offense related to her failure to declare the money. Finally, 18 months after it initially seized her money, the Government filed a formal civil forfeiture action that Vasquez was able to contest. The court found the money subject to forfeiture and Vasquez appealed.⁹⁸

Vasquez conceded that under *Calero-Toledo* the Government could constitutionally seize her property without a prior hearing. Nor did she allege any defect

⁹⁶ 461 U.S. 555 (1983).

⁹⁷ At the time of this offense, persons entering or leaving the United States had to file a form declaring their possession of any amount of money in excess of \$5,000. That amount has since been raised to \$10,000. 31 U.S.C. § 5316.

⁹⁸ 461 U.S. at 558-61.

in the hearing that she eventually received. Her argument was only that “the Government’s delay in filing a civil forfeiture proceeding violated her due process right to a hearing at a meaningful time.”⁹⁹ The Supreme Court noted that most of its attention in this area had been devoted to the property owner’s right to a *pre-seizure* hearing, and agreed to hear the case to decide “when a post-seizure delay may become so prolonged that the dispossessed property owner has been deprived of a meaningful hearing at a meaningful time.”¹⁰⁰

The Court found that there are four factors that determine whether the delay in commencing forfeiture proceedings constitutes a violation of due process. The first is the length of the delay, and the Court agreed with Vasquez that a delay of 18 months is substantial.

The second factor is the reason for the delay, and here the Court agreed with the Government that the need to conduct a related investigation entitles the Government to some time before it must commence its forfeiture case. While this factor cannot be invoked to justify an indefinite delay, the Court observed that “Both the Government and the claimant have an interest in a rule that allows the Government some time to investigate the situation in order to determine whether the facts entitle the Government to forfeiture so that, if not, the Government may return the money without formal proceedings.”¹⁰¹

Similarly, the Government has an interest in withholding the commencement of civil forfeiture proceedings until a related criminal case has been resolved. The pendency of a criminal case does not automatically toll the time for instituting a forfeiture proceeding, the Court said, but the court should take into account the fact that

⁹⁹ 461 U.S. at 562.

¹⁰⁰ 461 U.S. at 562-63.

¹⁰¹ 461 U.S. at 565.

a “prior or contemporaneous civil proceeding could substantially hamper the criminal proceeding.”¹⁰²

Third, the Court said that it should consider the affirmative steps the claimant might have taken to secure the return of her property. Here, the Court found that other than making the occasional inquiry into the status of her case, Vasquez had done nothing to prompt more rapid action, such as filing motions in court demanding the return of her property unless a formal forfeiture proceeding was commenced.

Finally, the Court said that it must consider the extent to which the claimant was prejudiced by the delay. Prejudice, the Court explained, could take the form of the loss of witnesses or other important evidence without which the claimant might be hampered in presenting her defense. But there was no evidence of any such prejudice here. Accordingly, the Supreme Court held that the 18-month delay between the time Vasquez’s property was seized and the time the Government commenced the civil forfeiture proceeding did not violate her Fifth Amendment right to due process.

In the Civil Asset Forfeiture Reform Act of 2000, Congress did as it had done in regard to the innocent owner defense following the Supreme Court’s decision in *Bennis*, and amended the forfeiture laws to give property owners greater rights by statute regarding the commencement of forfeiture proceedings than the Due Process Clause requires. Under CAFRA, the Government must now send notice of its intent to commence a forfeiture proceeding to the property owner within 60 days of the seizure of property, and if the property owner responds by filing a claim, must commence a formal judicial forfeiture action in federal court within 90 days of when that claim is received.¹⁰³ Both deadlines, however, allow for extensions of time in certain circumstances, such as when the Government is able to satisfy the court that the

¹⁰² 461 U.S. at 567.

¹⁰³ See 18 U.S.C. §§ 983(a)(1) and (a)(3).

premature commencement of forfeiture proceedings could endanger someone's life; cause flight from prosecution, the destruction of evidence, or the intimidation of a witness; or otherwise jeopardize a criminal investigation.¹⁰⁴ Also, the Government has the right to seek a stay of the civil case once it is filed to avoid any adverse effect on a related criminal investigation or prosecution.¹⁰⁵

D.

Proportionality and Excessiveness

We turn now to the constitutional question that, above all others, commanded the attention of the federal courts in forfeiture cases in the 1990s: Does a court have an obligation to limit a forfeiture – notwithstanding the dictates of the applicable statute – to ensure that the forfeiture is proportional to the crime?

Throughout the history of the development of asset forfeiture law in the United States, it was assumed that forfeitures were not dependent in any way on the seriousness of the offense. To the contrary, the operative assumption was that if the property was used in the commission of a crime, it was subject to forfeiture in accordance with the terms of the applicable forfeiture statute. Like the innocence of the property owner, the seriousness of the crime itself was considered irrelevant. Accordingly, until the 1990s, no court had ever held that a civil forfeiture that was authorized by statute could be limited by any provision of the federal Constitution.

In contrast, it had been held on several occasions that criminal forfeiture actions – which, of course, constitute an *in personam* punishment of the criminal defendant – may be limited by the Cruel and Unusual Punishment's Clause of the Eighth

¹⁰⁴ See 18 U.S.C. § 983(a)(1)(D).

¹⁰⁵ See 18 U.S.C. § 981(g).

Amendment.¹⁰⁶ In the early 1990's, as civil forfeitures were expanded and applied to not just to traditional forms of contraband or the instruments of crime, but also to houses, vehicles, businesses and bank accounts that were used to facilitate the commission of an offense, the suggestion was made that civil forfeitures might be subject to the limitations of the Eighth Amendment as well.

Austin v. United States

The case that brought the issue before the Supreme Court arose when one Richard Lyle Austin was arrested for selling 2 grams of cocaine to an undercover police officer in South Dakota. The evidence showed that Austin had met the officer and agreed to sell him the cocaine at his auto body shop, and had retrieved the drugs from his nearby mobile home where they had been stored. A subsequent search of both locations revealed small amounts of marijuana and cocaine, a gun, drug paraphernalia, and approximately \$4,700 in cash.¹⁰⁷

Following Austin's conviction, the Government sought the forfeiture of both the auto body shop and the mobile home under the civil forfeiture statutes as property used to facilitate the commission of the drug offense. The lower courts affirmed the forfeiture, holding that "if the Constitution allows *in rem* forfeiture to be visited upon innocent owners, [it] hardly requires proportionality review of forfeitures."¹⁰⁸ But Austin appealed to the Supreme Court, arguing that the forfeiture of his property in these circumstances constituted a violation of the Excessive Fines Clause of the Eighth Amendment. The case reached the Supreme Court in 1993.

¹⁰⁶ See *Alexander v. United States*, 509 U.S. 544, 558 & n.4 (1993) (noting that there is no question that the imposition of *in personam* forfeiture in a criminal case is subject to the Eighth Amendment, and remanding the case to the lower courts to determine whether the forfeiture of several businesses that the defendant used in violation of the obscenity laws was unconstitutionally excessive).

¹⁰⁷ *Austin v. United States*, 509 U.S. 602, 605 (1993).

¹⁰⁸ 509 U.S. at 606.

In *Austin v. United States*, the Government argued that the Eighth Amendment's protection against excessive fines applies only to criminal cases, or to civil cases that, despite their label, are so punitive in nature as to constitute criminal punishment.¹⁰⁹ But the Supreme Court disagreed. Unlike some provisions of the Bill of Rights, the Court said, the Eighth Amendment is not limited to criminal cases at all. Its purpose is "to limit the Government's power to punish,"¹¹⁰ and the notion of punishment "cuts across the division between the civil and the criminal law."¹¹¹ Thus, the question, the Court said, was not whether the forfeiture of Austin's property was civil or criminal, but rather whether it is punishment.

Whether civil forfeiture constitutes punishment of the owner was, at that time, a question that the Court had not previously been called upon to answer. Nevertheless, it undertook a review of the forfeiture cases from the 19th and early 20th Centuries in an attempt to determine whether the forfeitures of the pirate ships, distilleries and vehicles in the early cases had constituted punishment of the property owners. A majority of the court held that they did. It was true, the Court said, that the role of the property owner in the offense has always been irrelevant for purposes of forfeiture, but that means only that the property owner was not being punished for committing the offense himself. It nevertheless remained that the owner was being punished for negligently allowing another person to misuse his property.¹¹²

Other members of the Court were not so sure, questioning whether the Court might be trying to rewrite history in order to force the early cases into a latter-day

¹⁰⁹ 509 U.S. at 607.

¹¹⁰ 509 U.S. at 609.

¹¹¹ 509 U.S. at 610.

¹¹² 509 U.S. at 618.

construction that viewed all forfeitures as serving a punitive purpose.¹¹³ (As we shall see, it was this revisionist view of forfeiture as punishment that led to the upheaval over the application of the Double Jeopardy Clause to civil forfeiture that the Court was forced to resolve three years later.) Nevertheless, the full Court agreed that while some early forfeitures of the instruments of crime might have been purely remedial in nature, in the sense that they were designed to remove the property that was causing the injury from circulation, more recent statutes were, at least in part, designed to punish the owner and deter others from permitting their property to be used for an unlawful purpose. Thus, the Court concluded, a forfeiture that serves purely remedial purposes could never be constitutionally excessive, but one that served both remedial and punitive purposes was subject to the Excessive Fines Clause of the Eighth Amendment.¹¹⁴

The forfeiture of Austin's property fell into the latter category, the Court concluded. While there were remedial aspects to the forfeitures – such as removing the instruments of the drug trade and compensating the Government for the cost of its investigation – the forfeitures were nevertheless designed to punish Austin for the illegal use of his property. Thus, the Eighth Amendment limited what could be forfeited. But the Court declined to say what test should be used to determine if a forfeiture was excessive. Justice Scalia, in his concurring opinion, said that the relevant inquiry for an excessive forfeiture should not be how much the property was worth, but whether the property had a close enough relationship to the offense.¹¹⁵ Thus, he suggested, a scale used to measure out a quantity of illegal drugs would be subject to forfeiture

¹¹³ 509 U.S. at 628-29 (Kennedy, J. concurring).

¹¹⁴ 509 U.S. at 622.

¹¹⁵ 509 U.S. at 628 (Scalia, J. concurring).

“whether made of the purest gold or the basest metal.”¹¹⁶ But the majority decided to leave that issue for another day.¹¹⁷

***Bajakajian* and the “gross disproportionality” test**

That day did not arrive for another 5 years. In the meantime, the lower courts devised any number of divergent and inconsistent tests for whether the forfeiture of property in a civil or criminal case violated the Excessive Fines Clause of the Eighth Amendment. Some adopted Justice Scalia’s approach, holding that the only issue was whether the property was closely related to the commission of the offense.¹¹⁸ Others took the opposite approach, weighing the culpability of the property owner and the harm caused by the offense against the “intangible, subjective value” of the property – a test sometimes ridiculed as a “California test” because it asks, “how does the forfeiture make the owner feel?”¹¹⁹ Finally, in 1998, the Supreme Court confronted the issue that it previously had left unresolved.

¹¹⁶ *Id.* at 627.

¹¹⁷ 509 U.S. at 622-23 (“Prudence dictates that we allow the lower courts to consider that question in the first instance.”).

¹¹⁸ See *United States v. Chandler*, 36 F.3d 358 (4th Cir. 1994) (proper measure of excessiveness is an instrumentalities test based on the nexus between the property and the offense; rejecting other factors as too subjective); *United States v. 152 Char-Nor Manor Blvd.*, 922 F. Supp. 1064 (D. Md. 1996) (applying *Chandler* to marijuana grow operation).

¹¹⁹ See *United States v. Real Property Located in El Dorado County*, 59 F.3d 974 (9th Cir. 1995) (court must compare tangible and intangible/subjective value of the property—e.g., whether it is the family home—and the hardship to the defendant—including effect on family and on defendant’s financial condition—against the culpability of the owner and the harm caused by the illegal activity); *United States v. Real Property Titled in the Names of Kang and Lee*, 120 F.3d 947 (9th Cir. 1997) (defendant’s direct role in profitable gambling offense over many years outweighs harshness factors; any claim that property had “intangible, subjective value” belied by claimant’s attempt to sell property while forfeiture action was pending).

In *United States v. Bajakajian*,¹²⁰ Mr. Hosep Bajakajian, a traveler departing the United States from the Los Angeles airport, was stopped after a dog trained to detect the presence of currency by its smell signaled the presence of a large quantity of cash in Bajakajian's luggage. Customs agents informed Bajakajian that he was required to declare whether he was transporting more than \$10,000 in currency out of the country, but he denied that he was doing so. When an inspection of the luggage revealed the presence of \$357,144 in currency, however, Bajakajian was arrested. Ultimately, he pled guilty to the criminal offense of failure to report the currency on the required customs form.¹²¹

As part of the criminal case, the Government sought to forfeit the \$357,144 as property "involved in" the currency reporting offense.¹²² The statute provided that the forfeiture of the entire sum was mandatory, but the lower courts held that such forfeiture would violate Bajakajian's rights under the Excessive Fines Clause of the Eighth Amendment.¹²³ The Government appealed and the Supreme Court agreed to hear the case.

The Government offered several reasons why the Excessive Fines Clause should not apply to this case at all, or if it did, why the Court should nevertheless allow the forfeiture of the entire \$357,144. Money that a traveler fails to declare on a customs form when taking the money out of the country, the Government said, is akin to goods on which a smuggler fails to pay a customs duty. Since the earliest days of the Republic, the forfeiture of such smuggled goods has always been upheld without

¹²⁰ 524 U.S. 321 (1998).

¹²¹ 524 U.S. at 325.

¹²² The forfeiture statute at issue in *Bajakajian*, 18 U.S.C. § 982(a)(1), has since been amended. The forfeiture provision for the currency reporting offense for which Bajakajian was convicted is now found at 31 U.S.C. § 5317(c).

¹²³ 524 U.S. at 326.

any regard to the value of the goods being forfeited. Also, the Government said, forfeiture of the undeclared currency in Bajakajian's case was remedial, not punitive, because the money constituted the instrumentality of the offense, and because the forfeiture would deter the illicit movement of cash and aid in providing the Government with valuable information regarding the flow of money into and out of the United States. According to the Court's decision in *Austin*, it will be remembered, purely remedial forfeitures are never unconstitutionally excessive.¹²⁴

The Court would have none of it, however. The undeclared currency was not the instrument by which the offense was committed, the Court said; it was "merely the subject of the crime of failure to report."¹²⁵ Nor would the forfeiture of the currency have any remedial purpose. Confiscating Bajakajian's money, the Court said, would do nothing to provide the Government with information regarding the amount of currency leaving the country, nor would it compensate the Government for any loss.¹²⁶ Finally, the Court said, whatever remedial purpose the forfeiture might have, and whatever affinity there might be between the forfeiture of undeclared currency and the forfeiture of smuggled goods, the "instrumentality" cases on which the Government relied were all civil *in rem* cases that historically were never regarded as punitive. Criminal forfeiture cases, the Court concluded, are different.

Many experts in the forfeiture field have found the Court's decision in *Bajakajian* to be poorly reasoned and intellectually inconsistent – a view that is based largely on

¹²⁴ See note , *supra*.

¹²⁵ 524 U.S. at 334 n.9.

¹²⁶ 524 U.S. at 329. In response to the Government's argument that the forfeiture would have a deterrent purpose, the Court said that deterrence has traditionally been viewed not as a remedial goal, but "as a goal of punishment." It is worth noting, however, that the Court took the opposite view in *Bennis* just two years earlier when it said, "forfeiture also serves a deterrent purpose distinct from any punitive purpose." 516 U.S. at 452.

the fact that the Court devoted so much of its analysis to the supposed distinction between civil and criminal forfeiture for Eighth Amendment purposes. As we have seen, the Court had already held in *Austin* that the Eighth Amendment applies to all forms of punishment, civil and criminal, and to civil forfeitures in particular. Indeed, the Court had gone to great lengths in *Austin* to demonstrate that civil forfeitures had always been regarded as punitive. In suggesting that the Eighth Amendment would apply differently, or not at all, depending on whether the Government chose civil forfeiture or criminal forfeiture as the method of confiscation in a given case, the Court created an artificial dichotomy that made no sense in light of *Austin*, and that has been universally rejected by later cases.¹²⁷

In retrospect, it might have been better if the Court had ignored the civil/criminal distinction as *Austin* had done, and simply held that whatever the remedial aspects the forfeiture might have been, its punitive aspects – *i.e.*, the forfeiture of a large sum of money for a relatively minor offense – triggered the application of the Eighth Amendment, and required the Court to define the test for unconstitutional excessiveness. As other courts have done in later cases, it could have distinguished forfeitures in traditional customs cases not on the ground that they were civil, but on the ground that the smuggled goods constitute the instrumentality or *corpus delicti* of the

¹²⁷ In the years since *Bajakajian*, the lower courts have routinely rejected the notion that there is any distinction between civil and criminal forfeiture for Eighth Amendment purposes, and have held that *Bajakajian*'s gross disproportionality test applies equally in civil and criminal cases. See *United States v. \$273,969.04 U.S. Currency*, 164 F.3d 462 (9th Cir. 1999) (civil forfeiture for failure to report the exportation of currency is subject to same excessive fines analysis as the Supreme Court applied in *Bajakajian*); *United States v. \$359,500 in U.S. Currency*, 25 F. Supp. 2d 140 (W.D.N.Y. 1998) (same); *United States v. Ahmad*, 213 F.3d 805 (4th Cir. 2000) (*Bajakajian* applies equally to criminal forfeitures and to civil forfeitures of non-instrumentalities); *United States v. Real Property...40 Clark Road*, 52 F. Supp. 2d 254 (D. Mass. 1999) (*Bajakajian* applies to civil forfeiture of facilitating property under the drug statutes).

crime¹²⁸ – a status that the Court declined to afford to money that a traveler fails to report on a customs form. Indeed, in the aftermath of *Bajakajian*, Congress recognized the force of that distinction by enacting a new statute that makes bulk cash smuggling a criminal offense in its own right, and provides for the forfeiture of all of the smuggled currency.¹²⁹

In short, the Court could have held that purely remedial forfeitures – of smuggled goods, criminal proceeds, or the instruments of crime, whether accomplished civilly or criminally – can never be excessive, whereas forfeitures that have a punitive purpose – again, whether they be civil or criminal – must be subjected to some potential limitation to avoid a violation of the Excessive Fines Clause. Indeed, some courts think that is where the Supreme Court ended up.¹³⁰

In any event, the Court did ultimately define the test for excessiveness in forfeiture cases to which the Eighth Amendment applies. “The touchstone of the constitutional inquiry under the Excessive Fines Clause,” the Court said, “is the principle of proportionality.”¹³¹ “If the amount of the forfeiture is grossly disproportional to the

¹²⁸ See *United States v. \$273,969.04 U.S. Currency*, *supra* (*Bajakajian* does not apply to traditional Customs forfeitures under 19 U.S.C. § 1497).

¹²⁹ See 31 U.S.C. 5332. In enacting the new bulk cash smuggling statute, Congress included a set of Findings and Purposes that say, among other things, that “in cases where the only criminal violation under current law is a reporting offense, the law does not adequately provide for the confiscation of smuggled currency. In contrast, if the smuggling of bulk cash were itself an offense, the cash could be confiscated as the *corpus delicti* of the smuggling offense.” Pub. L. 107-56, § 371 (2001).

¹³⁰ See *United States v. Ahmad*, 213 F.3d 805, 814 & n.3 (4th Cir. 2000) (*Bajakajian* limits *Austin*’s application of the Excessive Fines Clause to civil forfeitures that are punitive to some degree; the Eighth Amendment does not apply to the civil forfeiture of instrumentalities because they are remedial); *United States v. 1948 Martin Luther King Drive*, 270 F.3d 1102 (7th Cir. 2001) (*dicta* suggesting that *Bajakajian* would not apply to any “truly *in rem*” forfeiture in which the claimant’s conduct was not the basis for the forfeiture action); *United States v. Land, Winston County*, 221 F.3d 1194 (11th Cir. 2000) (without citing *Bajakajian* panel holds that excessive fines analysis does not apply to purely remedial forfeiture in gambling case under section 1955(d)); *United States v. An Antique Platter of Gold*, 184 F.3d 131 (2d Cir. 1999) (forfeiture of contraband—e.g., illegally imported goods—is traditionally viewed as nonpunitive; therefore *Bajakajian* does not apply); *United States v. \$273,969.04 U.S. Currency*, *supra* (forfeiture for smuggling lies outside the scope of the excessive fines analysis; *Bajakajian* does not apply).

¹³¹ 524 U.S. at 334.

gravity of the defendant's offense, it is unconstitutional."¹³² Given the relatively insignificant nature of *Bajakajian's* reporting violation, the Court concluded, the forfeiture of the entire \$357,144 would be unconstitutional.

In the years since *Bajakajian*, the lower courts have attempted to apply the "grossly disproportional" test in a great variety of contexts. Moreover, in CAFRA, Congress codified the Eighth Amendment requirement, providing that in all civil forfeiture cases, the court must conduct a proportionality analysis.¹³³ The case law is still not fully developed; we will not know how the *Bajakajian* test will apply in all possible forfeiture contexts for many years, if ever. But it is now firmly established that in every case – civil or criminal – that is not purely remedial, the court must, notwithstanding the mandatory nature of the forfeiture statute, conduct an Eighth Amendment analysis to determine if the forfeiture would be grossly disproportional to the gravity of the offense. If it is, the Court must mitigate the forfeiture to the extent necessary to avoid the Eighth Amendment violation.¹³⁴

¹³² 524 U.S. at 337. The Court derived the "grossly disproportional" test for forfeiture cases under the Excessive Fines Clause from the test it had used for criminal cases under the Cruel and Unusual Punishment Clause. See *Solem v. Helm*, 463 U.S. 277, 288 (1983) (a criminal sentence violates the Eighth Amendment if it is "grossly disproportionate" to the offense). But Justice Thomas, who authored the opinion in *Bajakajian*, has recently opined that, in his view, "the Cruel and Unusual Punishment Clause of the Eighth Amendment contains no proportionality principle" at all. *Ewing v. California*, ___ U.S. ___, 123 S. Ct. 1179, 1191 (2003) (Thomas, J. concurring).

¹³³ See 18 U.S.C. 983(g) (providing that a claimant in a civil forfeiture case may petition the court to determine if the forfeiture is constitutionally excessive; in that this determination, the court must compare the forfeiture to the gravity of the offense, and the claimant bears the burden of proving that the forfeiture "is grossly disproportional" by a preponderance of the evidence).

¹³⁴ 524 U.S. at 349 (Kennedy, J. dissenting) ("The only ground for reducing the forfeiture, then, is that any higher amount would be unconstitutional"); cf. *Coin and Currency*, 401 U.S. at 731 (White, J., dissenting) ("Of course, we are not free to set aside convictions or forfeitures at will. The forfeiture judgment imposed here must stand unless the Constitution otherwise commands.")

E.

Double Jeopardy

The Supreme Court's holding in *Austin*, that civil forfeiture constitutes punishment for Eighth Amendment purposes, suggested to some courts that civil forfeiture might be considered punishment for double jeopardy purposes under the Fifth Amendment as well. Indeed, it was only a little more than a year after *Austin* was decided that two courts held exactly that, and thereby nearly brought the forfeiture program in the United States to a halt.¹³⁵

In *United States v. \$405,089.23 in U.S. Currency*,¹³⁶ two drug dealers were convicted of drug trafficking and money laundering offenses and sentenced to life in prison. While the criminal case was pending, the Government commenced a civil forfeiture action against the proceeds of the drug trafficking offenses, and the property involved in the money laundering.¹³⁷ When the criminal case was over, a district court in California granted summary judgment for the Government in the civil forfeiture case; but the Court of Appeals for the Ninth Circuit reversed the forfeiture judgment on double jeopardy grounds. A civil forfeiture action against property derived from or involved in a criminal offense for which a defendant has already been convicted, the court said, constitutes an unconstitutional attempt to impose a second punishment for the same offense in a separate proceeding, in violation of Double Jeopardy Clause of the Fifth

¹³⁵ Between 1994, when the Court of Appeals for the Ninth Circuit first held that civil forfeiture constituted punishment for purposes of the Double Jeopardy Clause of the Fifth Amendment, and 1996, when the Supreme Court reversed the Ninth Circuit and put the issue to rest, forfeitures in the United States dropped by nearly 40 percent, from approximately \$500 million per year to little more than \$300 million. When the issue was resolved, the figures returned to their pre-double jeopardy levels.

¹³⁶ 33 F.3d 1210 (9th Cir. 1994).

¹³⁷ The forfeitures were based on 21 U.S.C. 881(a)(6) (authorizing civil forfeiture of proceeds of a drug offense), and 18 U.S.C. 981(a)(1)(A) (authorizing civil forfeiture of property involved in a money laundering offense), respectively.

Amendment.¹³⁸ Accordingly, the court ordered the Government to return the forfeited \$405,089 to the two drug dealers, even though they were in prison.

Similarly, in *United States v. Ursery*, 59 F.3d 568 (6th Cir. 1995), the Government filed a civil forfeiture action against a house in Michigan where the defendant, Guy Jerome Ursery, had been discovered growing marijuana.¹³⁹ Ursery agreed to settle the forfeiture claim, paying the Government \$13,250 in lieu of forfeiting his residence. Shortly thereafter, a jury convicted Ursery of manufacturing marijuana, and he was sentenced by the court to 63 months in prison. But the Court of Appeals for the Sixth Circuit reversed the conviction, holding that because the earlier civil forfeiture constituted punishment for the drug offense, the criminal conviction represented an unconstitutional second punishment for the same offense, in violation of the Double Jeopardy Clause.

In 1996, the Supreme Court resolved this issue by reversing both of these cases and holding that civil forfeiture *does not* constitute punishment for the underlying criminal offense within the meaning of the Double Jeopardy Clause of the Fifth Amendment.¹⁴⁰ *United States v. Ursery*, 518 U.S. 267 (1996). We will examine the rationale in *Ursery* in a moment, but first it is important to understand how the Court arrived at the point where it found itself in 1996.

The early double jeopardy cases

Notwithstanding the decision in *Austin*, the rulings by the lower courts in \$405,089.23 and *Ursery* came as something of a surprise. There was a long history in federal law of statutes providing for both criminal penalties for the wrongdoer and *in rem*

¹³⁸ 33 F.3d at 1222.

¹³⁹ See 21 U.S.C. 881(a)(7) (authorizing civil forfeiture of real property used to commit, or to facilitate the commission of a drug offense).

¹⁴⁰ The Double Jeopardy Clause provides as follows: “nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.”

forfeiture of the property involved in the offense. For example, as noted previously, the First Congress in 1789 enacted smuggling statutes that authorized both the civil forfeiture of the smuggled goods and the criminal prosecution of the smuggler.¹⁴¹ Never in this long history had the Supreme Court held that the imposition of both the civil forfeiture sanction and a criminal conviction constituted double jeopardy. In fact, the Court had held exactly the opposite at least three times.

In *Various Items of Personal Property v. United States*,¹⁴² the Government brought a civil forfeiture action against a distillery and other property on the ground that the corporate owner had used the property to conduct its distilling business in violation of federal law – *i.e.*, misrepresenting that the distilled alcohol was not being used as a beverage, and thus defrauding the Government of the tax on distilled spirits. The Government conceded that the corporation had been convicted of conspiring to commit the same offense prior to initiation of the forfeiture case. The question before the Court, therefore, was whether the prior conviction barred the civil forfeiture action under the Double Jeopardy Clause.¹⁴³ The Court said that it did not.

Civil forfeitures are actions against property *in rem*, the Court said, whereas criminal prosecutions are against the wrongdoer *in personam*. Thus, “[t]he forfeiture is no part of the punishment for the criminal offense.” Accordingly, the Court concluded, “[t]he provision of the Fifth Amendment to the Constitution in respect of double jeopardy does not apply.”¹⁴⁴

¹⁴¹ See *Urserly*, 518 U.S. at 274 (citing early statutes); *Austin*, 509 U.S. at 614 (same).

¹⁴² 282 U.S. 577 (1931).

¹⁴³ 282 U.S. at 579

¹⁴⁴ 282 U.S. at 581.

Forty-one years later, the Court again addressed the application of the Double Jeopardy Clause to civil forfeiture in *One Lot Emerald Cut Stones v. United States*.¹⁴⁵ In that case, a defendant was acquitted of smuggling emeralds into the United States in violation of 18 U.S.C. 545, but the Government nevertheless commenced a civil forfeiture action against the smuggled goods under another statute, 19 U.S.C. 1497. The question was whether the acquittal barred the civil forfeiture. The Court held that it did not.

The civil forfeiture, the Court said, constituted neither a second criminal trial nor a second criminal punishment.¹⁴⁶ In so holding, however, the Court did not rely solely on the categorical *in rem* versus *in personam* distinction between civil forfeiture and a criminal prosecution that it had relied on in *Various Items*. Going into more detail in its analysis than it had in the earlier case, the court found, based on the legislative history of the statute, that Congress clearly intended Section 1497 to provide a civil sanction in addition to the criminal penalty for the smuggling offense, and that forfeiture under that statute served a number of remedial purposes, such as preventing forbidden merchandise from circulating in the United States.¹⁴⁷ Thus, the Court concluded that the forfeiture statute was intended to be a civil remedy and was not “so unreasonable or excessive that it transforms what was clearly intended as a civil remedy into a criminal penalty.”¹⁴⁸

The Court paid its third visit to the double jeopardy issue a decade later in *United States v. One Assortment of 89 Firearms*.¹⁴⁹ In that case, a gun owner was acquitted

¹⁴⁵ 409 U.S. 232 (1972).

¹⁴⁶ 409 U.S. at 235.

¹⁴⁷ *Id.* at 236-37.

¹⁴⁸ *Id.* at 237.

¹⁴⁹ 465 U.S. 354 (1984).

on firearms charges under a statute making it an offense to knowingly engage in the business of dealing in firearms without a license. Following the acquittal, the Government brought an *in rem* action for the forfeiture of the firearms involved in the offense. Once again, the question before the Court was whether the acquittal on the criminal charge barred the subsequent civil forfeiture. The Court held unanimously that it did not.

“Unless the forfeiture sanction was intended as punishment, so that the proceeding is essentially criminal in character,” the Court said, “the Double Jeopardy Clause is not applicable.”¹⁵⁰ Further refining the analysis it had begun to develop in *Emerald Cut Stones*, the Court devised a two-part test to determine whether the forfeiture was civil or “essentially criminal” in character. First, the court must determine whether Congress intended the forfeiture to be civil in nature. And second, the court must determine whether the “statutory scheme was so punitive either in purpose or effect as to negate that intention.”¹⁵¹

The Court concluded that by designating the forfeiture as an *in rem* remedy that is enforced pursuant to “distinctly civil procedures,” Congress had clearly indicated that it intended the forfeiture to be civil in nature. Moreover, as it had in *Emerald Cut Stones*, the Court found that the forfeiture had “broad remedial aims,” such as keeping potentially dangerous weapons out of the hands of unlicensed dealers.”¹⁵² Finally, as to the second part of the test, the Court found that the civil forfeiture sanction carried none of the indicia normally associated with a criminal penalty.

The majority opinion in *Ursery*

¹⁵⁰ 465 U.S. at 362.

¹⁵¹ *Id.* at 362-63, deriving the two-part test from *United States v. Ward*, 448 U.S. 242, 248 (1980).

¹⁵² *Id.* at 364.

So, by the time it was called upon to settle the issues raised by the lower courts in *Ursery* and \$405,089.23, the Supreme Court had before it a long history of statutes enacted by Congress that provided for both civil forfeiture and criminal prosecution for the same offense, and three prior decisions holding that civil forfeiture under those statutes did not constitute punishment for double jeopardy purposes. But the Court also had to deal with its recent decision in *Austin* holding that civil forfeiture did constitute punishment for purposes of the Excessive Fines Clause of the Eighth Amendment.

The Court's rationale for rejecting the application of the Double Jeopardy Clause to civil forfeitures in *Ursery* has sometimes been viewed as a little murky. That is, the Court seemed to be saying nothing more than that civil forfeiture does not constitute punishment for double jeopardy purposes simply because "it has always been so." Indeed, the Court's opinion by Chief Justice Rehnquist does start out that way.

Referring to the long history of statutes providing for both criminal prosecution and civil forfeitures, and to the Court's history of rejecting double jeopardy challenges to such statutes, the Court bristled at the notion that it had somehow "changed its collective mind," and "adopted a new test for determining whether a nominally civil sanction constitutes 'punishment' for double jeopardy purposes,"¹⁵³ when it held in *Austin* that civil forfeiture constitutes punishment for purposes of the Eighth Amendment.

Congress long has authorized the Government to bring parallel criminal proceedings and civil forfeiture proceedings, and this Court consistently has found civil forfeitures not to constitute punishment under the Double Jeopardy Clause. It would have been quite remarkable for this Court both to have held unconstitutional a well-established practice, and to have overruled a long line of precedent, without having even suggested that it was doing so.¹⁵⁴

¹⁵³ 518 U.S. at 279, quoting \$405,089.23, 33 F.3d at 1218-19.

¹⁵⁴ 518 U.S. at 287-88.

However, the Court did not rest its conclusion solely on the doctrine of *stare decisis*. To the contrary, the Court proceeded to lay out a detailed test for determining whether a civil forfeiture provision constitutes punishment for double jeopardy purposes.

Adopting the two-part test articulated in *89 Firearms*, the Court held that it first had to determine whether Congress intended the forfeiture provisions to be civil or criminal. Then it had to consider whether the proceedings were so punitive in fact “as to persuade us that the forfeiture proceedings may not legitimately be viewed as civil in nature, despite Congress’ intent.”¹⁵⁵

That Congress clearly intended the forfeiture provisions to be civil was evident, the Court said, from several things. First, Congress entitled the statutes “Civil Forfeiture,” and provided that the proceedings would be instituted *in rem*, which meant that they would target the property itself, and not depend on the role of the property owner in the commission of the offense. Moreover, Congress provided that the forfeiture proceedings would be governed by “distinctly civil” procedures, including the civil burden of proof.¹⁵⁶

Moving to the second part of this analysis, the Court provided a catalog of ways in which civil forfeiture statutes serve remedial, non-punitive goals. For example, the Court noted that “requiring the forfeiture of property used to commit federal narcotics violations encourages property owners to take care in managing their property and ensures that they will not permit that property to be used for illegal purposes.”¹⁵⁷ It also noted that civil forfeiture statutes may be used to discourage “unregulated commerce” in certain types of property, such as the firearms in *89 Firearms*; to abate a

¹⁵⁵ *Id.* at 288.

¹⁵⁶ *Id.* at 289.

¹⁵⁷ *Id.* at 290.

nuisance, such as an apartment building being used to sell crack cocaine; to prevent future use of property for illicit purposes; and to remove certain types of forbidden property from “circulating in the United States.”¹⁵⁸ Finally, the Court noted that to the extent a forfeiture statute applies to the proceeds of a criminal offense, “it serves the additional nonpunitive goal of ensuring that persons do not profit from their illegal acts.” In light of these remedial, nonpunitive purposes, the Court concluded, there was little evidence, much less the “clearest proof,” that civil forfeiture statutes are “so punitive in form and effect as to render them criminal despite Congress’ intent to the contrary.”¹⁵⁹

The guidance to the lower courts is now fairly clear: if the legislature expresses a clear intention to regard the sanctions authorized by a forfeiture statute to be civil in nature; if the statute provides for an action against the property *in rem*, and not against the property owner *in personam*; if the statute employs “distinctly civil” procedures; and if the sanctions serve one or more remedial, nonpunitive purposes, it is highly likely that a forfeiture under the statute will not trigger the application of the Double Jeopardy Clause.

What the majority opinion did not do, however, is explain why, notwithstanding all of these factors, the same civil forfeiture statute could be considered to be remedial for double jeopardy purposes and yet be considered punitive for purposes of the Excessive Fines Clause of the Eighth Amendment, as the Court had held only three years before in *Austin*. All that the Chief Justice would say in that regard is that the Excessive Fines Clause was “a constitutional provision which we never have understood as parallel to, or even related to, the Double Jeopardy Clause of the Fifth Amendment.”¹⁶⁰ Accordingly, the Court concluded, “we decline to import the analysis of *Austin* into our

¹⁵⁸ *Id.* at 290-91.

¹⁵⁹ *Id.* at 290.

¹⁶⁰ *Id.* at 287.

double jeopardy jurisprudence.”¹⁶¹ The Court left it to Justice Kennedy in his concurring opinion to explain why that should be so.

Why a forfeiture can be “punitive” for Eighth Amendment purposes but not for purposes of the Double Jeopardy Clause

The reason civil forfeitures can constitute punishment for Eighth Amendment purposes but not for double jeopardy purposes is that the two constitutional provisions are concerned with different things. The Eighth Amendment protects against excessive punishments, regardless of what it is the person is being punished for. In contrast, the Double Jeopardy Clause of the Fifth Amendment protects only against the imposition of multiple punishments for the same criminal offense.

Justice Kennedy began his explanation of this distinction by noting that “civil *in rem* forfeiture is not punishment of the wrongdoer for his criminal offense.”¹⁶² Instead, *in rem* forfeitures are directed at the property owner who is responsible for the criminal misuse of his property. That does not mean that civil forfeiture does not constitute punishment. *Austin* plainly holds that it does. But the punishment is not for the criminal offense. It is for the misuse of the property.

“The theory,” Justice Kennedy wrote, “is that the property, whether or not illegal or dangerous in nature, is hazardous in the hands of this owner because either he uses it to commit crimes, or allows others to do so. The owner can be held accountable for the misuse of the property.”¹⁶³ “Since the punishment befalls any property holder who cannot claim statutory innocence, whether or not he committed any criminal acts,”

¹⁶¹ *Id.*

¹⁶² *Id.* at 293 (Kennedy, J., concurring).

¹⁶³ *Id.* at 294.

Justice Kennedy concluded, “it is not a punishment for a person’s criminal wrongdoing.”¹⁶⁴

Thus, civil forfeiture does punish an owner by taking the property involved in a crime, and that punishment is properly subject to the Excessive Fines Clause of the Eighth Amendment. But even in those cases where the property owner is also the wrongdoer charged with the criminal offense, the forfeiture is not a second *in personam* punishment for the offense itself. As that is all that the Double Jeopardy Clause of the Fifth Amendment is concerned with, a civil *in rem* forfeiture cannot constitute a double jeopardy violation.

Justice Kennedy went on to make clear that this distinction does not depend on the legal fiction, condemned in *Austin*, that the property itself is the wrongdoer. “It is the owner who feels the pain and receives the stigma of the forfeiture,” he wrote, “not the property.”¹⁶⁵ Thus, civil forfeitures can and do constitute punishment. But because the punishment is for the misuse of the property and not for the commission of the criminal offense, a forfeiture judgment that is subject to the proportionality requirements of the Eighth Amendment will not necessarily trigger the application of the Double Jeopardy Clause of the Fifth Amendment. Accordingly, there is nothing inconsistent between the Supreme Court’s holding in *Austin*, applying the Excessive Fines Clause to most civil forfeitures, and its subsequent holding in *Ursery*, holding that civil forfeitures will almost never constitute punishment for double jeopardy purposes.

F.

The Fourth Amendment: Does the protection against unreasonable search and seizure apply in a civil forfeiture case?

¹⁶⁴ *Id.* at 294-95.

¹⁶⁵ *Id.* at 295.

The debate over the application of the Excessive Fines Clause of the Eighth Amendment and the Double Jeopardy Clause of the Fifth Amendment to civil forfeiture proceedings featured a recurring question: “Is this forfeiture proceeding, though “civil” in name, really a criminal punishment such that the protections that normally attend criminal prosecutions should apply?” As we have seen, the Supreme Court essentially side-stepped that issue in the Eighth Amendment cases, holding that whether it is considered civil or criminal, civil forfeiture constitutes punishment, and thus cannot be grossly disproportional to the gravity of the offense. In the double jeopardy cases, on the other hand, the court squarely held that a civil forfeiture is not a criminal punishment that is subject to the Double Jeopardy Clause.

The same question was raised with respect to the Fourth Amendment. Do the provisions of that Amendment,¹⁶⁶ which prohibit unreasonable searches and seizures and thus protect the privacy rights of individuals, apply only in criminal cases where the individual is charged with an offense? Or do they apply equally in civil cases that can result in the individual’s loss of his property? The answer was clear: For Fourth Amendment purposes, civil forfeitures are considered “quasi-criminal” in nature. Thus, all of the protections available to defendants in criminal cases, including the right to exclude illegally seized evidence from the trial, are available to property owners in civil cases, even though such cases are directed against the property *in rem*. But the exceptions to the Fourth Amendment that have been carved out by the courts in criminal cases – such as the exceptions to the warrant requirement — apply to civil forfeiture cases as well.

The threshold question, of course, was whether the protections embedded in the Fourth Amendment apply to civil forfeiture cases at all. In *One 1958 Plymouth Sedan v.*

¹⁶⁶ See note , *supra*.

Pennsylvania,¹⁶⁷ local police officers stopped a car in Philadelphia and found 31 cases of untaxed liquor in the trunk. Acting pursuant to state liquor-control laws, the State of Pennsylvania commenced forfeiture proceedings against the car, but the trial judge ruled that the evidence obtained in the search of the car – the 31 cases of liquor – could not be used in the forfeiture case because the officers lacked probable cause for the search.¹⁶⁸ Without the seized evidence, of course, the State could not establish a factual basis for the forfeiture, so the forfeiture action was dismissed. But the Supreme Court of Pennsylvania reversed the lower court, holding that the rule prohibiting the admission of illegally seized evidence does not apply in civil forfeiture cases.¹⁶⁹ Because this involved an interpretation of the Federal Constitution, the United States Supreme Court agreed to review the case.

It is a well-established principle of constitutional law that evidence seized by the police in violation of a person's Fourth Amendment rights may not be used in evidence against that person in a criminal case.¹⁷⁰ The purpose of this "exclusionary rule" is prophylactic: if police officers know that illegally seized evidence cannot be used to obtain a criminal conviction, they will be deterred from violating the constitutional rights of citizens in the course of investigating the criminal case. The question therefore was, Should this prophylactic rule be extended to civil cases where the property, not any particular person, was the nominal defendant.

¹⁶⁷ 380 U.S. 693 (1965).

¹⁶⁸ The probable cause standard has been articulated many times in many ways. The following is typical: "the probable cause standard requires courts to make a practical, common sense decision whether, given all the circumstances, there is a fair probability that the property to be forfeited was involved in or the subject of a transaction that fits within [the terms of the statute authorizing the forfeiture]." *United States v. One 1987 Mercedes Benz 300E*, 820 F. Supp. 248, 251 (E.D. Va. 1993).

¹⁶⁹ 380 U.S. at 694-95.

¹⁷⁰ See *Mapp v. Ohio*, 367 U.S. 643, 657 (1961); *Weeks v. United States*, 232 U.S. 383 (1914).

The Supreme Court had touched upon this issue once before. In *Boyd v. United States*,¹⁷¹ decided in 1886, the Court held that when a criminal statute authorizes forfeiture as part of the penalty for the commission of the offense, the Government cannot avoid complying with the requirements of the Fourth Amendment by the “device” of seeking to forfeit the property in a separate civil *in rem* proceeding rather than including the forfeiture as part of the judgment in the criminal case. In that situation, the Court said, the civil forfeiture proceeding is “quasi-criminal” in nature, and is therefore considered a criminal proceeding for purposes of the Fourth Amendment.¹⁷² Accordingly, the Court said, the owner of the property subject to forfeiture, though not the defendant in the forfeiture case, “is entitled to all the privileges which appertain to a person who is prosecuted for a forfeiture of his property by reason of committing a criminal offense.”¹⁷³

In *One 1958 Plymouth*, the Supreme Court followed *Boyd* and held that the exclusionary rule applied to any civil forfeiture case requiring the determination that the criminal law has been violated:

It would be anomalous indeed, under these circumstances, to hold that in the criminal proceeding the illegally seized evidence is excludable, while in the forfeiture proceeding, requiring the determination that the criminal law has been violated, the same evidence would be admissible.¹⁷⁴

In the years since *One 1958 Plymouth* was decided, it has become well-established that the claimant in a civil forfeiture case can move to suppress any evidence seized in violation of his Fourth Amendment rights so that the evidence may

¹⁷¹ 116 U.S. 616 (1886).

¹⁷² 116 U.S. at 633-34.

¹⁷³ 116 U.S. at 638.

¹⁷⁴ *One 1958 Plymouth*, 380 U.S. at 701.

not be used by the Government to establish the forfeitability of the property.¹⁷⁵ The illegal seizure, however, does not bar the forfeiture action itself. If the Government is able to establish the factual basis for the forfeiture with independently-derived evidence, it is free to do so.¹⁷⁶

The lower courts remained divided, however, over whether the Fourth Amendment applies in precisely the same way in both civil and criminal cases. For example, there are a number of judicially-recognized exceptions to the requirement in the Fourth Amendment that all seizures be made pursuant to a judicial warrant. If police officers have probable cause to believe that property constitutes evidence of a criminal offense, and they find that property in plain view in a public place, or in the course of a search incident to the arrest of a criminal suspect, they may seize it there and then, without having to obtain a warrant. The majority of courts held that the same

¹⁷⁵ *United States v. Premises and Real Property...500 Delaware Street*, 113 F.3d 310 (2d Cir. 1997) (exclusionary rule applies to civil forfeiture cases) (citing *One 1958 Plymouth Sedan*); *United States v. \$404,905.00 in U.S. Currency*, 182 F.3d 643 (8th Cir. 1999) (exclusionary rule applies to “quasi-criminal” civil forfeiture cases; if the seizure is unlawful, the Government must prove its forfeiture case with other untainted evidence); *United States v. Real Property Known as 22249 Dolorosa Street*, 167 F.3d 509 (9th Cir. 1999) (all evidence, including officer’s testimony, derived from illegal search of house suppressed; suppressed evidence cannot be used to establish basis for forfeiture).

¹⁷⁶ See *Madewell v. Downs*, 68 F.3d 1030, 1044 n.18 (8th Cir. 1995) (“unconstitutional conduct in seizing drug-related property is irrelevant to power of the [F]ederal [G]overnment to forfeit property” based on untainted evidence); *United States v. One 1974 Learjet*, 191 F.3d 668 (6th Cir. 1999) (district court erred in dismissing forfeiture complaint; illegal seizure of property might result in return of property pending trial or in suppression of evidence, but lack of probable cause at the time of seizure has no bearing on the right of the Government to establish forfeitability of the property at trial); *United States v. \$9,041,598.68*, 163 F.3d 238 (5th Cir. 1998) (lack of probable cause for seizure may result in suppression of seized property as evidence but has no other consequence); *United States v. Daccarett*, 6 F.3d 37, 46 (2d Cir. 1993) (“even when the initial seizure is found to be illegal, the seized property may still be forfeited,” although evidence may be suppressed).

exceptions to the warrant requirement should apply when property was seized not as evidence, but for the purpose of forfeiture. Other courts, however, applied the warrant requirement more strictly in forfeiture cases than in criminal cases. The Supreme Court finally resolved this issue in 1999.

In *Florida v. White*,¹⁷⁷ police officers observed Tyvessel White using his car to deliver cocaine, and thus developed probable cause to believe that the car was subject to forfeiture under Florida law. Several months later, the same officers saw White's car parked in his employer's parking lot. Without obtaining a warrant, the officers seized the car so that the State could commence civil forfeiture proceedings.¹⁷⁸

White argued that the warrantless seizure of the car violated the Fourth Amendment, and therefore that the car itself and any evidence found inside it after it was seized should be suppressed. The trial court disagreed, but the Florida Supreme Court reversed the trial court and held that the warrantless seizure was indeed illegal. According to the Florida court, the fact that the police develop probable cause to believe that a car was used to commit a criminal violation does not, standing alone, justify a warrantless seizure. Absent exigent circumstances, the court said, the Fourth Amendment requires the police to obtain a warrant before seizing property for the purpose of forfeiture.¹⁷⁹ Again, because the question involved the interpretation of the Federal Constitution, the United States Supreme Court agreed to resolve the issue.

The Supreme Court reversed the Florida court and held that no warrant was required. Since the advent of the automobile, the Court said, it has been recognized that the inherent mobility of a vehicle made it impractical for the police to obtain a

¹⁷⁷ 526 U.S. 559 (1999).

¹⁷⁸ 526 U.S. at 561-62.

¹⁷⁹ 526 U.S. at 562-63.

warrant before searching the interior of an automobile for evidence of crime.¹⁸⁰ If the interior of an automobile can be searched, and evidence found therein can be seized, based on probable cause alone, without a judicially issued warrant, the Court reasoned, the same rule should apply to the seizure of the automobile itself. The need to seize readily movable property, in other words, is the same whether it is the contents of an automobile or the automobile itself that is subject to seizure.¹⁸¹

The fact that in one case the contents of the automobile were being seized for evidence, whereas in the other case the automobile itself was being seized for forfeiture, made no difference. To the contrary, the Court said, the warrantless seizure of an automobile for forfeiture is analogous to the warrantless arrest of an individual when the police have probable cause to believe that he has committed a felony.¹⁸² As long as the arrest of the individual occurs in a public place, and not in his home, the Court has said, it does not involve any invasion of the suspect's privacy and so does not violate the Fourth Amendment.¹⁸³ Similarly, as long as the seizure of moveable personal property such as an automobile occurs in a public place – like the parking lot where White's vehicle was found – it does not involve any invasion of privacy and thus does not violate the Fourth Amendment. Accordingly, the Court held that the police may seize a vehicle for the purpose of forfeiture based on probable cause alone, as long as the vehicle is found in a public place.¹⁸⁴

¹⁸⁰ See *Carroll v. United States*, 267 U.S. 132 (1925) (creating an exception to the warrant requirement of the Fourth Amendment for searches of automobiles for evidence contained therein).

¹⁸¹ 526 U.S. at 565.

¹⁸² See *United States v. Watson*, 423 U.S. 411 (1976) (holding that suspected felons may be arrested without a warrant when found in a public place, but that a warrant is required to arrest a felon in his home).

¹⁸³ 526 U.S. at 566.

¹⁸⁴ *Id.*

It now appears to be settled that the Fourth Amendment and its exceptions apply equally in criminal cases and civil forfeiture proceedings.¹⁸⁵ Indeed, the Supreme Court's holding in *Florida v. White* was subsequently codified by Congress as part of the Civil Asset Forfeiture Reform Act. Under 18 U.S.C. 981(b)(2)(B), federal authorities are required to obtain a warrant to seize property for the purpose of forfeiture, "except that a seizure may be made without a warrant if there is probable cause to believe that the property is subject to forfeiture and the seizure is made pursuant to a lawful arrest or search, or another exception to the Fourth Amendment warrant requirement would apply."

G.

Trial Procedures and the Sixth Amendment Right to Counsel

Finally, we turn to the rights that are normally associated with a criminal defendant who is required to stand trial for a criminal offense. In general, the Supreme Court has held that those rights, which are embodied in the Sixth Amendment and in the Due Process Clause of the Fifth Amendment,¹⁸⁶ do not apply in civil forfeiture cases.¹⁸⁷

¹⁸⁵ See *United States v. \$557,933.89, More or Less, in U.S. Funds*, 293 F.3d 66 (2d Cir. 2002) (structured money orders found in plain view by airport security could be detained temporarily and ultimately seized on probable cause to believe the items were involved in a money laundering offense); *United States v. Rankin*, 261 F.3d 735 (8th Cir. 2001) (police officer's observation of defendant conducting drug deal from his car provided probable cause for seizure of car for forfeiture and subsequent inventory search); *United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993) (warrantless seizure of funds captured in middle of electronic funds transfer through intermediary bank justified by exigent circumstances); *United States v. \$149,442.43 in U.S. Currency*, 965 F.2d 868, 875-76 (10th Cir. 1992) (firearms, jewelry, and vehicles may be seized as proceeds or property used to facilitate when found incident to execution of search warrant even if items were not specifically listed in the warrant).

¹⁸⁶ See *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 633 (1989) (noting that the Constitution defines the basic elements of a fair trial through the Sixth Amendment, and expressing doubt that the Due Process Clause of the Fifth Amendment add anything to a Sixth Amendment claim).

¹⁸⁷ See *Austin*, 509 U.S. at 608 n.4 (listing the various rights of a criminal defendant that do not apply in civil forfeiture cases).

For example, while the Due Process Clause requires that the Government establish the defendant's liability in a criminal case beyond a reasonable doubt,¹⁸⁸ the Court has long held that neither the presumption of innocence (which places the burden of proof on the Government), nor the reasonable doubt standard apply in civil forfeiture cases.¹⁸⁹ Similarly, long ago the Supreme Court rejected the notion that because civil forfeitures were regarded as "quasi-criminal" for purposes of the Fourth Amendment right to privacy and the Fifth Amendment right against self-incrimination,¹⁹⁰ the trial rights embodied in the Sixth Amendment must apply in civil forfeiture cases as well.¹⁹¹ To the contrary, in *United States v. Zucker*,¹⁹² a forfeiture case decided in 1896, the Court held that the Confrontation Clause of the Sixth Amendment "has no reference to any proceeding . . . which is not directly against a person who is accused, and upon whom a fine or imprisonment, or both, may be imposed."¹⁹³

The same is true of the Sixth Amendment right to the assistance of counsel. It is well-established that because the right to counsel applies only in cases that can result

¹⁸⁸ See *In Re Winship*, 397 U.S. 358 (1970).

¹⁸⁹ See *Lilienthal's Tobacco v. United States*, 97 U.S. 237, 267(1877); see also *United States v. One "Piper" Aztec "F" Deluxe Model 250 PA 23 Aircraft*, 321 F.3d 355 (3rd Cir. 2003) (there was no constitutional infirmity in the pre-CAFRA allocation of the burden of proof on the claimant in civil forfeiture cases); *United States v. Land, Winston County*, 163 F.3d 1295 (11th Cir. 1998) (rejecting constitutional challenge to probable cause standard based on Eleventh Circuit precedents).

¹⁹⁰ See *Boyd v. United States*, 116 U.S. 616, 634 (1886); but see *Austin v. United States*, 509 U.S. at 608 n.4 (noting that the application of the Self-Incrimination Clause to civil forfeiture cases is not absolute).

¹⁹¹ The Sixth Amendment provides as follows: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

¹⁹² 161 U.S. 475 (1896).

¹⁹³ 161 U.S. at 481.

in the incarceration of the accused, there is no Sixth Amendment right to counsel in a civil forfeiture case.¹⁹⁴

The interesting constitutional issue, however, is whether a person who is accused of a crime in a *criminal case* – a situation in which the Sixth Amendment clearly does apply – has the right to use funds or other property that are subject to forfeiture in order to pay for the attorney of his choice. That issue is one that the Supreme Court had to resolve in two cases decided in 1989.

In *Caplin & Drysdale, Chartered v. United States*,¹⁹⁵ a drug dealer pled guilty to a criminal offense and agreed to the forfeiture of the proceeds of his drug operation. Included in the forfeited property was the money the defendant would have used to pay his lawyer's legal fees. The lawyer objected to the forfeiture, arguing that the forfeiture of the money intended to be paid as legal fees would violate the defendant's Sixth Amendment right to counsel. When the Government pointed out that the forfeiture statute contained no exception for legal fees, the lawyer responded that one should be implied.

Similarly, in *United States v. Monsanto*,¹⁹⁶ another drug case, the Government sought the forfeiture of the defendant's home and a quantity of cash as property derived from his heroin operation. When the indictment was returned, the Court entered a restraining order freezing those assets pending trial. The defendant objected to the restraining order on the ground that he had no other source of funds with which to retain counsel to represent him in the criminal case. If the restraining order statute

¹⁹⁴ See *United States v. \$292,888.04 in U.S. Currency*, 54 F.3d 564 (9th Cir. 1995) (even if civil forfeiture is punitive, there is no Sixth Amendment right to counsel in a case that cannot result in incarceration; citing the *dicta* in *Austin*); *United States v. Deninno*, 103 F.3d 82 (10th Cir. 1996) (same).

¹⁹⁵ 491 U.S. 617 (1989).

¹⁹⁶ 491 U.S. 600 (1989).

contained no exception for attorneys fees, the defendant said, one should be implied in order to avoid a violation of the Sixth Amendment. But the court overruled the objection and required the defendant to go to trial with a court-appointed lawyer.¹⁹⁷ When he was convicted, he appealed. The Supreme Court decided both cases the same day.

In *Caplin & Drysdale*, the Court acknowledged that a criminal defendant has a Sixth Amendment right to adequate representation, but it rejected the contention that a defendant has the right to use property subject to forfeiture to secure the counsel of his choice.¹⁹⁸ The rights of a person without funds to be represented by counsel, the Court said, are protected as long as he is afforded counsel appointed by the court.

A criminal defendant, the Court said, has the right to spend his own money on counsel of his choice, but he has “no Sixth Amendment right to spend another person’s money for services rendered by an attorney.”¹⁹⁹ For example, the Court said, “a robbery suspect has no Sixth Amendment right to use funds he has stolen from a bank to retain an attorney to defend him if he is apprehended.”²⁰⁰ Money derived from a drug offense, or any other crime for that matter, is no different. Criminal proceeds either remain the property of the victim or become the property of the Government at the moment the crime is committed.²⁰¹ Thus, a defendant who spends forfeitable proceeds to hire counsel is spending someone else’s money to do so.

The lawyer argued that the Government’s interest in the forfeiture of the money was satisfied as long as the defendant was deprived of his property. It should not

¹⁹⁷ *Id.* at 603-05.

¹⁹⁸ The Court first had to find that the defendant’s lawyer had standing to assert his client’s Sixth Amendment rights. It held that a lawyer has such standing. 491 U.S. at 624 n.3.

¹⁹⁹ 491 U.S. at 626.

²⁰⁰ *Id.*

²⁰¹ See 21 U.S.C. § 853(c) (codifying the “relation back doctrine”).

matter to the Government, the lawyer said, whether the money ended up in the Government's coffers or in the defense attorney's pocket. But the Court said there were three reasons what that argument lacked merit.

First, the court said, the Government does have a pecuniary interest in recovering criminal proceeds and putting them to use for law enforcement purposes. Second, the Government frequently uses asset forfeiture as a device for recovering property for the benefit of the victims of the defendant's offense. "Where the Government pursues this restitutionary end," the Court said, "the Government's interest in forfeiture is virtually indistinguishable from its interest in returning to a bank the proceeds of a bank robbery; and a forfeiture-defendant's claim of right to use such assets to hire an attorney, instead of having them returned to their rightful owners, is no more persuasive than a bank robber's similar claim."²⁰² And third, the Court said that one of the goals of criminal forfeiture is to lessen the economic power of organized crime and drug enterprises. "This includes," the Court said, "the use of such economic power to retain private counsel."²⁰³

At bottom, the essence of the defense attorney's objection to the forfeiture was that the Sixth Amendment right to counsel is so critical that a defendant should have the right to use forfeitable funds to hire counsel regardless of its source and regardless of what use the Government would make of the funds if they were forfeited. But the Court said the same could be said for the exercise of other constitutionally protected rights. "If defendants have a right to spend forfeitable assets on attorney's fees," the Court asked, "why not on exercises of the right to speak, practice one's religion, or travel?" But there is no hierarchy among constitutional rights, the Court said, and no right to use property derived from, or used to commit, a criminal offense to exercise

²⁰² 491 U.S. at 629-30.

²⁰³ *Id.* at 630.

those constitutional rights either.²⁰⁴ Accordingly, the Court held that the Sixth Amendment did not require it to create an exemption for attorneys fees from the otherwise mandatory language in the forfeiture statute directing that all property derived from or used to commit a drug trafficking offense be forfeited to the United States.

The holding in *Caplin & Drysdale* disposed of the defendant's Sixth Amendment objection to the restraining order in *Monsanto* as well. If the Government can prevent a defendant from using forfeited funds to pay his attorney once he is convicted, the Court held, then surely it can prevent him from frustrating that end by dissipating his assets prior to trial.²⁰⁵ Thus, nothing in the Sixth Amendment prevents a court from applying the provision in the criminal forfeiture statute permitting the pre-trial restraint of forfeitable assets,²⁰⁶ even if the defendant has no other source of funds with which to hire counsel. All that the Government is required to do is to establish that there is probable cause to believe that the property will be forfeited if the defendant is convicted.²⁰⁷

"In enacting [the criminal forfeiture statute]," the Court said, "Congress decided to give force to the old adage that 'crime does not pay.' We find no evidence that Congress intended to modify that nostrum to read, 'crime does not pay, except for attorneys fees.'"²⁰⁸ And nothing in the Sixth Amendment, the Court concluded, required Congress to create that exception.

In the years since *Caplin & Drysdale* and *Monsanto* were decided, the lower courts have established a set of procedures for determining when and how a defendant

²⁰⁴ *Id.* at 628.

²⁰⁵ *Monsanto*, 491 U.S. at 616.

²⁰⁶ See 21 U.S.C. § 853(e).

²⁰⁷ 491 U.S. at 616.

²⁰⁸ 491 U.S. at 614.

may contest a pre-trial restraining order on the ground that he has no other source of funds with which to hire counsel. First, the courts have held that it makes no difference whether the restraining order is issued in the criminal case itself or in a parallel civil case.²⁰⁹ In either event, the defendant has the right to a probable cause hearing if he demonstrates, as a threshold matter, that he has no other source of funds, and that there is a bona fide reason to believe that the Government lacks probable cause to believe that the restrained property is subject to forfeiture.²¹⁰ Applying *Monsanto*, however, the courts universally hold that if the Government meets its probable cause burden, the forfeitable funds will remain subject to restraint throughout the criminal trial, and cannot be used by the defendant to hire counsel.²¹¹

Moreover, if the defendant is convicted and his property is forfeited, not only may his defense attorney not object to the forfeiture on the ground that the defendant needs the money to pay his attorneys, but if the money has already been paid to the attorney, he must return it, unless he is able to establish by a preponderance of the evidence that

²⁰⁹ See *United States v. Michelle's Lounge (Michelle's Lounge I)*, 39 F.3d 684, 693 (7th Cir. 1994) (due process requires a hearing on probable cause in a civil forfeiture case if the Government has seized all of defendant's assets needed to obtain counsel in a parallel criminal prosecution); *United States v. Farmer*, 274 F.3d 800, 804-05 (4th Cir. 2001) (defendant entitled to pretrial hearing if property is seized for civil forfeiture if he demonstrates that he has no other assets available).

²¹⁰ See *Farmer, supra*; *United States v. Jones*, 160 F.3d 641 (10th Cir. 1998) (defendant has initial burden of showing that he has no funds other than the restrained assets to hire private counsel or to pay for living expenses, and that there is bona fide reason to believe the restraining order should not have been entered); *United States v. Jamieson*, 189 F. Supp. 2d 754, 757 (N.D. Ohio 2002) (same, following *Jones*; to satisfy Sixth Amendment requirement, defendant must show he has no access to funds from friends or family; Government has right to rebut showing of lack of funds if hearing is granted); *United States v. St. George*, ___ F. Supp.2d ___, 2003 WL 214783 (E.D. Tenn. Jan. 18, 2003) (following *Jones*; defendant must make threshold showing that he lacks alternative source of funds to retain counsel *and* that there is reason to believe there is no probable cause for the forfeiture of the restrained property; denying hearing to defendant who failed to make second showing).

²¹¹ *Id.*

he was a bona fide purchaser for value who was without reason to believe that the fee he was receiving was subject to forfeiture.²¹² Thus, applying *Caplin & Drysdale*, courts will uphold the forfeiture of attorneys fees when the defense attorney cannot satisfy the bona fide purchaser standard, and will hold defense counsel in contempt of court if he refuses to disgorge the forfeited fee, or will allow the Government to file a civil action against the attorney for converting Government property to his own use.²¹³

III

Conclusion

The evolution of asset forfeiture law in the United States is a tale of constant expansion and adaptation. Like a rare species of plant that has been plucked from the biological niche where it first evolved, adapted to new uses and new environments, and disseminated across the globe to serve new purposes that humans find useful, the practice of asset forfeiture, has been lifted from the remote corner of admiralty and customs law where it was conceived, applied to an ever-growing set of new crimes and circumstances, and become a powerful tool of law enforcement routinely applied in tens of thousands of criminal cases. But just as a plant or animal can thrive in a new environment only if, in the course of biological evolution, it is able to adapt its parts to new uses for which they were never intended, so was it necessary to adapt, modify and interpret the legal concepts underlying asset forfeiture in new ways so that the ancient practice could serve its new functions.

²¹² See *United States v. McCorkle*, ___ F.3d ___, 2003 WL 347655 (11th Cir. Feb. 18, 2003) (describing the procedure for obtaining a special verdict under § 853(c) against forfeitable property in the hands of a defense attorney, and allowing the attorney to contest the forfeiture in the ancillary proceeding); *United States v. Moffitt, Zwerling & Kemler*, 83 F.3d 660 (4th Cir. 1996) (same); *United States v. Saccoccia*, 165 F. Supp. 2d 103 (D.R.I. 2001) (same; explaining how the relation back doctrine works).

²¹³ See *United States v. McCorkle*, *supra*; *Moffitt, Zwerling*, *supra*.

Sometimes, that process of adaption has gone smoothly, and sometimes it has not. Forfeiting an airplane used to smuggle drugs in the 21st Century is not terribly different in either concept or application from forfeiting a vessel used to smuggle pirate booty in 1789. But forfeiting the residence of a drug dealer and his family, or the retirement plan of a corrupt physician, or the bank account of a charitable enterprise accused of financing terrorism is very different indeed. As the old concept designed to collect customs revenue and confiscate pirate ships was applied to these new situations, it was inevitable they would have to be modified and subjected to limitations and constraints.

The Supreme Court of the United States has been engaged for a very long time in the process of determining how the protections afforded individual liberty and property by the Bill of Rights limit the application of the asset forfeiture laws. That process accelerated dramatically in the 1990's: as the forfeiture laws matured and began to realize their full potential as instruments of the State in the battle against crime, so the understanding of the constitutional limits of forfeiture practice had to develop and mature. The evolution of forfeiture law has not ended and will likely never end, but from the perspective of the first decade of the 21st Century we are able to look back and see how, in the seminal period just ended, the Constitutional guarantees of due process, proportionality and the right to a fair trial were applied to the process of forfeiting the proceeds and instruments of crime. The courts will be fussing over the details for a long time, but the framework is now set; the basic rules of the game are known.

It will be interesting to see how constitutional courts in other countries that have now enacted civil and criminal forfeiture statutes into law resolve the same issues. Perhaps the incremental steps taken in the United States by the Supreme Court will serve as a guide; perhaps different and better approaches will emerge. It will be fun to see.