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# From Exodus to Embarrassment: Civil Forfeiture under the Drug Abuse Prevention and Control Act

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# FROM EXODUS TO EMBARRASSMENT: CIVIL FORFEITURE UNDER THE DRUG ABUSE PREVENTION AND CONTROL ACT

*Michael F. Alessio*

## TABLE OF CONTENTS

I.	INTRODUCTION .....	430
II.	JUDICIAL INTERPRETATION OF 21 U.S.C. § 881 .....	433
	A. THE GENERAL FORFEITURE PROVISIONS OF 21 U.S.C. § 881 .....	433
	B. PRACTICAL EFFECTS OF DESIGNATING PROCEEDINGS UNDER 21 U.S.C. § 881 AS CIVIL IN NATURE .....	435
	1. <i>Usual Constitutional Safeguards Are Not Always Triggered</i> .....	435
	2. <i>The Burden of Proof in Civil Forfeiture Proceedings</i> ..	437
	3. <i>Meeting the Burden of Probable Cause</i> .....	438
	4. <i>Restrictions on Delay in Initiation of Civil Forfeiture Proceedings</i> .....	440
	5. <i>Notice Requirements in Initiation of Civil Forfeiture Proceedings and The Problem of Summary Forfeiture</i> .....	441
	6. <i>Protection of Innocent Property Owners</i> .....	443
III.	LIMITING THE SCOPE OF 21 U.S.C. § 881 AND THE GOVERNMENT'S POWER .....	444
	A. PROTECTION OF THE INNOCENT OWNER .....	444
	1. <i>Protection Provided by Section 881 and the Problem of Relation-Back</i> .....	444
	2. <i>The Supreme Court's Solution to the Innocent Owner Problem and Relation Back</i> .....	445
	B. THE PROBLEM OF PROPORTIONALITY <i>IN REM</i> .....	446
	1. <i>The Disproportionate Results of Civil Forfeiture</i> .....	446
	2. <i>The Supreme Court's Solution to the Problem of Proportionality In Rem</i> .....	446
	C. DUE PROCESS VIOLATIONS AND CIVIL FORFEITURE PROCEEDINGS .....	447
	1. <i>The Due Process Dilemma</i> .....	447
	2. <i>The Due Process Balancing Test Applied to Civil Forfeiture</i> .....	448

3. <i>The Supreme Court's Analysis of the Counterbalance         Between Private and Governmental Interests</i> . . . . .	448
IV. THE PROBLEMATIC ADMINISTRATION OF 21 U.S.C. § 881 . . . . .	451
A. ACCOUNTING PROCEDURES CREATE A POTENTIAL FOR ABUSE AND MISMANAGEMENT . . . . .	451
B. THE USE OF FORFEITED ASSETS . . . . .	452
V. CONCLUSION . . . . .	454

## I. INTRODUCTION

"[I]f the law put . . . everyone in prison, we could be sure to get the drug dealers."<sup>1</sup>

THE flow of drugs into America is one of the country's most grave problems; it lies at the heart of much of our poverty and crime.<sup>2</sup> After the latest "war on drugs" was declared in 1989, civil forfeiture laws have been more actively enforced as one of the government's most potent weapons in its arsenal against drug trafficking.<sup>3</sup> The need to remedy a grave problem, however, should not lead to the adoption of any method which produces favorable statistics. War cries such as "zero tolerance" and "drug free society" may win votes, but they exemplify a law enforcement approach which tramples the rights of the bystander in the war on drugs.<sup>4</sup> In the pursuit of shutting down the drug trafficking trade,

1. 137 CONG. REC. E 3059-30 (daily ed. Sept. 17, 1991) (Statement of Rep. Jacobs).

2. H.R. REP. NO. 91-1444, 91st Cong., 1st Sess. 1970, reprinted in 1970 U.S.C.C.A.N. 4566, 4566-68 (blaming much of America's poverty and crime problems on foreign drug trade industries). In 1989, 55% of all federal criminal appeals involved narcotics offenses. Charles Edward Anderson, *Uncle Sam Gets Serious: A Report From The Front Line*, 76 A.B.A. J. 60, 62 (Feb. 1990) (the number of drug-related criminal cases rose 270% during the 1980s). Since the early 1980s, the number of heroin users in America has increased by 150% and the number of cocaine users by 10,000%. Ostrowski, *Thinking About Drug Legalization*, 121 POL'Y ANALYSIS 29-33 (1989). In 1988, 54% of high school students admitted to the use of illegal drugs. Richard L. Berke, *Student Survey Detects Decline in Use of Crack*, N.Y. TIMES, Mar. 1, 1989, at A16. In 1989, a Gallup Poll reported that more than 65% of Americans considered illegal drugs to be the nation's biggest problem. Marc B. Stahl, *Asset Forfeiture, Burdens of Proof and the War on Drugs*, 83 CRIM. L & CRIMINOLOGY 274 (1992).

3. Every administration since that of John F. Kennedy has publicly declared some type of "war" on drugs. Howard Kohn, *Cowboy in the Capital: Drug Czar Bill Bennett*, ROLLING STONE, Nov. 2, 1989, at 42. Expenditures for the most recent war on drugs tripled between the years 1980 and 1988, the bill rising above \$20 billion at the close of the 1980s. The number of drug related arrests tripled and the number of drug related convictions doubled during the decade. At the same time, America's prison population more than doubled and an unprecedented percentage of inmates were incarcerated for non-violent drug-related crimes. Doug Bandow, *War on Drugs or War on America?*, 3 STAN. L. & POL'Y REV. 242, 242 (1991). Seizures of cocaine rose from 2,000 kilograms in 1981 to 57,000 kilograms in 1988. Richard Esposito and Bob Drory, *Columbia's Traffic in Drugs Unabated*, NEWSDAY, Sept. 3, 1989, at 7. See *infra* notes 23-25 and accompanying text for a discussion of the legislative intent behind the enactment of civil forfeiture laws.

4. Despite years of punishment and prohibition, drugs are more readily available than ever: In President Clinton's former home of Little Rock, Arkansas, crack cocaine is conveniently sold in \$5 and \$10 sizes; LSD blotter-sheets bearing the likeness of Hillary

modern drug laws all but ignore the judicial underpinning of criminal law, that a person is innocent until proven guilty.

The Drug Abuse Prevention and Control Act<sup>5</sup> has enabled the U.S. government to compel the forfeiture of property used in violation of narcotics laws since its inception in 1970.<sup>6</sup> This broadly-defined ability has led to unfair results and abusive behavior by law enforcement officials.<sup>7</sup>

In *United States v. One 1976 Porsche*,<sup>8</sup> law enforcement officials seized the claimant's sports car after finding only .226 of a gram of marijuana in the trunk. The government brought forfeiture proceedings against the vehicle<sup>9</sup> and the court held that the forfeiture of such highly valued property was not unconscionable, even considering the small quantity of contraband discovered.<sup>10</sup> This holding, although correct within the literal meaning of section 881, has facilitated the imposition of greatly disproportionate and unfair consequences to property owners.<sup>11</sup>

In *United States v. One 1977 Mercedes Benz*<sup>12</sup> law enforcement officials conducted an illegal search of a luxury car which produced a package containing cocaine. The driver of the vehicle was not the owner, but had borrowed the car from the owner who had no knowledge of the illegal contraband possessed by the driver. The criminal case against the driver

Clinton sell for \$1 per dose; and brown-tar heroin has made its presence felt as far down as local elementary schools. *Telephone Interview with Anonymous Drug-User* (December 23, 1993).

5. 21 U.S.C. §§ 801-971 [hereinafter Drug Act]. The civil forfeiture provisions of the Act are codified at 21 U.S.C. § 881 (1988). Criminal forfeiture of property is authorized by 21 U.S.C. § 853 (1988).

6. Drug Control Act, Pub. L. No. 91-513, 84 Stat. 1236 (1970) (also known as the Controlled Substances Act). The forfeiture of property has long been recognized as an effective tool in law enforcement and is authorized under many circumstances that represent violations of various federal laws. See, e.g., 15 U.S.C. § 11 (1988) (authorizing the forfeiture of property acquired in violation of anti-trust laws); 15 U.S.C. § 1177 (1988) (authorizing the forfeiture of property used in illegal gambling); 16 U.S.C. §§ 65, 117(d), 128, 171, 256C (1988) (authorizing the forfeiture of guns and other equipment used unlawfully in national parks and private hunting grounds); 18 U.S.C. § 3668(d) (1988) (authorizing the forfeiture of vehicles and aircraft seized for a violation of liquor laws).

7. See *infra* Parts II and III for an overview of the unfair results created by the interpretation of the statute; Part IV for an examination of the abusive administration of the forfeiture power.

8. 670 F.2d 810 (9th Cir. 1979).

9. Civil forfeiture proceedings are *in rem* and considered to be against the property in question. *United States v. One 1976 Chevrolet Corvette*, 477 F. Supp. 32, 34 (E.D. Pa. 1979).

10. *One 1976 Porsche*, 670 F.2d at 812. The court stated that the language of the statute is such that quantity or intended use is not a consideration when determining the validity of a forfeiture. *Id.* at 812. This interpretation of the Drug Act has been criticized as a violation of the Eighth Amendment. The U.S. Constitution requires proportional results when it takes *in personam* action, but not necessarily with actions which are designated as *in rem*. Petitioners' Amicus Curiae Brief at 2, *Austin v. United States*, 113 S. Ct. 2801 (1993), (No. 92-6073).

11. See *infra* notes 40-42, 121-30 and accompanying text for a discussion of the unfair consequences created by the proportionality problem.

12. 708 F.2d 444 (9th Cir. 1983), *cert. denied*, 464 U.S. 1071 (1984).

was dropped for lack of evidence.<sup>13</sup> The forfeiture proceedings involving the innocent owner, however, were successful because she was said to have no standing to challenge the illegal search.<sup>14</sup> The innocence of the owner was not enough to overcome the forfeiture of the property.

Such cases raise serious questions about the constitutionality and fairness of the forfeiture provisions of the Drug Act. The Supreme Court has stated that "[i]ndividual freedom finds tangible expression in property rights. At stake in . . . forfeiture cases are the security and privacy of the home and those who take shelter within it."<sup>15</sup> Recognizing the need for reform, the Supreme Court recently addressed several of these issues and significantly curtailed the potency of the government's forfeiture power.<sup>16</sup> The interpretation and administration of the Drug Act create a process with the potential for great abuse which does not afford the rights of property owners adequate judicial protection. The procedural aspects of forfeiture under section 881 all but guarantee government success<sup>17</sup> and do not follow the fundamental notions of fair play and justice typically found in the American judicial system.

This comment will discuss these concerns by examining the present interpretation and administration of the Drug Act. Part II of this comment outlines the general provisions of the Drug Act and its judicial interpretation as a civil *in rem* proceeding. It also provides an overview of the practical effects of such a designation and analyzes how the rights of property owners are not adequately protected. Part III more closely examines three of these problems and the recent remedial steps taken by the Supreme Court to limit the scope of the government's forfeiture power. Part IV considers the potential for abuse and corruption created by the administration of the Drug Act by law enforcement officials. Finally, Part V of this comment predicts future steps to limit the provisions of the Drug Act and concludes that the scope of the government's forfeiture power must be curtailed in such a manner as to alleviate these problems while allowing the Drug Act to continue as an effective tool in the war on drugs.

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13. *Id.* The Ninth Circuit Court of Appeals noted that the exclusionary rule was applicable to the case against the driver and the evidence was barred as being in violation of the Fourth Amendment. *Id.* at 448.

14. *Id.* A violation of due process by the government only invokes the exclusionary rule in favor of those parties whose Fourth Amendment rights were violated. An illegal search does not automatically prevent the government from judicially compelling the forfeiture of private property. *Id.* at 450.

15. *United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 508 (1993) (recognizing individual property rights as an essential principle of freedom and privacy).

16. These recent decisions are *United States v. 92 Buena Vista Ave., Rumson, Austin v. United States*, and *United States v. James Daniel Good Real Property*. See *infra* Part III for a discussion of these cases.

17. Anton R. Valukas, *Forfeitures: When Uncle Sam Says You Can't Take It With You*, 14 *LTG.* 31, 34 (1988) (this advantage explains why the government is "not inclined to settle forfeiture cases"). The government wins a vast majority of civil forfeiture cases without a judicial contest from the owner and the government's losing of a civil forfeiture case has been characterized as "nearly impossible." Holly R. Skolnick, *CONN. L. TRIB.*, Aug. 2, 1993, at 20.

## II. JUDICIAL INTERPRETATION OF 21 U.S.C. § 881

### A. THE GENERAL FORFEITURE PROVISIONS OF 21 U.S.C. § 881

Section 881 of the Drug Act provides that the owner of property shall have no property right in any things of value which are furnished or are intended to be furnished by any person, not necessarily by the true owner, in exchange for a controlled substance in violation of the Drug Act,<sup>18</sup> in anything used or intended to be used to facilitate any violation of the Drug Act, or in any proceeds traceable to such activity.<sup>19</sup> The properties subject to such forfeiture include vehicles,<sup>20</sup> personal property<sup>21</sup> and real property.<sup>22</sup>

The theory behind empowering the government to compel the forfeiture of such a broad spectrum of property is simple. The government viewed a high profit margin as the motive behind drug trafficking and sought to eliminate this motive through the use of forfeiture, independent of any criminal charges, of the illegally derived assets.<sup>23</sup> It is clear that the legislative intent in drafting section 881 was specifically to attack and eliminate the benefits of drug trafficking.<sup>24</sup> The language of the Drug Act is broad enough, however, for the courts to ignore the intended use of any illegal contraband and bypass the original legislative intent by compelling the forfeiture of property owned by non-traffickers.<sup>25</sup>

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18. A violation of any provision of 21 U.S.C. §§ 801-904 will trigger this language. 21 U.S.C. § 881 (1988).

19. 21 U.S.C. § 881(a). Section 881(a)(6) provides, in part:

[t]he following shall be subject to forfeiture to the United States and no property right shall exist in them . . . things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, *all proceeds traceable to such an exchange*, and all moneys . . . used or intended to be used to facilitate any violation of this subchapter . . . .

*Id.* (emphasis added).

20. 21 U.S.C. § 881(a)(4).

21. *Id.* § 881(a)(6).

22. *Id.* § 881(a)(7).

23. H.R. REP. NO. 98-1030, 98th Cong., 2d Sess. 4 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3374. The Drug Act allows the government to remove the profits of drug trafficking and thus remove the incentive. *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).

24. H.R. REP. NO. 91-1444, 91st Cong., 1st Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4567; *see United States v. One 1972 Datsun*, 378 F. Supp. 1200, 1205 (1974) (discussing the legislative history of section 881).

25. *United States v. \$31,990 in U.S. Currency*, 982 F.2d 851, 855 (2d Cir. 1993) (holding that the original intent behind section 881 was to stop narcotics trafficking, not necessarily small-scale personal use of narcotics without intent to sell); *United States v. One 1975 Mercedes 280S*, 590 F.2d 196, 198 (6th Cir. 1978) (holding that any "measurable quantity" of contraband is enough to support a forfeiture, even if it was evident that the contraband was intended for personal use). Furthermore, the Executive Branch of the government has "lost sight of the legislative purpose of the forfeiture provisions and has begun to see them as a source of much-needed revenues." Jed S. Rakoff, *Will the Supreme Court Restrain Forfeiture?*, N.Y.L.J., July 8, 1993, at 4. Forfeited items valued at more than \$50,000 comprise only 17% of the 1991 inventory, a statistic which contradicts the official policy that the "little guy" is not the intended target of section 881. 137 CONG. REC. E3059-03, E3060 (daily ed. Sept. 17, 1991) (statement of Rep. Jacobs)

Subject property may be seized by law enforcement officials without a warrant if probable cause exists to believe that the property has been used in violation of the Drug Act.<sup>26</sup> Once the property is seized, in order to affect a successful forfeiture, the government need only demonstrate probable cause for the belief that a nexus existed between the property and the behavior proscribed by the Drug Act.<sup>27</sup> Thus, a criminal conviction of the owner is not required and the acquittal of the owner of any related criminal charges is not a defense to the forfeiture.<sup>28</sup> Once the government has met this burden, the burden shifts to the property owner<sup>29</sup> to establish by a preponderance of the evidence that there is no nexus between the property and the alleged illicit behavior.<sup>30</sup>

Once forfeited, the property is at the disposal of the Attorney General.<sup>31</sup> The only restriction on its use is that the property be retained for "official" purposes or be transferred to any Federal or State agency which directly participated in the seizure or forfeiture.<sup>32</sup> The property may also be sold by any "commercially feasible means."<sup>33</sup> These vague restrictions create a potential for abuse on the part of the officials charged with the discretionary maintenance and administration of forfeited property.<sup>34</sup>

Because the focus of forfeiture proceedings under section 881 is on the property itself and not the liberty of the owner, these proceedings are considered to be *in rem*, or against the property, without regard to the actions or identity of the owner.<sup>35</sup> This technical distinction has led to the

26. 21 U.S.C. § 881(b)(3). Section 881(b) provides, in part: "seizure without such process may be made when . . . the Attorney General has probable cause to believe that the property is subject to civil forfeiture under this subchapter." *Id.*

27. *United States v. \$364,960 in U.S. Currency*, 661 F.2d 319, 323 (5th Cir. 1981); *United States v. One 1979 Porsche Coupe*, 709 F.2d 1424 (11th Cir. 1983). See *infra* notes 61-75 and accompanying text for a discussion of what is required for a successful showing of probable cause.

28. *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 362-66 (1984); *United States v. Sandini*, 816 F.2d 869, 872 (3d Cir. 1987); see *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).

29. Section 881(d) incorporates 19 U.S.C. § 1615 by reference, which details the shifting of the burden of proof from the government to the claimant once the proper nexus between the property and the alleged behavior has been established. 21 U.S.C. § 881(d) (1988).

30. *United States v. One 1963 Cadillac Hardtop*, 231 F. Supp 27, 29 (E.D. Wis. 1964) (holding that the claimant's burden in a civil forfeiture proceeding is met by a preponderance of the evidence). The property owner may also attempt to show that the "innocent owner" provision of the Drug Act applies and, thus, that the forfeiture is not proper. 21 U.S.C. § 881(a)(6). There is also an exception for common carriers codified at 21 U.S.C. § 881(a)(4)(A).

31. 21 U.S.C. § 881(e)(1).

32. 21 U.S.C. 881 (e)(1)(A). Section 881 (e)(1) provides, in part: "Whenever property is civilly . . . forfeited under this subchapter the Attorney General may . . . retain the property for official use or . . . transfer the property to any Federal agency or to any State or local law enforcement agency which participated directly in the seizure or forfeiture of the property." *Id.* (emphasis added).

33. 21 U.S.C. § 881(e)(1)(B) (1988).

34. See *infra* Part IV for a discussion of administrative abuses of forfeited property held by government entities.

35. *United States v. One 1976 Chevrolet Corvette*, 477 F. Supp 32, 34 (E.D. Pa. 1979); *Goldsmith-Grant Co. v. United States*, 254 U.S. 505, 509 (1921) (holding that the vehicle

designation of forfeiture proceedings under section 881 as civil in nature, even though they are connected to the alleged commission of a criminal act.<sup>36</sup>

## B. PRACTICAL EFFECTS OF DESIGNATING PROCEEDINGS UNDER 21 U.S.C. § 881 AS CIVIL IN NATURE

### 1. Usual Constitutional Safeguards Are Not Always Triggered

The designation of forfeiture under section 881 as civil in nature means that the owner need not be charged with or convicted of any crime to forfeit ownership of the property.<sup>37</sup> In one study, eighty percent of successful civil forfeitures conducted by the U.S. government did not have any corresponding criminal charges.<sup>38</sup> Because the liberty of a defendant is not at stake, civil forfeiture proceedings do not trigger the full spectrum of constitutional safeguards.<sup>39</sup>

Disproportionate consequences are a common result with civil forfeiture proceedings. The quantity of any illegal contraband found in a search is irrelevant and the seriousness of the alleged offense is not a factor in determining the judicially imposed consequences.<sup>40</sup> This leads

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itself was guilty of wrongdoing); *Dobbins Distillery v. United States*, 96 U.S. 395, 397 (1877) (considering an inanimate object to be capable of wrongdoing and thus, the judicial proceeding is considered to be against the object and not its owner). The oldest roots of civil forfeiture are found in *Exodus*: "If an ox gore a man that he [shall] die, the ox shall be stoned, and his flesh shall not be eaten." *Exodus* 21:28; see *United States v. One 1963 Cadillac Coupe de Ville Two-Door*, 250 F. Supp. 183, 185 (W.D. Mo. 1966) (the court stated that "[w]hen this ancient concept [of Exodus] is recalled, our understanding of the law of forfeiture of chattels is more easily understood"; the court also discussed the long tradition of *in rem* forfeiture in the American justice system). See generally Lewis J. Heisman, J.D., Annotation, *Forfeiture of Personal Property Used in Illegal Manufacture, Processing or Sale of Controlled Substances Under § 511 of Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C.S. § 881)* 59 A.L.R. FED. 765 (1982) (examining the legal theories supporting the *in rem* distinction).

36. See, e.g., *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 686 (1974) (the Court discussed the English and American histories of civil forfeiture and examined the justifications for them); *Boyd v. United States*, 116 U.S. 616, 633-34 (1886) (holding forfeiture to be a civil proceeding); see *United States v. Schmalfeldt*, 657 F. Supp. 385, 387-89 (W.D. Mich. 1987) (discussing the history and origins of civil forfeiture); Jacob L. Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 TEMP. L.Q. 169 (1973). See generally Irving A. Pianin, Comment, *Criminal Forfeiture: Attacking the Economic Dimension of Organized Narcotics Trafficking*, 32 AM. U. L. REV. 227, 229 (1982) (distinguishing *in rem* forfeiture proceedings from *in personam*, or criminal forfeiture, which focuses on the guilt or innocence of a person).

37. *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 362-66 (1984); *United States v. Sandini*, 816 F.2d 869, 872 (3d Cir. 1987).

38. 137 CONG. REC. E3059 (daily ed. Sept. 17, 1991) (statement of Rep. Jacobs) (this was a ten-month study conducted in Pittsburgh, Pennsylvania).

39. *United States v. Riverbend Farms, Inc.*, 847 F.2d 553, 558 (9th Cir. 1988); *United States v. One 1970 Pontiac GTO, 2-Door Hardtop*, 529 F.2d 65, 66 (9th Cir. 1976); *United States v. One 1948 Cadillac Convertible Coupe*, 115 F. Supp. 723, 728 (D.N.J. 1953).

40. *United States v. 508 Depot Street*, 964 F.2d 814, 818 (8th Cir. 1992), *rev'd*, *Austin v. United States*, 113 S. Ct. 2801 (1993) (stating that "the government [was] exacting too high of a penalty in relation to the offense," but nonetheless upholding the validity of the forfeiture); *United States v. One 1975 Mercedes 280S*, 590 F.2d 196, 198 (6th Cir. 1978) (holding that any "measurable amount" of contraband is enough to support a forfeiture,



to the possibility that a civil forfeiture could impose more severe consequences on a property owner than a corresponding criminal penalty would impose.<sup>41</sup> Such a result appears to violate the Eighth Amendment's ban on excessive fines.<sup>42</sup>

The success of civil forfeiture proceedings is not always affected by Fourth Amendment due process violations.<sup>43</sup> In *United States v. One 1977 Mercedes Benz*,<sup>44</sup> the forfeiture of the claimant's luxury car was successful notwithstanding a due process violation during the search of the vehicle.<sup>45</sup> In cases where the property owner does have standing to claim a due process violation, such a violation still will not strip the government of its ability to compel the forfeiture.<sup>46</sup>

The claimant in a civil forfeiture proceeding is afforded partial constitutional protection under the Fifth Amendment.<sup>47</sup> The claimant cannot be compelled to answer questions and can remain silent by invoking the privilege against self-incrimination.<sup>48</sup> If this protection is invoked, however, the claimant will not be able to carry the proper burden of proof and will lose the case. An owner who refuses to testify based on grounds of self-incrimination lacks standing to contest the forfeiture.<sup>49</sup> There is, however, no Fifth Amendment protection against placing the claimant in double jeopardy because any possible result of a civil forfeiture proceeding is considered to affect only the property and not the claimant's liberty.<sup>50</sup> This places the claimant in a precarious situation: either testify to the source and use of the contraband — possibly invoking criminal liabil-

irrespective of the value of the forfeited property); *United States v. One Clipper Bow Ketch (Nisku)*, 548 F.2d 8, 11 (1st Cir. 1977).

41. See, e.g., *United States v. One 1980 Red Ferrari*, 875 F.2d 186, 189 (8th Cir. 1989) (vehicle owner who was found guilty of narcotics possession and subject to a criminal fine of \$1,000 subsequently forfeited his vehicle with a value of more than 40 times the criminal fine under a civil forfeiture action brought by the federal government); *United States v. 835 Seventh St.*, 820 F. Supp. 688 (N.D.N.Y. 1993) (six ounces of marijuana, worth \$1,125, were found in the claimant's house, worth \$69,000, which was subsequently forfeited to the government).

42. The Eighth Amendment provides, in part: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST., amend. VIII (emphasis added). But see *Ingraham v. Wright*, 430 U.S. 651, 666 (1977) (noting that Eighth Amendment protections are not applicable to a claimant in a civil forfeiture case). See *infra* Part III.B for further discussion of the proportionality *in rem* problem.

43. *United States v. \$73,277 in United States Currency*, 710 F.2d 283 (7th Cir. 1983) (discussing the application of the Fourth Amendment to civil forfeiture proceedings).

44. 708 F.2d 444 (9th Cir. 1983).

45. *Id.*; see *supra* notes 12-14 and accompanying text for the relevant facts and procedural history.

46. *United States v. \$297,235*, 516 F. Supp. 720, 722 (E.D. Mo. 1981) (upholding a forfeiture when the introduction of evidence wholly unrelated to the due process violation against the claimant is independently sufficient to support probable cause to make the seizure).

47. *Baker v. United States*, 722 F.2d 517, 519 (9th Cir. 1983) (holding that the Fifth Amendment is applicable to civil forfeiture proceedings).

48. *United States v. United States Coin & Currency*, 401 U.S. 715 (1971) (stating that the privilege against self-incrimination applies to civil forfeitures under the Drug Act where in other civil actions it may not apply).

49. *Baker*, 722 F.2d at 519.

50. See *United States v. One Lot Emerald Cut Stones*, 409 U.S. 232, 235-37 (1972).

ity for its presence — or claim protection under the Fifth Amendment, causing a failure to carry the requisite burden of proof.

This lack of constitutional safeguards is based solely upon the legal fiction that forfeiture under section 811 is an *in rem* civil proceeding. These usual constitutional safeguards ensure that justice and fairness are present in the American judicial process. Without a more reasonable justification of their absence, civil forfeiture under section 881 is unjust and unfair.<sup>51</sup>

## 2. *The Burden of Proof in Civil Forfeiture Proceedings*

The government's typical burden of proof in criminal proceedings, including criminal forfeiture, is to prove every element of a crime beyond a reasonable doubt.<sup>52</sup> The defendant must establish any defenses to a criminal charge by a preponderance of the evidence.<sup>53</sup> When the government attempts to impose civil penalties, the government must show the defendant's liability by a preponderance of the evidence.<sup>54</sup>

In a civil forfeiture proceeding under section 881, however, the government's burden of proof is lowered to a showing of probable cause.<sup>55</sup> This burden has been articulated as "less than prima facie proof but more than mere suspicion,"<sup>56</sup> and has been characterized as the "lowest [burden] in any American courtroom."<sup>57</sup> The determination that forfeiture proceedings under section 881 are civil in nature allows courts to reject the burden of proof required by the due process clause of the U.S. Constitution and impose in its place the burden of probable cause.<sup>58</sup> Once probable cause has been shown by the government, the burden shifts to the claim-

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51. The Bill of Rights is central to the notion of restricting government interference in the private affairs of its citizens and is crucial in safeguarding the liberty and security of citizens with regard to property. *See generally*, *United States v. Robel*, 389 U.S. 258 (1967) (discussing the fundamental need to protect certain private interests from government intrusion).

52. *Patterson v. New York*, 432 U.S. 197, 206 (1977); *Mullaney v. Wilbur*, 421 U.S. 684, 701-02 (1975).

53. *Patterson*, 432 U.S. at 206; *Mullaney*, 421 U.S. at 697.

54. *United States v. Regan*, 232 U.S. 37, 48 (1914) (detailing the burden of proof in a civil penalty case brought by the United States government).

55. 21 U.S.C. § 881 expressly incorporates 19 U.S.C. § 1615 which provides, in part: "the burden of proof shall lie upon such claimant . . . [p]rovided, [t]hat *probable cause* shall first be shown for the institution of such suit or action . . . ." 19 U.S.C. § 1615 (1982) (emphasis added); *see United States v. One 1979 Porsche Coupe*, 709 F.2d 1424, 1425 (11th Cir. 1983); *United States v. \$364,960 in U.S. Currency*, 661 F.2d 319, 323 (5th Cir. 1981).

56. *United States v. 526 Liscum Drive*, 866 F.2d 213, 216 (6th Cir. 1989).

57. *Preview of U.S. Supreme Court Cases*, 1992-93 Term, Issue No. 1, Sept. 30, 1992, at 1; *see United States v. Banco Cafetero Panama*, 797 F.2d 1154, 1160 n.7 (2d Cir. 1986) (discussing what level of proof is required to make a showing of probable cause in relation to other burdens of proof); *United States v. One 56-Foot Motor Yacht Named Tahuna*, 702 F.2d 1276, 1281 (9th Cir. 1983) (detailing what is required for a showing of probable cause).

58. *United States v. \$2,500 in United States Currency*, 689 F.2d 10, 12 (2d Cir. 1982); *Bramble v. Richardson*, 498 F.2d 968 (10th Cir.), *cert. denied*, 419 U.S. 1069 (1974).

ant to show by a preponderance of the evidence that the property was not used in connection with any activity proscribed by the Drug Act.<sup>59</sup>

Thus, the government has lowered its own burden of proof while maintaining the higher burden of proof the owner would be required to meet in any other criminal or civil penalty proceeding against him. The respective burdens of proof on the government and the claimant heavily favor government success and create a situation where the standard "innocent until proven guilty" does not apply.<sup>60</sup>

### 3. *Meeting the Burden of Probable Cause*

In meeting its evidentiary burden, the government can make use of evidence that is not relevant in proceedings which impose a higher standard of proof. In addition to direct evidence, both hearsay and circumstantial evidence are effective tools available to the government in making its showing of probable cause.<sup>61</sup> Furthermore, it is not necessary for the government to establish each and every element of its claim, as is required in a criminal case or civil penalty proceeding.<sup>62</sup> Unlike the government, the claimant must strictly adhere to the rules of evidence.<sup>63</sup> The claimant's burden is not provable by hearsay nor by circumstantial evi-

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59. 21 U.S.C. § 881(d) (1988) (incorporating 19 U.S.C. § 1615's procedural rules for shifting the burden of proof in a civil forfeiture proceeding). Customs laws are also incorporated by reference into § 881. *United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 505-06 (1993). The claimant may also attempt to show that he comes under the innocent owner provision by a preponderance of the evidence. 21 U.S.C. § 881(a)(6).

60. By shifting the burden of proof upon a showing of probable cause by the government, the property is effectively guilty until proven innocent. DAVID SMITH, PROSECUTION AND DEFENSE OF CIVIL FORFEITURE CASES ¶ 11.03 (1990). See *United States v. The Leasehold Interest in 121 Nostrand Ave., Apartment 1-C, Brooklyn, N.Y.*, 760 F. Supp. 1015 (E.D.N.Y. 1991) (noting the unfairness of the relative burdens of proof, but upholding the seizure as the court was bound by the express language of the statute).

61. See, e.g., *United States v. One 1978 Mercedes Benz*, 711 F.2d 1297, 1304 (5th Cir. 1983); *United States v. One 1964 Beechcraft Baron Aircraft*, 691 F.2d 725, 728 (5th Cir.), cert. denied, 461 U.S. 914 (1983) (permitting the government to make use of hearsay in a civil forfeiture proceeding); *United States v. \$2,500.00 in United States Currency*, 689 F.2d 10, 16 (2d Cir.), cert. denied sub nom., *Aponte v. United States*, 465 U.S. 1099 (1984) (holding that circumstantial evidence is available for government use in showing probable cause); see, e.g., *United States v. \$103,075 in U.S. Currency*, 741 F. Supp. 903, 905 (M.D. Ga. 1989) (holding that the sheer amount of cash seized by the government was a key factor in determining probable cause and triggering a shift in the burden; noting in dicta that a large amount of cash is a "common thread" running through cases involving possession or distribution of controlled substances and the proceeds therefrom). But see *United States v. \$7,850 in U.S. Currency*, 7 F.3d 1355 (8th Cir. 1993) (evidence of suspicious behavior, traveling under an assumed name, prior drug convictions, and the purchasing of a ticket with cash was not enough to constitute probable cause and shift the burden to the claimant); FED. R. EVID. 802 (providing that hearsay is not admissible unless it comes under a specific exception).

62. *United States v. United States Currency Totaling \$87,279*, 546 F. Supp. 1120, 1126-27 (S.D. Ga. 1982).

63. *United States v. One 1968 Piper Navaho Twin Engine Aircraft*, 594 F.2d 1040, 1042 (5th Cir. 1979) (stating that the higher standard of proof placed upon the claimant demands the use of more formal rules of evidence).

dence unless it falls within a handful of narrow exceptions as provided by the applicable rules of evidence.<sup>64</sup>

The government often relies on "drug courier profiles" to facilitate a showing of probable cause.<sup>65</sup> If a suspect traveller appears nervous, has checked no luggage, and has paid cash for a ticket to a "drug source" city with a quick turn-around time, that traveler matches the government's "drug courier profile."<sup>66</sup> Simply matching this profile often subjects the traveller to closer scrutiny by law enforcement officials.<sup>67</sup> These profiles should not constitute evidence of probable cause as they account for much innocent behavior.<sup>68</sup>

Race is often a factor in determining probable cause to make an initial asset seizure, although it is never articulated as such by the seizing entity.<sup>69</sup> In *Jones v. United States Drug Enforcement Administration*,<sup>70</sup> the court stated that it was "clear from the testimony that Drug Interdiction Unit officers approached [the subjects] because of their race."<sup>71</sup> The court also noted the troubling nature of the officer's admission that the sole basis for the detention and subsequent investigation of two Hispanic men in an unrelated case was the fact that they were traveling in the company of a Caucasian woman.<sup>72</sup> In 1991, the racial composition of all travellers who had flown on commercial airlines during the previous year was greatly disproportionate to the high number of minorities who had been stopped and questioned.<sup>73</sup>

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64. See, e.g., FED. R. EVID. 803, 804 (providing a laundry list of exceptions to the rule against hearsay).

65. *Jones v. United States Drug Enforcement Agency*, 819 F. Supp. 698 (M.D. Tenn. 1993).

66. *Id.* at 718.

67. *Id.* at 698.

68. See, e.g., *Florida v. Royer*, 460 U.S. 491 (1983) (discussing the use of the drug courier profile by the government in attempting to show probable cause); *Reid v. Georgia*, 448 U.S. 438, 441 (1980); *United States v. Superstein*, 723 F.2d 1221, 1227-29 (6th Cir. 1983) (noting that current drug courier profiles account for much innocent behavior and are not completely reliable as proof of illicit activity).

69. *Jones*, 819 F. Supp. at 723-24 (examining racial stereotypes as a reason for conducting searches and seizures). The government consistently claims not to have based probable cause on racial criteria, but law enforcement statistics tell a different story. 137 CONG. REC. E3059 (daily ed. Sept. 17, 1991) (statement of Rep. Jacobs). See *infra* note 73 for relevant racial statistics.

70. *Jones*, 819 F. Supp. 698 (M.D. Tenn. 1993) (noting that the statutory scheme of section 881 and the administration of it provide substantial opportunity for abuse and corruption).

71. *Id.* at 723.

72. *Id.*

73. *Id.* at 713-14. The reported percentages of travelers are as follows: 87.5% Caucasian; 5.1% African-American; 1.6% Hispanic; and .8% Asian. *Id.*, (citing The Gallup Organization, *Air Travel Survey* (1991)). The racial percentages of persons stopped by the Drug Interdiction Unit (hereinafter "DIU") during the stated period was as follows: 13.46% Hispanic and 1.7% Asian. *Jones*, 819 F. Supp. at 713-14 (the racial distinction of the persons was based upon the origin of their surnames, the names were taken from the DIU's forfeiture logbook). In one instance, "an examination of 121 travelers' cases in which police found no illegal drugs, made no arrest, but seized money anyway, showed that 77 percent of the people stopped were black, Hispanic or Asian." 137 CONG. REC. E3059 (daily ed. Sept. 17, 1991) (statement of Rep. Jacobs).

Dog sniffs are frequently used to assist the government's showing of probable cause.<sup>74</sup> Controlled studies have, however, shown this procedure to be highly inaccurate. One study shows that a dog sniff would result in a positive reaction to over 96% of U.S. currency.<sup>75</sup> Such high sensitivity to minute traces of narcotics does not yield any relevant information about the prior use of the currency and should not be used as evidence of probable cause. A positive dog sniff may signal only the presence of money, not the money's involvement in drug trafficking.<sup>76</sup>

By allowing the government to use hearsay and circumstantial evidence in meeting its burden of proof, the government is effectively required to prove nothing. Having a low burden of proof and liberal rules of evidence show that the shifting of the burden to the claimant is an illusion. Under these circumstances, the burden is effectively placed upon the claimant from the outset of the trial.

#### 4. *Restrictions on Delay in Initiation of Civil Forfeiture Proceedings*

Following an initial seizure of property, the government is required to initiate forfeiture proceedings within a "reasonable" amount of time.<sup>77</sup> Courts are given considerable discretion, however, in determining what is "reasonable". In one case, a delay of over fourteen months was upheld as reasonable.<sup>78</sup> In addition to the reasonability requirement, the commencement of a civil forfeiture action must occur within the five year limitations period imposed by federal customs law, implying that a period of up to five years might be considered reasonable.<sup>79</sup> The delay need not be unintentional to be upheld under a reasonability test. In *United States v. Oil Screw Gulf Princess II*,<sup>80</sup> the government's delay in initiating civil forfeiture proceedings was admittedly an intentional delay to gain lever-

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74. *United States v. \$53,082 in U.S. Currency*, 985 F.2d 245, 250 n.5 (6th Cir. 1992) (examining the frequency of dog-sniffs and questioning their validity and relevance to a showing of probable cause); *United States v. \$175,260 in U.S. Currency*, 741 F. Supp. 45, 46 (E.D.N.Y. 1990) (describing the typical dog-sniff procedure).

75. *\$53,082 in U.S. Currency*, 985 F.2d at 250 n.5. DEA chemists reported that currency in general circulation is contaminated with narcotics from contact with other contaminated bills. *Id.*

76. *United States v. \$639,558 in U.S. Currency*, 955 F.2d 712, 714 n.2 (D.C. Cir. 1992).

77. 21 U.S.C. § 881(b) provides, in part: "[I]n the event of a seizure pursuant to paragraph (3) or (4) of this subsection, proceedings under subsection (d) of this section shall be instituted promptly." 21 U.S.C. § 881(b) (1988) (emphasis added). Courts interpret this provision as requiring reasonable promptness. *United States v. One Motor Yacht Named Mercury*, 527 F.2d 1112, 1114 (1st Cir. 1975) (holding that a 12 month delay was reasonable under the circumstances).

78. *United States v. One 1973 Ford LTD*, 409 F. Supp. 741, 741-42 (D. Nev. 1976).

79. A forfeiture action may not be dismissed for non-compliance with the timing requirements of 19 U.S.C.A. §§ 1602-07 as long as the action was filed within the 5-year statute of limitations required by customs laws. See *United States v. Montalvo-Murillo*, 495 U.S. 711, 716-22 (1990); *United States v. James Daniel Good real property*, 971 F.2d 1376, 1379 (9th cir. 1992), *rev'd in part* by 114 S. Ct. 492, 505-06 (1993) (noting that federal customs laws are incorporated into section 881 by reference).

80. 543 F. Supp. 1037 (D.S.C. 1983).

age in a criminal case against the ship's owners but was still upheld as reasonable.<sup>81</sup>

Any chance the owner does have of regaining possession of the seized property greatly diminishes with the passage of time.<sup>82</sup> A lengthy delay could mean that a civil forfeiture action could go unchallenged because the prohibitive cost of a delayed trial could outweigh the value of the seized property.<sup>83</sup> Lengthy delays also mean that a property owner must go without the benefit of the property, adding further economic distress to the situation.<sup>84</sup> Consequently, this system may reward the seizure of property without probable cause because of the increased probability that the forfeiture will go uncontested after a lengthy, but "reasonable" delay.

##### 5. *Notice Requirements in Initiation of Civil Forfeiture Proceedings and The Problem of Summary Forfeiture*

An owner of property seized pursuant to section 881 is not constitutionally guaranteed a pre-seizure hearing.<sup>85</sup> In light of the absence of a pre-seizure hearing, the importance of the notice requirements placed upon the government greatly increases. If there is no pre-seizure hearing and if lengthy delays occur in instituting forfeiture proceedings, the owner of the property may have to rely on government notice to learn of the initial seizure. It is possible that the owner is not aware of the seizure and would not become aware of it without actual notice from the seizing entity.<sup>86</sup> This is particularly likely when the owner has loaned the property to a third party and is unaware of the illicit activity. Thus, the government should be held to strict notice requirements that are in such a way as to adequately protect both the owner's due process right to a pre-seizure hearing and the government's interest in making immediate and unannounced seizures.

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81. *Id.* at 1041. Unless the delay is of an unreasonable length, the intent behind the delay is irrelevant. *Id.*

82. See DAVID SMITH, PROSECUTION AND DEFENSE OF CIVIL FORFEITURE CASES ¶ 10.05 (1990) (discussing the diminishing possibility of winning a forfeiture case after the government's lengthy delay in initiating the action).

83. *Id.*

84. See *United States v. \$8,850 in United States Currency*, 461 U.S. 555, 570 (1982) (Stevens, J., dissenting) (the dissenting opinion stated that to dispossess a citizen of the use and benefit of property for 18 months without a hearing is a violation of the owner's fifth amendment rights).

85. See, e.g., *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 633, 678-79 (utilizing a balancing test to determine the necessity of a pre-seizure hearing; the court held that the government's interest in ensuring the security of the property outweighed the owner's interest in it); *Mathews v. Eldridge*, 424 U.S. 319 (1976) (formulating a balancing test used in such circumstances); *United States v. Wolf*, 787 F.2d 1094, 1097 (7th Cir. 1986) (holding that a pre-seizure hearing is not a constitutional pre-requisite for a successful civil forfeiture proceeding).

86. *Robinson v. Hanrahan*, 409 U.S. 38 (1972) (holding that the notice of the seizure and pending forfeiture proceedings was inadequate where the property owner was known to be in jail at the time; under the circumstances, the owner was completely reliant upon receiving actual notice to learn of the seizure).

The notice requirement imposed on the government is dependent upon the value of the seized property. If the property value is less than \$10,000, the government can give notice by mere publication.<sup>87</sup> If no claim for relief is filed within three weeks of publication, plus twenty days, the property is summarily forfeited to the government.<sup>88</sup> Summary forfeiture does not impose any further burden upon the government. There is no trial required, or even a showing of probable cause, to affect a summary forfeiture.<sup>89</sup> Summary forfeiture is likely to go unchallenged because the cost to the owner of filing suit and carrying his burden of proof at trial is likely to outweigh the value of the property in such cases.<sup>90</sup> This empowers the government to make seizures of relatively low-valued assets without probable cause and expect a high success rate under this summary forfeiture rule.<sup>91</sup> If the value of the property exceeds \$10,000, the government must attempt to give actual notice to the owner and initiate formal judicial forfeiture proceedings.<sup>92</sup> As a result, the present structure of the notice system rewards the seizure of property without probable cause.

Courts typically approve of these notice requirements based on the rationale of administrative convenience.<sup>93</sup> Under a balancing test to determine whether a due process violation has occurred,<sup>94</sup> however, administrative convenience to the government should not always outweigh the property rights of an individual.<sup>95</sup>

In cases where the seized property is the owner's only significant asset or where the total value of the owner's possessions are approximate to a value of \$10,000, a summary forfeiture is likely to occur. Even if actual

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87. 19 U.S.C. §§ 1607, 1609 (1982) (these sections are expressly incorporated into the Drug Act by section 881).

88. *Id.*

89. *Id.*; *Winters v. Working*, 510 F. Supp. 14, 16 (W.D. Tex. 1980).

90. Upon notice, the claimant must post a bond to the government in the sum of \$5,000 or 10% of the property's value, whichever is less, but at a minimum of \$250, adding a further economic burden to the claimant's situation. 19 U.S.C. § 1608 (1982). Claimants who challenge a government forfeiture "have the choice of fighting the full resources of the U.S. Treasury or caving in." 137 CONG. REC. E3060 (daily ed. Sept. 17, 1991) (statement of Rep. Jacobs).

91. 80% of civil forfeiture cases go uncontested. 137 CONG. REC. E3060 (daily ed. Sept. 17, 1991) (statement of Rep. Jacobs). So called "big-ticket" items, those not subject to summary forfeiture, comprised only 17% of the forfeiture inventory in a Pittsburgh Press study ending in December of 1990. *Id.*

92. 19 U.S.C. § 1610 (1982) (this section is expressly incorporated into the Drug Act by section 881).

93. *See, e.g., In Re Warrant to Seize One 1988 Chevrolet Monte Carlo v. United States*, 861 F.2d 307, 310 (1st Cir. 1988); *Willis v. United States*, 787 F.2d 1089, 1091-93 (7th Cir. 1986).

94. *Mathews v. Eldridge*, 424 U.S. 319 (1976) (weighing three prongs of a balancing test: (1) consideration of the private interests effected by the government action, (2) the risk of erroneous intervention or deprivation, and (3) the government interest at stake — including but not limited to any increased administrative burden); *United States v. One 1971 BMW Four-Door Sedan*, 652 F.2d 817, 821 (9th Cir. 1981).

95. *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969) (noting in dicta that when a taking of property has drastic economic consequences, denial of the right to actual notice violates the fundamental principles of due process).

notice is given, such persons are typically unable to afford to file suit because the forfeited assets are generally not available for the payment of court costs and attorney's fees.<sup>96</sup> A forfeiture would leave them destitute and likely to engage in criminal activity. Under these circumstances, section 881 would perpetuate the illicit activity it was designed to curb.

#### 6. *Protection of Innocent Property Owners*

The government's burden of proof in a civil forfeiture proceeding requires only a showing of probable cause for the belief that a nexus exists between the property and the behavior proscribed by the Drug Act.<sup>97</sup> In meeting this burden, the government is not required to bring criminal charges against the owner, and the acquittal of the owner on any related criminal charges is not a defense to the forfeiture.<sup>98</sup> Thus, third party owners or spouses are extremely susceptible to the consequences of behavior which is outside of that person's knowledge or sphere of control.<sup>99</sup> This should not imply, however, that the "innocence" of the claimant of any criminal wrongdoing is completely without relevance. If the claimant can come under an exception provided by section 881, the forfeiture action will fail.<sup>100</sup>

The Drug Act expressly provides a safe harbor for "innocent" owners, those persons with an interest in the seized property but who had no knowledge of and were not responsible in any way for the illicit acts which gave rise to the forfeiture.<sup>101</sup> Section 881 (a)(6) provides that "no property shall be forfeited . . . to the extent of an interest of the owner, by reason of any act or omission established by that owner to have been committed or omitted *without the knowledge or consent of that owner.*"<sup>102</sup> This defense, however, becomes ineffectual when the government by-

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96. See generally Anton R. Valukas, *Forfeitures: When Uncle Sam Says You Can't Take It With You*, 14 LITIG. 31 (1988) (discussing the forfeiture of attorney's fees and the application of the sixth amendment).

97. *United States v. One 1979 Porsche Coupe*, 709 F.2d 1424, 1426 (11th Cir. 1983); *United States v. \$364,960 in United States Currency*, 661 F.2d 319, 323 (5th Cir. 1981).

98. See U.S. DEPT. OF JUSTICE, *DRUG AGENT'S GUIDE TO FORFEITURE OF ASSETS* (1987 revision), 3-9 (1987); see also *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 362-66 (1984); *United States v. Sandini*, 816 F.2d 869, 872 (3d Cir. 1987).

99. See, e.g., *United States v. One 1977 Mercedes Benz*, 708 F.2d 444 (9th Cir.), cert. denied sub nom., *Webb v. United States*, 464 U.S. 1071 (1984) (vehicle of innocent owner was forfeited); *United States v. One 1982 Datsun 200SX*, 627 F. Supp. 62, 63 (W.D. Pa. 1985) (a company car was subject to forfeiture because of employee behavior, irrespective of the behavior of the corporation), *aff'd*, 782 F.2d 1032 (3d Cir. 1986); *United States v. One 1977 Porsche Carrera 911 VIN 9117201924*, 748 F. Supp. 1180 (W.D. Tex. 1990), *aff'd*, 946 F.2d 30 (5th Cir. 1991); see also Carl H. Loewenson Jr., *Banks as Innocent Owners in Forfeiture Cases*, N.Y.L.J. Mar. 17, 1993, 1 (discussing lending institutions as third-party innocent owners and the protection of real property liens).

100. 21 U.S.C. § 881(a)(6) (1988) ("innocent owner" defense is expressly given as an exception and is codified at § 881(a)(6)).

101. *Id.* Historically, innocence was not a defense. The decision in *Colero-Toledo* led to Legislative amendments to codify the exception under section 881. *Colero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). Compare Pub. Law No. 91-513, 84 Stat. 1236 (1970) with 21 U.S.C. § 881 (a)(6) (1988).

102. 21 U.S.C. § 881(a)(6) (1988) (emphasis added).



passes the use of a pre-seizure hearing and obtains a seizure warrant in an *ex parte* proceeding. To obtain an *ex parte* seizure warrant, the government is required to make its showing of probable cause, but because this is a unilateral proceeding, the Magistrate can issue a warrant without requiring the government to disprove the possibility of innocent ownership.<sup>103</sup> Even if the claimant does prove his defense of innocent ownership, there is no recourse for the temporary deprivation the innocent owner has erroneously suffered.<sup>104</sup> Furthermore, the problem of summary forfeiture places innocent third party owners and spouses in additional jeopardy because they could lose their ability to claim this defense.

### III. LIMITING THE SCOPE OF 21 U.S.C. § 881 AND THE GOVERNMENT'S POWER

The interpretation and administration of section 881's forfeiture provisions raise many issues of fairness, constitutionality, and corruption. The most troubling of these issues, however, are the lack of protection for innocent owners, the potential for disproportionate results, and the absence of a pre-seizure hearing or notice. The scope of the statutory power granted to the government should be limited in such a way that these problems are alleviated without emasculating the forfeiture provisions of section 881.

#### A. PROTECTION OF THE INNOCENT OWNER

##### 1. *Protection Provided by Section 881 and the Problem of Relation-Back*

The innocent owner defense<sup>105</sup> conflicts with the apparent timing of vestiture of the government's interest in seized property.<sup>106</sup> Section 881(h) provides, in part: "[a]ll right, title, and interest in property . . . shall vest in the United States *upon commission of the act* giving rise to forfeiture under this section."<sup>107</sup> The government has consistently claimed that the commission of the illicit act is the mechanism by which title immediately vests in the United States.<sup>108</sup> If the government's interest does vest automatically upon commission of the act, the claimant would be effectively barred from utilizing the "innocent owner" defense

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103. *United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 500-02 (1993).

104. *Id.*

105. 21 U.S.C. § 881 (a)(6) (1988). *See infra* notes 97-104 and accompanying text for a discussion of the innocent owner defense.

106. 21 U.S.C. § 881(h) (1988).

107. *Id.* (emphasis added).

108. *See, e.g., United States v. 92 Buena Vista Ave., Rumson*, 113 S. Ct. 1126 (1993); *United States v. 10652 South Laramie*, 779 F. Supp. 952 (N.D. Ill. 1991); *United States v. 3181 S.W. 138th Place*, 778 F. Supp. 1570 (S.D. Fla. 1991) (holding that the "relation-back" doctrine destroyed liens created after the commission of the illicit act but prior to the initiation of forfeiture proceedings).

when the claimant has acquired title subsequent to the commission of the act giving rise to the forfeiture.<sup>109</sup>

## 2. *The Supreme Court's Solution to the Innocent Owner Problem and Relation Back*

In *United States v. Buena Vista Ave.*,<sup>110</sup> the claimant received approximately \$240,000 as a gift from a personal acquaintance to purchase the house which she and her children had occupied for the previous six years. The district court held that the government had established probable cause to believe that the funds used by the claimant to purchase the house were the illegally derived proceeds of drug trafficking.<sup>111</sup> The claimant moved for application of the innocent owner defense, claiming that she was without knowledge of the illicit activity. The district court rejected this defense and held that only bona fide purchasers for value or persons who had acquired their property interest before the commission of the illicit act could successfully assert the defense as provided in section 881(a)(6).<sup>112</sup>

The court of appeals declined to limit the innocent owner defense to bona fide purchasers for value and overruled the district court.<sup>113</sup> The court examined the statutory language and legislative history of section 881 and determined that they suggest no such limitation on the definition of the term "owner."<sup>114</sup> The court held that the term "owner" should be broadly construed so as to include any person with any interest in the property, whether legal or equitable.<sup>115</sup> The court of appeals also limited the application of the relation-back doctrine by holding that a successful assertion of the innocent owner defense would not require the claimant to have acquired an interest before the commission of the illicit acts.<sup>116</sup> The court reasoned that if it embraced the government's interpretation of the relation-back doctrine<sup>117</sup> the statutory defense for innocent owners

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109. *Section I: A National Survey of Current Law — Summary and Analysis*, 61 U.S.L.W. 1125 (1993) (discussing the federal circuit court split on how to reconcile this conflict).

110. 113 S. Ct. 1126 (1993).

111. *Id.* at 1128.

112. *Id.*

113. *Id.* at 1130-32.

114. *Id.* at 1131-34 (citing *United States v. A Parcel of Land Known As 92 Buena Vista Avenue*, 937 F.2d 98, 101 (3d Cir. 1991) (considering the plain language of the statute in determining the intended definition of the term "owner")).

115. *Id.* (citing *United States v. 6109 Grubb Road*, 886 F.2d 618, 625 (3d Cir. 1989) (considering the legislative history of the statute in holding that the term "owner" should be broadly construed)).

116. *92 Buena Vista Avenue*, 113 S. Ct. at 1134-35.

117. The government contends that because of the operation of the relation-back doctrine, the claimant never actually had ownership of the property. *Id.* at 1134.

would be effectively nullified.<sup>118</sup> The Supreme Court affirmed the holding of the court of appeals in a four-member plurality opinion.<sup>119</sup>

The government can no longer prematurely cut-off the innocent owner defense by use of the relation-back doctrine. Moreover, any person with a cognizable legal or equitable interest in property has standing to assert this defense.<sup>120</sup>

## B. THE PROBLEM OF PROPORTIONALITY *IN REM*

### 1. *The Disproportionate Results of Civil Forfeiture*

In civil proceedings under section 881, the quantity and intended use of any illegal contraband is not part of the judicial calculus for determining the validity of the forfeiture. Nor does the value of the property forfeited bear a direct relationship to the seriousness of the alleged activity which gave rise to the forfeiture.<sup>121</sup> Therefore, disproportionate consequences are a common result with civil forfeiture proceedings.<sup>122</sup>

This anomaly stems from the theory that an action *in rem* imposes no "punishment" upon the owner. The Eighth Amendment was drafted to act as a limitation upon the government's ability to fine and punish its citizens, stipulating that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."<sup>123</sup> Thus, the Eighth Amendment's ban on excessive fines would not mitigate the often harsh results of civil forfeiture proceedings under Section 881 unless those results constituted a "punishment" within the intended meaning of the amendment.

### 2. *The Supreme Court's Solution to the Problem of Proportionality In Rem*

In *Austin v. United States*,<sup>124</sup> the claimant had been indicted on four counts of state drug law violations. He pled guilty to one count of possession of narcotics with intent to distribute and was sentenced to seven years imprisonment. The United States filed a subsequent action for the forfeiture of the claimant's mobile home and his place of business. The

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118. *Id.* at 1134-36 (noting that it was unlikely that Congress would enact a meaningless statute).

119. *Id.* at 1138-46 (Justice Scalia, joined by Justice Thomas, concurred in the conclusion but faulted the plurality's reading of the statutory language; Justice Kennedy, joined by Justices Rehnquist and White, dissented, arguing that the claimant had no interest in the property because of her donee status.).

120. *Id.* at 1134-35 (holding that the term "owner" is to include interests acquired by gift and noting that it is clearly necessary for the government to successfully initiate legal action before it can employ the relation-back doctrine).

121. Any "measurable quantity" of contraband is enough to support a civil forfeiture. *United States v. One 1975 Mercedes 280S*, 590 F.2d 196, 198 (6th Cir. 1978).

122. See *supra* notes 8-11, 40-42 for examples of the disproportionate results of civil forfeiture.

123. U.S. CONST., amend. VIII; *Austin v. United States*, 113 S. Ct. 2801, 2803 n.2 (1993).

124. *Austin*, 113 S. Ct. 2801 (1993).

district court granted summary judgment and the claimant argued in opposition that the forfeiture was in violation of the Eighth Amendment.

The initial inquiry is not, then, whether forfeiture of the claimant's property under section 881 is civil or criminal in nature, it is whether or not such a forfeiture constitutes a "punishment" triggering the application of the Eighth Amendment.<sup>125</sup> The Supreme Court examined the nature of judicial sanctions and the possibility that they can be imposed to carry out multiple purposes.<sup>126</sup> The common historical understanding of civil forfeiture led the Court to conclude that forfeiture acts, at least in part, as a punishment. The Court found nothing in the present statutory language nor the legislative history of section 881 to contradict this conclusion.<sup>127</sup> Therefore, the Eighth Amendment's ban on excessive fines was held to apply, requiring that the results of a forfeiture pursuant to section 881 must be proportionate to, *inter alia*, the seriousness of the alleged activity and the extent of the claimant's involvement in that activity.<sup>128</sup> The Court declined, however, to formulate a definitive test for proportionality.<sup>129</sup> This holding greatly limits the potency of civil forfeiture as a revenue engine for the government, but allows civil forfeiture to retain the strength needed to deter and punish the drug traffickers originally targeted by the Drug Act.<sup>130</sup>

## C. DUE PROCESS VIOLATIONS AND CIVIL FORFEITURE PROCEEDINGS

### 1. *The Due Process Dilemma*

Due process of law generally requires that the government not deprive individuals of their life, liberty or property without first providing those individuals adequate notice and an opportunity to have their position heard.<sup>131</sup> Exigent circumstances, constituting an exception to this general rule, can arise when certain government interests are hindered by affording an individual pre-deprivation due process.<sup>132</sup> If the property in question is of a readily moveable type, a car or boat for example, the

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125. *Id.* at 2804-05 (noting that some provisions of the Bill of Rights are expressly reserved for criminal defendants and that the Eighth Amendment includes no such limitation; thus, it could be applied, under the proper circumstances, to proceedings that are not criminal in nature).

126. *Id.* at 2806 (stating that sanctions can be both remedial and punitive in nature).

127. At the time of the amendment's drafting, the legal theories justifying civil forfeiture typically exhibited some notion of "punishment" as a central theme. *Id.* at 2806-11 (pointing out that section 881 is the only civil forfeiture statute to expressly provide a defense based upon innocence, uniquely focusing on the culpability of the claimant; furthermore, the provisions of the statute are intimately associated with the commission of some criminal act, further evidencing the statute's punitive intent).

128. *Id.* at 2812 (noting that such factors may be relevant but that a comprehensive test for proportionality is not to be limited to these factors alone).

129. *Id.* (stating that prudence dictated the deference of that question to the lower courts in the first instance).

130. See *supra* notes 22-24 and accompanying text for a discussion of the legislative intent behind section 881.

131. U.S. CONST., amend. V (stating that "[n]o person shall . . . be deprived of life, liberty, or property, without the due process of law.>").

132. See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

continuing jurisdiction of the court is in jeopardy. The property could be moved and the court would lose *in rem* jurisdiction, thereby losing any ability to enforce its laws concerning the property.<sup>133</sup> Therefore, because continuing jurisdiction over the property is vital, continued control over the property is of paramount concern to the government. In such cases, requiring pre-deprivation due process seriously endangers the government's ability to compel a justified forfeiture because it gives the property owner the opportunity to remove the chattel from that jurisdiction.<sup>134</sup> In addition to continuing jurisdiction, other government interests at stake include financial reliance on forfeiture as a means to fuel law enforcement efforts and the minimalization of administrative burdens.<sup>135</sup> The potential frustration of these governmental interests must be weighed against the claimant's right to exercise control over the property without undue governmental interference and the right to be heard before the government takes action.<sup>136</sup>

## 2. *The Due Process Balancing Test Applied to Civil Forfeiture*

In determining the due process to which the property owner is entitled, the balancing test set forth in *Mathews v. Eldridge*<sup>137</sup> must be examined in light of the nature of the property in question. This balancing of interests considers three issues: (1) the private interests affected by the government intrusion; (2) the risk of erroneous seizure; and (3) the governmental interests at stake.<sup>138</sup> In a civil forfeiture proceeding, both notice of the seizure and an opportunity to be heard prior to seizure constitute elements of due process. The government's interest must outweigh both these elements and the risk of an erroneous seizure for the government to dispense with the requisite due process.<sup>139</sup> The nature of the seized property is a key factor in this analysis.

## 3. *The Supreme Court's Analysis of the Counterbalance Between Private and Governmental Interests*

In *United States v. James Daniel Good Real Property*,<sup>140</sup> the Court examined the seizure of a parcel of real property used as the claimant's residence. The claimant pleaded guilty to drug trafficking violations under Hawaii state law, and, more than four years later, the federal government filed an *in rem* forfeiture action, claiming the residence was used to facilitate the prior acts of the claimant. After the government obtained a seizure warrant in an *ex parte* proceeding, the home was seized without

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133. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 (1974).

134. *Id.*

135. *See Mathews*, 424 U.S. at 335.

136. This balancing is part of the three-pronged test used to determine whether government action violates due process. *See Mathews*, 424 U.S. at 335.

137. 424 U.S. 319 (1976).

138. *Id.* at 335.

139. *Id.* at 333.

140. 114 S. Ct. 492 (1993).

providing any prior notice or a hearing to the owner. The district court upheld the seizure, but the court of appeals reversed, holding that a seizure without prior notice and hearing represents a violation of due process.<sup>141</sup> The Supreme Court granted *certiori* and affirmed the court of appeals holding regarding the due process question.<sup>142</sup>

The Court examined the three prongs of the *Mathews* test<sup>143</sup> in light of the fact that the property seized was real property, which cannot be moved. The government argued that the safeguards of compliance with the Fourth Amendment were sufficient when seizing property prior to a forfeiture and, in the alternative, that a seizure pursuant to drug forfeiture laws constitutes an exception to the due process requirement.<sup>144</sup> The Court stated that although the Fourth Amendment does restrict the government's ability to seize property, it does not constitute the exclusive determination of how the interests of a property owner are to be protected against government intrusion.<sup>145</sup> The Court held that a seizure that is intended to secure the government's interest in property and not to preserve evidence of wrongdoing must not only comport with the Fourth Amendment, but the Due Process Clause of the Fifth Amendment as well.<sup>146</sup> Absent any extraordinary circumstances constituting an exception to the general due process requirements, the government is required to give a meaningful pre-deprivation hearing and adequate notice to the owner, which in the present case it did not.<sup>147</sup>

In *Calero-Toledo v. Pearson Yacht Leasing Co.*,<sup>148</sup> the Court held that the government was justified in seizing a yacht prior to providing the owner with notice and a hearing.<sup>149</sup> The Court based its decision on the

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141. *Id.* at 495.

142. *Id.* (the Court reversed on the unrelated issue of non-compliance with certain timing requirements).

143. *Mathews*, 424 U.S. at 335.

144. *James Daniel Good*, 114 S. Ct. at 498-99 (the government immediately took possession of the home and impounded the rental income from the property). The government contended that its actions in this case satisfied the requirements of the Fourth Amendment and that such compliance should have been sufficient to cause the Court to validate the forfeiture because the Due Process Clause of the Fifth Amendment was not applicable and, in the alternative, that the Fifth Amendment imposed no additional requirements on the government under the circumstances. PETITIONER'S BRIEF, 1992 WL 528507 at \*9.

145. *James Daniel Good*, 114 S. Ct. at 499.

146. *Id.* The threshold issue is not to determine which solitary amendment applies in any given case, but rather whether the government intrusion has violated any of the constitutional amendments. Contrary to what the government contends here, one amendment is not applied at the exclusion of another. *Id.* at 499 (citing *Soldal v. Cook County*, 113 S. Ct. 538, 548 (U.S. 1992)). Exclusive reliance on the protections of the Fourth Amendment may be appropriate in the criminal justice context because the amendment was "tailored explicitly for the criminal justice system . . . [and its] balance between individual and public interests always has been thought to define the 'process that is due' for seizures of person or property in criminal cases." Because the present case was a civil matter, exclusive reliance on the protections of the Fourth would not be appropriate. *Id.* at 499-500 (citing *Gerstein v. Pugh*, 420 U.S. 103 (1975)).

147. *Id.* at 498-501.

148. 461 U.S. 663 (1974).

149. *Id.* at 679.

nature of the seized property and reasoned that a boat is the "sort [of property] that could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given."<sup>150</sup> The possibility of frustrating the government's ability to assert *in rem* jurisdiction by seizing the property creates a need for immediate action on the part of the government, this prompt action comes in the form of seizure without due process.

In *James Daniel Good*,<sup>151</sup> the Court held that due process must be afforded prior to the seizure of real property.<sup>152</sup> The ownership of a home is among the most important of any private interest in property, greater than that of any personal property.<sup>153</sup> When dealing with the *ex parte* seizure of a home, careful attention must be given to the protection of the owner because of the importance of the interests involved and the unilateral nature of the proceeding. The *ex parte* proceeding does not require the government to answer any possible claims of the owner. Instead, the government must only demonstrate to the magistrate judge that there is probable cause to believe a nexus exists between the property and a drug violation.<sup>154</sup> Thus, the *ex parte* proceeding gives no protection to the innocent owner, making this an unacceptable risk of erroneous deprivation.<sup>155</sup>

For jurisdiction to attach in an *in rem* forfeiture, there must be a physical seizure of the property. Real property, however, is governed by the law of the situs and no physical seizure is required for judicial cognizance to attach.<sup>156</sup> Therefore, continuing jurisdiction is not reliant upon a physical seizure of the property and can be maintained without permitting the government to bypass the requisite due process. The government's interest in continued *in rem* jurisdiction is outweighed by the private interest at stake in home ownership and the risk of erroneous deprivation of rights — due process must be afforded the claimant in such cases. The Court also rejected the government's claim that the property is in danger

150. *Id.*

151. 114 S. Ct. 492 (1993).

152. *Id.* at 500-05

153. *Id.* at 501.

154. *United States v. One 1979 Porsche Coupe*, 709 F.2d 1424, 1426 (11th Cir. 1983); *United States v. \$364,960 in U.S. Currency*, 661 F.2d 319, 323 (5th Cir. 1981).

155. *James Daniel Good*, 114 S. Ct. at 501-02 (noting that because the government stands to benefit financially from the seizure, "it makes sense to scrutinize governmental action more closely." The Court called for an element of neutrality in governmental decision making, regardless of its form) (citing *Harmelin v. Michigan*, 111 S. Ct. 2682, 2693 n.9 (1991)).

156. *Id.* at 502-03. Section 881 anticipates that process would be executed on real property without a physical seizure:

[i]f the character or situation of the property is such that the *taking actual possession is impracticable*, the marshal or other person executing the process shall affix a copy thereof to the property in a conspicuous place and leave a copy of the complaint and process with the person having possession or the person's agent.

Rule E(4)(b), SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS (emphasis added).

of being destroyed, sold or used to facilitate additional illegal activity if due process is provided.<sup>157</sup> The government then points to the prior conviction of the property owner as justification for the lack of due process, claiming that the government's knowledge of the conviction at the time of the seizure pardons their non-compliance.<sup>158</sup> The guilt or innocence of the claimant, however, does not determine the procedures required of the government. The question is the legality of the seizure, not the potential success of the government's case.<sup>159</sup>

The designation of section 881 as a civil proceeding has led to these harsh and unfair results. The procedural aspects of civil forfeiture stack the deck heavily in favor of the government and place an unfair burden upon the property owner who has the option of fighting the almost unlimited legal and financial resources of the government or allowing the forfeiture to summarily occur. Once the property has been forfeited, however, the injustice does not end. The vaguely drafted provisions of the Drug Act and the lack of administrative safeguards encourage the abuse of forfeited property by law enforcement officials.

#### IV. THE PROBLEMATIC ADMINISTRATION OF 21 U.S.C. § 881

The administration of section 881 by law enforcement officials creates a potential for abuse including the misuse of forfeited property and the corruption that comes with a financial incentive system.

##### A. ACCOUNTING PROCEDURES CREATE A POTENTIAL FOR ABUSE AND MISMANAGEMENT

The National Assets Seizure and Forfeiture Fund<sup>160</sup> was created in 1985 by the Department of Justice as a holding bay for drug-related forfeitures. At its inception, the Fund had an inventory of \$27 million in seized property.<sup>161</sup> Each year the inventory in the Fund grows by almost \$500 million, and over \$1.4 billion in property presently awaits forfei-

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157. 114 S. Ct. at 503-07. The court noted several possible means for protecting governmental interests in property without a physical seizure: the sale of the property can be prevented by filing a notice of *lis pendens*; the government can obtain an *ex parte* restraining order to protect against the possibility of waste or destruction, but the government's practice of trading non-disturbance for attornment with tenants under an existing occupancy agreement indicates that there is little danger of waste in the ordinary case; and by obtaining search and arrest warrants as the need arises, the government can pre-empt the use of the property in any subsequent illicit activity. *Id.* Under the circumstances, the Court determined that the government's interests are in no way hindered by requiring due process of law. *Id.* at 507.

158. *Id.* at 505 (this argument was rejected because the Court considered that the validity of this seizure would depend upon compliance with due process and not the strength of any prior criminal conviction of the claimant).

159. *Id.* (the holding is not limited to residential real property, but is applicable to all real property).

160. Hereinafter "Fund."

161. Sean P. Murphy, *Forfeitures Help Finance the War on Drugs*, BOSTON GLOBE, Mar. 10, 1991, at 17.



ture.<sup>162</sup> Despite this amazing growth, the number of Federal Marshals charged with accounting for the inventory had not increased during the first five years since the creation of the Fund.<sup>163</sup> The marshals must keep tabs on an inventory of over 300,000 items located in over ninety-four districts nationwide.<sup>164</sup>

These accounting procedures leave much to be desired in the way of inventory security. The government's General Accounting Office<sup>165</sup> has labeled civil forfeiture as a "high risk" government program.<sup>166</sup> The Justice Department's Inspector General characterizes the accounting and management procedures as "poor inventory control," and stated to Congress that in an audit of one district office, "over one-third of the jewelry we attempted to trace from the reports could not be located in storage, and over one-half the automobiles could not be located based upon the computerized records."<sup>167</sup>

These inadequate accounting procedures invite the abuse of asset inventories. Serious questions arise as to the use and sale of forfeited property and the financial incentives for law enforcement officials created by a profit-sharing system.

#### B. THE USE OF FORFEITED ASSETS

The government utilizes forfeited assets as part of a financial incentive system. Government officials encourage and reward airline and hotel employees to report travelers who exhibit "suspicious" behavior.<sup>168</sup> Any proceeds from civil forfeiture can also be distributed to or split with any government agency who directly participated in the seizure or forfeiture of the property.<sup>169</sup>

The normal working relationship between law enforcement agencies can be distorted by this financial incentive system.<sup>170</sup> Local law enforce-

162. Sean P. Murphy, *10 Sites Are Seized in U.S. Drug Sweep*, BOSTON GLOBE, Mar. 8, 1991, at 17; *Use Drug Profits to Treat Addicts*, NEWSDAY, Aug. 18, 1991, at 37.

163. In 1985, there were 240 full-time marshals in charge of accounting for the inventory, and in 1990 the number of marshals remained the same. Tom Watson, *Marshals Struggle to Keep Tabs on Forfeited Goods*, AM. LEGAL TIMES, Aug. 27, 1990, at 4.

164. *Id.*

165. Hereinafter "GAO".

166. Watson, *supra* note 163, at 4. The GAO cites past mismanagement of Fund inventories and the selling of property at far below fair market value in its evaluation. The GAO considers the program a financial liability for the government. *Id.*

167. *Id.*

168. *Jones v. United States D.E.A.*, 819 F. Supp. 698, 724 (M.D. Tenn. 1993).

169. 21 U.S.C. § 881(e)(1)(A) (1988).

170. The government's financial interest in the pursuance of forfeiture is embodied in a 1990 memo from the Attorney General of the United States:

[w]e must significantly increase production to reach our budget target . . . [f]ailure to achieve the \$470 million projection would expose the Department's forfeiture program to criticism and undermine confidence in our budget projections. Every effort must be made to increase forfeiture income during the remaining three months of [fiscal year] 1990.

Executive Office for United States Attorneys, U.S. Dept. of Justice, 38 U.S. ATTORNEY'S BULLETIN 180, 182 (1990).

ment officials may seek out and encourage federal assistance when it is not appropriate to do so if their state does not permit civil forfeiture; similarly, local law enforcement officials may attempt to avoid sharing the spoils of forfeiture by discouraging the needed participation by federal officials in states with very broad civil forfeiture powers.<sup>171</sup> This system gives law enforcement officials a direct financial interest in the investigation and prosecution of illicit behavior.<sup>172</sup> Both American and English legal history demonstrate the dangerous consequences of such a financial incentive system; the salaries of magistrates, judges, and sheriffs once having been based on such incentives is "an unsavory and embarrassing scar on the administration of justice."<sup>173</sup>

Law enforcement officials often make personal use of the forfeited property.<sup>174</sup> Forfeited assets and proceeds are not included in the budgets of law enforcement agencies, meaning that there is no requirement to account to an outside agency for its receipt or manner of use.<sup>175</sup> Law enforcement officials are only required to sign a form vaguely promising that the property will be utilized for "law enforcement purposes."<sup>176</sup>

Forfeited assets are often sold at public auctions<sup>177</sup> at far below their fair market value.<sup>178</sup> The sheer size of the Fund's inventory makes it unmanageable and the government must often wait out lengthy judicial appeals before the property can be offered for sale. Thus, property can linger in government warehouses for long periods of time, either losing its value altogether or being greatly depreciated. Because property held by the government for such lengthy periods would inevitably require exten-

171. David A. Kaplan, *Where the Innocent Lose*, NEWSWEEK, Jan. 4, 1993, at 42. Local law enforcement agencies armed with potent forfeiture statutes can reap huge benefits. For example, a Kansas City suburb of 29,000 residents presently awaits the forfeiture of over \$250,000 in cash and property. 137 CONG. REC. E3059 (daily ed. Sept. 17, 1991) (statement of Rep. Jacobs).

172. Financial incentives can produce counter-intuitive behavior in law enforcement officials. For example, Florida drug agents allegedly make greater attempts to stop drug buyers who are on their way south into the state while they still have forfeitable cash; drug couriers moving along the northern route out of the state have already purchased their drugs, which are seizable but of no benefit to the police, and are allegedly subject to less intensive surveillance efforts. Kaplan, *supra* note 171, at 42.

173. *Jones v. United States D.E.A.*, 819 F. Supp. 698, 724 (M.D. Tenn. 1993).

174. A chief assistant prosecutor in New Jersey uses a seized yellow Corvette as his personal vehicle. 137 CONG. REC. E3059 (daily ed. Sept. 17, 1991) (statement of Rep. Jacobs). A New York District Attorney, who was recently called before the County Legislature to explain the informal use of seized property, drives to work in a seized BMW. Cris Carmody, *Forfeiture Laws Get a Second Look*, THE NAT'L L.J., Nov. 2, 1992, at 7. Denver police appropriated the weight-lifting equipment from a health club drug raid. Kaplan, *supra* note 171, at 42.

175. *Jones*, 819 F. Supp. at 724.

176. 137 CONG. REC. E3059 (daily ed. Sept. 17, 1991) (statement of Rep. Jacobs).

177. The Drug Act permits the disposal of property by "any other commercially feasible means." 21 U.S.C. § 881(e)(1)(B) (1988).

178. Tom Watson, *Marshal's Struggle to Keep Tabs on Forfeited Goods*, AM. LEGAL TIMES, Aug. 27, 1990, at 4. In one case, a fishing trawler valued at over \$50,000 was sold for \$10 at a public auction to a lone bidder. *Id.* at 4. In another, two parcels of land valued at almost \$200,000 were sold to personal friends of the county prosecutor for only \$20,000. Richard Pliskin, *How a House Was Built On Featherbed Lane*, N.J. L.J., June 22, 1992, at 30.

sive repair and management expenditures, the Fund's inventory may not only depreciate in value but may actually become a financial liability.<sup>179</sup> Furthermore, property which is seized and held by the government is tax exempt, adding another dimension to this financial burden.<sup>180</sup> In Dade County, Florida, the Federal government holds title to over 600 forfeited local properties valued at over \$159 million. This translates into a \$3.72 million annual loss in tax revenues for the county.<sup>181</sup>

The administration of civil forfeitures under section 881 by law enforcement officials creates a financial incentive system with a high potential for abuse. Misuse and mismanagement of asset inventories should trigger heightened suspicion and scrutiny of the methods employed and the intent behind the stepped-up use of the government's forfeiture power.

## V. CONCLUSION

Historically, periods of war typically coincide with periods of strong economic growth and prosperity.<sup>182</sup> The recent "war" on drugs has followed this trend — it has padded the coffers of the state and greatly expanded its powers, but at the cost of restricting the liberties protected by the Constitution. This has led to re-examination of the powers created by modern drug laws. Today, courts are becoming increasingly sensitive to preventing unjust and unfair consequences under civil forfeiture proceedings.<sup>183</sup>

It is important to consider, however, that while protecting the rights of property owners, the steps to limit government power should not go so far as to create a safe harbor for drug traffickers. The broadening of the "innocent owner" defense creates attractive money laundering opportunities for drug traffickers.<sup>184</sup> The broad power of the government needs to be held in check, but not in such a way as to restrain the Drug Act from achieving its original purpose.<sup>185</sup>

Critics of civil forfeiture call for many changes to be made. Some members of Congress are advocating such changes as an increased burden of proof for the government, the elimination of the cost-bond system which puts a premium on the right to contest a forfeiture, and govern-

179. Watson, *supra* note 178, at 4.

180. Rick Eyerdam, *Dade Drowning in Properties Seized From Crime*, S. FLA. BUS. J., July 27, 1992, at 1A.

181. *Id.* An assistant Dade County Attorney has filed over 122 suits against the U.S. Government for the payment of these taxes. *Id.*

182. RANDOLPH BOURNE, *WAR AND THE INTELLECTUALS*, 65-71 (1964) (the prosperity which war often heralds explains why wars are typically popular with state leaders despite their destructive capacity).

183. *See, e.g.*, United States v. 92 Buena Vista Avenue, 113 S. Ct. 1126 (1993); Austin v. United States, 113 S. Ct. 2801 (1993).

184. Robert G. Morvillo, *Forfeiture: Procedures, Interpretations, Defense*, N.Y.L.J., Aug. 3, 1993, at 3 (discussing the possibility of creating money laundering situations).

185. *See supra* notes 24-26 and accompanying text for a discussion of the original intent of the Drug Act.

mental liability for property damage occurring while the property is in the government's possession.<sup>186</sup> Some critics, who are more concerned with stemming the demand for drugs as opposed to the supply, are calling for a re-directing of forfeited assets into community-based drug abuse prevention and education programs.<sup>187</sup> Almost half of American states impose a tax on the possession and distribution of illegal drugs as an additional legal weapon.<sup>188</sup>

Future judicial remedies could include a more strict "substantial connection test," which would deny forfeiture if the government fails to show the nexus between the property and the illicit behavior under a heightened standard of proof. The use of a more strict substantial connection test would help to mitigate the harsh results of many civil forfeiture cases.<sup>189</sup> Considering that the United States maintains what is possibly the largest numbers of police and military personnel forces in the world, if it were possible to strong-arm a way out of the drug crisis, these efforts would surely have been effective by now.

In conclusion, the government has pursued the use of civil forfeiture almost without regard to the property rights of its citizens. The procedural advantages enjoyed by the government are based solely upon the legal fiction that an *in rem* proceeding does not affect the rights of the property owner — a legal theory that uses the personification of objects as its historical foundation. The respective burdens of proof weigh heavily in favor of the government and place an unfair burden upon the property owner. Under these circumstances, the individual property owner

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186. Holly R. Skolnick & G. Richard Straffer, *Restrictions for Asset Forfeitures*, LEGAL TIMES, July 26, 1993, at S34 (anticipating possible Congressional restructuring of current drug laws).

187. See, e.g., PR Newswire Association, Inc., *U.S. First — Federal Forfeited properties Transferred to Community Groups for Weed and Seed*, PR NEWswire, Oct. 26, 1992; Marcia Coyle, *Forfeiture Frenzy*, NAT'L L.J., Jul. 5, 1993, at 11. These critics often cite the "push-down/pop-up" theory as an argument against policing the flow of drugs and replacing such efforts with programs to educate about drug use. Ethan Nedelman, *The Case for Legalization*, 92 PUB. INTEREST 3, 9 (1988) (theorizing that if drug production is eliminated or substantially curbed in one foreign country, another source country will simply rise to take its place—making the supply of illegal drugs inexhaustible; for example, Colombian drug production grew rapidly as Mexico successfully curbed its drug production in the early 1970s, but presently, Mexican drug production is experiencing rapid growth as Colombia slowly begins to eradicate its drug trafficking industry).

188. Twenty-one states have imposed taxes on dealings with illegal narcotics. The states actually anticipate the non-payment of the tax, allowing a fine to be imposed based on the non-payment. These fines are potentially much greater than typical criminal narcotics fines and avoid the constitutional issues of property forfeiture. The fines can be imposed and collected immediately upon arrest and can be kept by the state without violating anyone's constitutional rights even absent a successful criminal drug conviction. Robert E. Tomasson, *21 States Imposing Drug Tax and Then Fining the Evaders*, N.Y. TIMES, Dec. 23, 1990, at 1.

189. See, e.g., *United States v. 3639-2d St. N.E.*, 869 F.2d 1093, 1097 (8th Cir. 1989) (using a more stringent substantial connection test to limit the forfeiture power of the government); *United States v. Various Parcels of Real Property*, 650 F. Supp. 62, 65 (N.D. Ind. 1986) (requiring the government to substantiate specific facts to create a substantial connection); *United States v. Santoro*, 866 F.2d 1538, 1541-42 (4th Cir. 1989) (applying a more strict substantial connection test).

has the choice of fighting the almost unlimited resources of the government or allowing the forfeiture to occur without contest. Furthermore, if the claimant does prevail at trial, the statute provides no adequate remedy for the temporary deprivation of property erroneously suffered. However, once the property has been forfeited, the injustice turns to potential corruption. The vague provisions of the Drug Act and the lack of administrative safeguards encourage the abuse of forfeited property by law enforcement officials. The present management of property forfeited to the government creates a financial incentive system which distorts the normally legitimate motives behind the prosecution of illegal activity. The scope of the government's forfeiture power must be curtailed in such a manner as to alleviate these problems but to allow the Drug Act to continue as an effective tool in the war on drugs.