



1987

# Seizures of Private Property in the War against Drugs: What Process Is Due

Peter A. Winn

Follow this and additional works at: <https://scholar.smu.edu/smulr>

## Recommended Citation

Peter A. Winn, *Seizures of Private Property in the War against Drugs: What Process Is Due*, 41 Sw L.J. 1111 (1987)  
<https://scholar.smu.edu/smulr/vol41/iss5/3>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

# SEIZURES OF PRIVATE PROPERTY IN THE WAR AGAINST DRUGS: WHAT PROCESS IS DUE?

by

Peter A. Winn\*

IN 1984, as part of an initiative to take the profit out of crime, Congress extended the powers of federal law enforcement agencies to seize and forfeit the property of drug dealers.<sup>1</sup> To provide additional funding for the war on drugs, Congress permitted federal law enforcement agencies for the first time to retain forfeited property for their own use.<sup>2</sup> Since 1984 the number of seizures and forfeitures has increased dramatically.<sup>3</sup> The civil in rem forfeiture proceeding, the engine driving this new campaign against drugs, is, however, a legal anomaly that proceeds on an archaic theory that inanimate objects themselves can be guilty of wrongdoing.<sup>4</sup> This theory of guilty property produces a summary proceeding in which the innocence of owners is not a defense;<sup>5</sup> owners have the burden of proof;<sup>6</sup> and the government, acting on the basis of rank hearsay, without notifying owners or giving them an opportunity to be heard, and without going before a judge to secure a warrant, can seize property from unsuspecting private owners.<sup>7</sup> This new

---

\* B.A., Williams College; M. Phil. in Philosophy, University of London; J.D., Harvard Law School. Attorney at Law, Patterson, Belknap, Webb & Tyler, New York, New York.

1. Drug Abuse Prevention and Control Act, 21 U.S.C. §§ 853, 881 (1982 & Supp. III 1985); Comprehensive Crime Control Act of 1984, S. REP. NO. 225, 98th Cong., 2d Sess. 191-209, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3374-92.

2. 21 U.S.C. § 881(e) (1982 & Supp. III 1985); Comprehensive Crime Control Act of 1984, S. REP. NO. 225, 98th Cong., 2d Sess. 216-58, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3399-40.

3. James Knapp, Deputy Associate Attorney General, Testimony before Committee on the Judiciary, Subcommittee on Crime, Mar. 9, 1987, in Miami, Fla.

4. *United States v. United States Coin & Currency*, 401 U.S. 715, 719-20 (1971) (construing *Dobbin's Distillery v. United States*, 96 U.S. 395, 399-401 (1878); *The Palmyra*, 25 U.S. (1 Wheat.) 1, 14 (1827)); *see also Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683-86 (1974) (long line of cases has established that government may treat objects as offenders and seize them, regardless of owner's innocence); *Goldsmith-Grant Co. v. United States*, 254 U.S. 505, 513 (1921) ("It is the illegal use that is the material consideration, it is that which works the forfeiture, the guilt or innocence of its owner being accidental.").

5. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683-86 (1974).

6. 19 U.S.C. § 1615 (1982) (burden of proof in customs law forfeitures). The Drug Control Act explicitly incorporates the procedures of customs law. 21 U.S.C. § 881(d) (1982); *see Note, Due Process Implications of Shifting the Burden of Proof in Forfeiture Proceedings Arising Out of Illegal Drug Transactions*, 1984 DUKE L.J. 822, 822 (although most civil suits place burden of proof on government, forfeiture of illegal drug cases puts burden on defendant).

7. 21 U.S.C. § 881(b) (1982 & Supp. III 1985); Supplemental Rules For Certain Admiralty and Maritime Claims, 28 U.S.C. rule C(3) (1982 & Supp. III 1985).

expansion of the scope of forfeiture provides law enforcement agencies with the power to seize at will property of almost any description, without any pre-seizure judicial review to determine whether probable cause exists.<sup>8</sup> As forfeiture seizures become increasingly common, the temptation increases to conduct a forfeiture seizure of a home or a bank account under the loose procedures approved for forfeitures and thereby avoid the strictures of the warrant requirement of the fourth amendment.<sup>9</sup> Because of the extremely broad scope of forfeiture laws, their summary procedures threaten not only drug dealers, but innocent third parties.<sup>10</sup>

This Article examines some recent cases that challenge, under the fourth and fifth amendments, the government's power to conduct summary forfeiture seizures prior to a hearing. The Article first analyzes some of the early cases. In the early 1970s a series of lower courts held the prehearing seizure provisions of the forfeiture statutes unconstitutional.<sup>11</sup> In response, the Supreme Court rebuffed these lower courts and affirmed the traditional power of law enforcement officers to make forfeiture seizures.<sup>12</sup> The law appeared settled. Recently, however, in response to the sweeping new drug forfeiture laws, lower courts again have begun to impose constitutional limits on the power of authorities to carry out forfeiture seizures.<sup>13</sup> These courts

---

8. 21 U.S.C. §§ 881(a), (b) (1982 & Supp. III 1985).

9. *Cf.* United States v. \$39,000 in Canadian Currency, 801 F.2d 1210, 1218 (10th Cir. 1986) (civil forfeiture cases characterize inanimate objects as defendants); United States v. Lodson, 774 F.2d 436, 440 (11th Cir. 1985). *See generally* Strafer, *End-running the Fourth Amendment: Forfeiture Searches of Real Property Under Admiralty Process*, 25 AM. CRIM. L. REV. 59 (1987); Note, *The Forfeiture Exception to the Warrant Requirement: A Distinction Without a Difference*, 67 VA. L. REV. 1035 (1981).

10. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 686-90 (1974).

11. Pearson Yacht Leasing Co., Inc. v. Massa, 363 F. Supp. 1337, 1342 (D.P.R. 1973), *rev'd sub nom.* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 669 (1974); United States v. 1971 Ford Truck, Serial No. F25HRJ82180, 346 F. Supp. 613, 618-19 (C.D. Cal. 1972); City of Everett v. Slade, 83 Wash. 2d 80, 515 P.2d 1295, 1298 (1973); *cf.* State v. One 1983 Pontiac (Joe Arave), 717 P.2d 1338, 1340 (Utah 1986), *reversing* State v. One Porsche 2-Door, 526 P.2d 917, 920 (Utah 1974).

12. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680 (1974).

13. United States v. \$38,000.00 in U.S. Currency, 816 F.2d 1538, 1548 (11th Cir. 1987) (government's forfeiture complaint must allege sufficient facts to show probable cause that connection exists between property and illegal act); United States v. \$39,000 in Canadian Currency, 801 F.2d 1210, 1222 (10th Cir. 1986) (government's allegations must supply reasonable inference that property is connected to illegal use); United States v. Real Property Located at 25231 Mammoth Circle, 659 F. Supp. 925, 927 (C.D. Cal. 1987) (warrants held invalid because not issued by neutral judicial officer and probable cause not established); United States v. 124 East North Ave., 651 F. Supp. 1350, 1356 (N.D. Ill. 1987) (no warrant for arrest in rem of property shall issue without prior ex parte review by judicial officer); United States v. One 1980 Ford Mustang VIN 0F03D121959, 648 F. Supp. 1305, 1307 (N.D. Ind. 1986) (in forfeiture action government carries initial burden of proving probable cause that substantial connection exists between property and illegal act); United States v. Life Ins. Co. of Va. Single Premium Whole Life Policy, 647 F. Supp. 732, 742 (W.D.N.C. 1986) (fourth amendment requires government to secure in rem warrant from judge or magistrate who has determined probable cause); United States v. \$128,035 in U.S. Currency, 628 F. Supp. 668, 675 (S.D. Ohio 1986) (absent exigent circumstances, seizure of real property without warrant unconstitutional); *In re Kingsley*, 614 F. Supp. 219, 224 (D. Mass. 1985), *appeal dismissed*, 802 F.2d 571 (1st Cir. 1986) (standard for probable cause in § 881 forfeiture same as used in search and seizure); United States v. Certain Real Estate Property Located at 1880 S.E. Dixie Highway, 612 F. Supp. 1492, 1497 (S.D. Fla. 1985) (no seizure of property should occur until judicial

generally have held that, prior to the seizure of property for forfeiture, the constitution requires at least an ex parte hearing before a judicial officer, and that, absent such protection, the seizure provisions of the forfeiture statutes violate the due process clause of the fifth amendment<sup>14</sup> and the prohibition against unreasonable searches and seizures of the fourth amendment.<sup>15</sup> This Article argues that these new court decisions are not simply recapitulations of the earlier constitutional challenge that failed. New factors have entered into the judicial picture that alter the balance struck in the earlier cases and make the recent cases distinguishable from their less illustrious forebears.

## I. THE CALERO-TOLEDO EXCEPTION

### A. Doctrine of Sniadach and Fuentes

In the late 1960s and early 1970s the Supreme Court began striking down state and federal statutes that permitted the seizure of property without an adversary hearing and before judgment.<sup>16</sup> In *Fuentes v. Shevin*<sup>17</sup> the Supreme Court expanded the concept of procedural due process under the fifth amendment to cover any significant deprivation of property.<sup>18</sup> Later, the Court in *Sniadach v. Family Finance Corp.*<sup>19</sup> and other leading cases used this expanded concept of procedural due process to stretch the notion of a governmental taking to include government-authorized private actions such as prejudgment replevin<sup>20</sup> and prejudgment garnishment,<sup>21</sup> as well as

---

officer has reviewed complaint in ex parte proceeding). *Contra* United States v. A Single Family Residence, 803 F.2d 625, 632 (11th Cir. 1986) (no requirement exists for detailed allegations or judicial review before issuance of warrant).

14. U.S. CONST. amend. V: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." *Cf.* United States v. Certain Real Estate Property Located at 1880 S.E. Dixie Highway, 612 F. Supp. 1492, 1497 (S.D. Fla. 1985) (no seizure should occur until judicial officer has reviewed complaint in ex parte hearing).

15. U.S. CONST. amend. IV: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *Cf. In re Kingsley*, 802 F.2d 571, 577-79 (1st Cir. 1986) (government must still follow fourth amendment probable cause and particularity requirements in § 881 seizures); *United States v. Pappas*, 613 F.2d 324, 329-30 (1st Cir. 1979) (warrantless seizure of automobile based on probable cause justified only when seizure immediately follows occurrence that gave probable cause).

16. *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 605-08 (1975) (attachment statute); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 603 (1974) (attachment statute); *Fuentes v. Shevin*, 407 U.S. 67, 82-83 (1972) (prejudgment replevin); *Bell v. Burson*, 402 U.S. 535, 539 (1971) (driver's license suspensions); *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971) (posting of names of alleged alcoholics); *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970) (termination of welfare benefits); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 342 (1969) (prejudgment garnishment).

17. 407 U.S. 67 (1972).

18. *Id.* at 86. The Court stated that "[a]ny significant taking of property by the State is within the purview of the Due Process Clause . . ." *Id.* The Court also stated that "a temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment." *Id.* at 85.

19. 395 U.S. 337 (1969).

20. 407 U.S. at 96; 395 U.S. at 340.

21. 395 U.S. at 342.

actions that were initiated by official governmental bodies.<sup>22</sup> With regard to this latter category of purely governmental takings, the Supreme Court appeared to limit even more strictly the power of the authorities to seize property without notice and a hearing.<sup>23</sup> After the precedents of *Sniadach* and *Fuentes*, at least one commentator expected the Court also to constrain the types of prehearing seizures permitted by the forfeiture statutes.<sup>24</sup> The Supreme Court indicated in two cases that litigants in civil forfeiture actions would be entitled to some of the same protections as criminal defendants under the fourth and fifth amendments.<sup>25</sup> In *One 1958 Plymouth Sedan v. Pennsylvania*<sup>26</sup> the Court held that the government could not rely on evidence obtained in violation of the fourth amendment's warrant requirement to sustain a forfeiture.<sup>27</sup> In *United States v. United States Coin & Currency*<sup>28</sup> the Court held that a defendant could invoke the fifth amendment's privilege against self-incrimination in forfeiture cases because of the quasi-criminal character of forfeiture statutes.<sup>29</sup> In *Coin & Currency* the Court questioned traditional forfeiture doctrine as based upon a superstition inherited from the "blind days of feudalism."<sup>30</sup> Although the Court decided the case on other grounds, it noted "the difficulty of reconciling the broad scope of traditional forfeiture doctrine with the requirements of the Fifth Amendment."<sup>31</sup> When the Supreme Court directly confronted the issue of whether prehearing forfeiture seizures violated the due process clause of the fifth amendment, however, the Court marched backward and carved out an exception to the doctrine of *Sniadach* and *Fuentes*.

### B. *The Calero-Toledo Exception*

For owners seeking to protect their property interests, *Calero-Toledo v. Pearson Yacht Leasing Co.*<sup>32</sup> presented a sympathetic set of facts and provided an unsympathetic set of facts for a government seeking to maintain its power to seize property prior to judgment of forfeiture. In March 1971 Donovan and Loretta Olson leased a yacht from Pearson Yacht Leasing Co., a division of Grumman. The lease appeared to have been a simple security

---

22. *Bell v. Burson*, 402 U.S. 535, 539 (1971) (Georgia Department of Public Safety); *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971) (police chief); *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970) (Commissioner of New York Social Services).

23. *Bell v. Burson*, 402 U.S. at 539-42; *Wisconsin v. Constantineau*, 400 U.S. at 437; *Goldberg v. Kelly*, 397 U.S. at 261.

24. *Cf. Freedman, Summary Action by Administrative Agencies*, 40 U. CHI. L. REV. 1, 25 (1972) (after *Sniadach*, Supreme Court prepared to override legislative determination that summary seizures permissible).

25. *United States v. United States Coin & Currency*, 401 U.S. 715, 718 (1971); *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 696 (1965).

26. 380 U.S. 693 (1965).

27. *Id.* at 696.

28. 401 U.S. 715 (1971).

29. *Id.* at 717-18.

30. *Id.* at 721.

31. *Id.*

32. 416 U.S. 663 (1974).

interest.<sup>33</sup> In May of 1972, after the Olsons had made payments for more than a year, Puerto Rican authorities discovered two marijuana cigarettes on board the yacht and charged one of the Olsons with possession. In July, two months after the arrest, the government seized the yacht pursuant to a Puerto Rican forfeiture statute.<sup>34</sup> The record is unclear as to whether or not the government already had possession of the yacht at the time of its seizure.<sup>35</sup> Although the government notified the Olsons, the Olsons did not post bond and therefore forfeited the yacht to the Commonwealth of Puerto Rico.<sup>36</sup> Not until the Olsons defaulted on their lease payments did Pearson learn of the forfeiture. The Commonwealth of Puerto Rico apparently had made a good faith effort to locate and notify the owners, and Pearson did not press the issue of lack of notice. Instead, Pearson sued in federal district court for the return of the yacht, asserting that prejudgment seizure of the vessel by the government was an unconstitutional deprivation of property

---

33. Brief of Appellant at 4, *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) (No. 73-157).

On March 15, 1971, Pearson leased a yacht to Donovan and Loretta Olson ("Lessee") for a five-year term. The parties simultaneously executed an option contract giving the lessee the right to purchase the yacht on thirty days' notice at any time during the lease term, the option price diminishing over that period at a depreciation rate equivalent to the monthly rental. At the end of the fifth year the yacht could be purchased for \$1.00.

*Id.*

34. The Puerto Rican statute, P.R. LAWS ANN. tit. 24, §§ 2512(a)(4), (b) (1979), provides:

(a) The following shall be subject to forfeiture to the Commonwealth of Puerto Rico:

.....

(4) All conveyances, including aircraft, vehicles, mount or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of [controlled substances];

.....

(b) Any property subject to forfeiture under clause (4) of subsection (a) of this section shall be seized by process issued pursuant to Act No. 39, of June 4, 1960, as amended, known as the Uniform Vehicle, Mount, Vessel and Plane Seizure Act, sections 1721 and 1722 of Title 34.

P.R. LAWS ANN. tit. 34, § 1722 (1971), provides:

(a) The proceedings shall be begun by the seizure of the property by the Secretary of Justice, the Secretary of the Treasury or the Police Superintendent, through their delegates, policemen or other peace officers.

35. The case was tried in the district court on stipulated facts. Neither the published opinion of the district court nor the briefs of the parties describes who was in possession of the yacht when the government seized it. In cases in which a forfeiture follows an arrest, it is not uncommon for the property to be in the physical possession of the authorities before a warrant for seizure is issued. *United States v. Kaiyo Maru No. 53*, 699 F.2d 989, 999 (9th Cir. 1983); *cf. United States v. \$8,850 in U.S. Currency*, 461 U.S. 555, 561-62 (1983) (government held \$8,850 for 18 months before filing forfeiture hearing); *United States v. Life Ins. Policy of Va. Single Premium Whole Life Policy*, 647 F. Supp. 732, 736 (W.D.N.C. 1986) (government seized various types of property for months before filing suit). In such cases the purpose of the warrant is to give the court jurisdiction over the property. *United States v. Kaiyo Maru No. 53*, 699 F.2d at 999. Since two months elapsed between the arrest of the yacht's occupant and the seizure, it is not unlikely that during those two months the Puerto Rican authorities had possession of the yacht.

36. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 667-68 (1974).

without due process in violation of the fifth amendment.<sup>37</sup>

A three-judge district court agreed with the plaintiff's contentions.<sup>38</sup> Relying upon *Coin & Currency* and the line of cases under *Sniadach* and *Fuentes*,<sup>39</sup> the district court found that, on the facts of the case, no important governmental or general public purpose existed to justify the property seizure prior to an adequate and meaningful hearing.<sup>40</sup> The district court rejected the government's argument that such seizures were necessary for effective control of narcotics. Instead, the court found that the government had made no showing of how a prehearing confiscation aided the enforcement of criminal laws, particularly given the two-month delay between the arrest of Olson and the seizure of the yacht.<sup>41</sup> The Supreme Court reversed.<sup>42</sup> In a strangely formalistic opinion by Justice Brennan, the Court upheld the constitutionality of prehearing forfeiture seizures as a type of extraordinary-situation exception set forth in *Fuentes*.<sup>43</sup> Under *Fuentes*, a pre-judgment seizure is constitutional if the government can satisfy a test consisting of three factors: that the seizure secured an important governmental or public interest, that a special need for a prompt action existed, and that the government exercised strict control over its use of force.<sup>44</sup> Applying this test to the facts in *Calero-Toledo*, the Court held that the government had fulfilled each of the three requirements.<sup>45</sup>

---

37. *Pearson Yacht Leasing Co. v. Massa*, 363 F. Supp. 1337, 1338 (D.P.R. 1973).

38. *Id.* at 1343. The plaintiff also raised another due process issue under the fifth amendment: that the forfeiture constituted an unconstitutional taking from an innocent owner. Although the Supreme Court also addressed this claim, 416 U.S. at 680-90, that ruling is not applicable to the discussion in this Article.

39. See *supra* note 16 and accompanying text.

40. *Pearson Yacht Leasing Co. v. Massa*, 363 F. Supp. at 1341-43. The district court also relied upon a recently decided district court case, *United States v. One 1971 Ford Truck*, Serial No. F25HRJ82180, 346 F. Supp. 613, 619 (C.D. Cal. 1972), in which the forfeiture of a father's truck for illegal acts committed by his son was held unconstitutional. 363 F. Supp. at 1342. State courts also have held forfeiture statutes unconstitutional. *State v. One Porsche 2-Door*, 526 P.2d 917, 918 (Utah 1974) (forfeiture of car for misdemeanor drug possession unconscionable); *City of Everett v. Slade*, 83 Wash. 2d 80, 515 P.2d 1295, 1298 (1973) (requiring preseizure notice and hearing in forfeiture action); see also *State v. One 1970 2-Door Sedan Rambler*, 91 Neb. 462, 215 N.W.2d 849, 852 (1974) (dissenting opinion) (requiring preseizure notice and hearing in forfeiture action).

41. 363 F. Supp. at 1343.

42. *Calero-Toledo*, 416 U.S. at 669.

43. *Id.* at 677.

44. *Fuentes v. Shevin*, 407 U.S. 67, 91 (1972).

First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.

*Id.*

45. 416 U.S. at 679.

First, seizure under the Puerto Rican statutes serves significant governmental purposes: Seizure permits Puerto Rico to assert *in rem* jurisdiction over the property in order to conduct forfeiture proceedings, thereby fostering the public interest in preventing continued illicit use of the property and in enforcing criminal sanctions. Second, preseizure notice and hearing might frustrate the interests served by the statutes, since the property seized—as here, a yacht—will

C. *Discussion of Calero-Toledo*

Recently, the Justice Department has relied heavily upon *Calero-Toledo* as authority for the proposition that forfeiture seizures by attorneys of the Justice Department constitute an exception to the warrant requirement of the fourth amendment.<sup>46</sup> This interpretation also appears to represent the position taken by the drafters of the amendments to the Supplemental Rules of Admiralty and Certain Maritime Claims.<sup>47</sup> One circuit court of appeals has adopted the position as well.<sup>48</sup> In view of the broad range of property now subject to seizure, such as bank accounts and real property, the temptation increases to conduct a forfeiture seizure of a home under the loose procedures approved in *Calero-Toledo* and thereby avoid the strict requirements set forth in the fourth amendment. It is important, therefore, that courts do not interpret *Calero-Toledo* as mandating a forfeiture exception to the fourth amendment.

A number of reasons exist to suggest that a broad interpretation of the holding in *Calero-Toledo* is untenable. First, the assumption of the Court that a prehearing seizure is a necessary prerequisite for a court's assertion of in rem jurisdiction over property, without which the forfeiture itself could not occur, is a curious holdover from nineteenth century admiralty jurisprudence.<sup>49</sup> Under this theory a ship on the high seas, outside the territorial jurisdiction of a court, could not be brought within the court's jurisdiction unless the government physically seized it pursuant to a warrant issued by that court.<sup>50</sup> The theory of territorial jurisdiction, upon which these courts based their decisions, has since yielded to principles of fairness and convenience to the parties.<sup>51</sup> This archaic theory does not constitute a legitimate reason to overrule the claims of individual liberties. Second, since the record

---

often be of a sort that could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given. And finally, unlike the situation in *Fuentes*, seizure is not initiated by self-interested private parties; rather, Commonwealth officials determine whether seizure is appropriate under the provisions of the Puerto Rican statutes.

*Id.*

46. Troland, *Asset Forfeiture*, 11 DEPARTMENT OF JUSTICE MANUAL B-30 (1987).

47. Official Comment to Supplemental Rule C(3), Supplemental Rules of Certain Admiralty and Maritime Claims, 28 U.S.C. rule C(3) (1982 & Supp. III 1985).

48. *United States v. Certain Real Estate Property Located at 4880 S.E. Dixie Highway*, No. 86-5245, slip op. 1896, 1899-1900 (11th Cir. Mar. 11, 1988); *United States v. A Single Family Residence*, 803 F.2d 625, 632 (11th Cir. 1986) (since magistrate made probable cause determination, government provided plaintiff with more procedural safeguards than constitution required).

49. See *infra* note 51.

50. *Dodge v. United States*, 272 U.S. 530, 532 (1926); *The Merino*, 22 U.S. (9 Wheat.) 391, 401-02 (1824); *The Ship Richmond v. United States*, 13 U.S. (9 Cranch) 102, 103-04 (1815); cf. *Pennoyer v. Neff*, 95 U.S. 714, 723 (1877) (state may exercise jurisdiction over property within its boundaries owned by nonresidents by holding and appropriating it); *Trans-Asiatic Oil Ltd. S.A. v. Apex Oil Co.*, 743 F.2d 956, 960 (1st. Cir. 1984).

51. *International Shoe Co. v. Washington*, 326 U.S. 310, 316-17 (1945) (party must maintain presence in state such that imposition of personal jurisdiction does not offend convenience or notions of fair play); cf. P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (2d ed. 1973) (principles of fairness and convenience superseded limitations based on territory).



in *Calero-Toledo* does not clearly state who at the time of the seizure possessed the yacht, the Court's holding is uncertain in scope. Is the jurisdictional predicate only enough to justify lack of pre-seizure notice when the property is already in the hands of the authorities, or does it also permit a forcible removal of property from the hands of an owner? Although a fictional seizure of property already in the government's possession to permit the exercise of in rem<sup>o</sup> jurisdiction is one matter, an exception to the fourth amendment is another.<sup>52</sup>

In *Calero-Toledo* the Supreme Court expressly reserved the question of whether the Puerto Rican statute violated the fourth amendment's warrant and probable cause requirements.<sup>53</sup> This reservation represents the Court's indirect statement that judges can best assess the appropriateness of a seizure through the warrant procedure.<sup>54</sup> The Court actually held that a forfeiture seizure prior to an adversarial hearing and judgment on the merits is, in certain circumstances, constitutional.<sup>55</sup> The Court said nothing about whether the constitution may require ex parte judicial review before permitting a seizure, as required for purposes of the fourth amendment.

Since *Calero-Toledo* contains limited facts and a restricted holding, the case does not create an exception to the fourth amendment. A number of older Supreme Court cases cited by the Court in *Calero-Toledo*, however, contain facts that are less limited and holdings that are less restricted.<sup>56</sup> Furthermore, many lower courts, including some of the same courts that are now striking down forfeiture seizures, apparently also have upheld the existence of a forfeiture exception to the fourth amendment.<sup>57</sup> How is one to harmonize these decisions?

## II. FOUR CATEGORIES OF PROPERTY SUBJECT TO FORFEITURE

Four basic categories of property are subject to forfeiture under federal statutes. The General Accounting Office (GAO) has established these categories clearly.<sup>58</sup> Some lower courts have recognized this taxonomy.<sup>59</sup> Even

---

52. *United States v. Kaiyo Maru No. 53*, 699 F.2d 989, 999 (9th Cir. 1983) (holding limited to situations in which government already has seized property).

53. 416 U.S. 663, 680 n.14 (1974).

54. Comment, *Forfeiture Seizures and the Warrant Requirement*, 48 U. CHI. L. REV. 960, 982-83 (1981).

55. 416 U.S. at 680.

56. *Cooper v. California*, 386 U.S. 58, 61 (1967) (police made valid search of car held as evidence for forfeiture proceeding and therefore did not violate fourth amendment); *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599-600 (1950) (to protect public, government may act without prior judicial determination); *United States v. One Ford Coupe Automobile*, 272 U.S. 321, 330 (1926) (since government could seize articles used by taxpayers to evade tax payments, seizure of car without hearing constitutional).

57. *United States v. One 1978 Mercedes Benz, Four-Door Sedan*, 711 F.2d 1297, 1302 (5th Cir. 1983); *United States v. Bush*, 647 F.2d 357, 368-69 (3d Cir. 1981); *United States v. One 1977 Lincoln Mark V Coupe*, 643 F.2d 154, 158 (3d Cir.), cert. denied, 454 U.S. 818 (1981).

58. Report by the Comptroller General to the Honorable Joseph R. Biden, United States Senate, *Asset Forfeiture—A Seldom Used Tool in Combatting Drug Trafficking*, GAO 2-3 (Apr. 10, 1981) [hereinafter *Asset Forfeiture*].

59. *United States v. 124 E. North Ave.*, 651 F. Supp. 1350, 1355 (N.D. Ill. 1987); *United*

when the categories are not explicitly recognized, however, it is impossible to harmonize the holdings of the lower courts with each other and with those of the Supreme Court, unless one recognizes that different protections are afforded to different classes of property.

### A. *Contraband*

The first class of property subject to forfeiture includes drugs, guns, smuggled goods, liquor, gambling devices, and other items the possession of which is a crime.<sup>60</sup> No property right exists in such property, and its seizure presents no fifth amendment question. This first class also includes items that the government has deemed by statute as inherently dangerous to the public, including putrid food or misbranded drugs.<sup>61</sup> Although a property right does exist in such articles, this right clearly is outweighed by the danger the articles pose to the public.<sup>62</sup> The GAO report labels all such property *contraband*.<sup>63</sup>

### B. *Derivative Contraband*

The second class of property, which the GAO report calls *derivative contraband*,<sup>64</sup> includes property used in the manufacture of *contraband*, such as liquor stills and drug processing equipment. This class also includes vehicles used to store and transport *contraband*, such as boats, airplanes, and automobiles.<sup>65</sup> The government usually seizes *derivative contraband* at the time of arrest, along with the *contraband* itself.<sup>66</sup> Both *contraband* and *derivative contraband* have been subject to forfeiture by the federal government for nearly two centuries.<sup>67</sup> Nearly all the cases upholding the constitutionality of summary forfeiture proceedings involve one or both of these two types of property.<sup>68</sup>

### C. *Proceeds*

The third class of property, which the GAO report labels *proceeds*, was only recently made subject to forfeiture.<sup>69</sup> This class includes property, usually cash, that is received in exchange or payment for drugs.<sup>70</sup> The government often finds such cash *proceeds* in the same location as illegal drugs and

---

States v. Life Ins. Co. of Va. Single Premium Whole Life Policy, 647 F. Supp. 732, 742 (W.D.N.C. 1986); United States v. Certain Real Estate Property Located at 4800 S.E. Dixie Highway, 612 F. Supp. 1492, 1495 (S.D. Fla. 1985).

60. *Asset Forfeiture*, *supra* note 58, at 2-3.

61. *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 600 (1950); *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908).

62. *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599-601 (1950).

63. *Asset Forfeiture*, *supra* note 58, at 2-3.

64. *Id.* at 3.

65. *Id.*

66. *Id.*

67. *See The Palmyra*, 25 U.S. 1 (1827).

68. *See infra* note 114 and accompanying text.

69. *Asset Forfeiture*, *supra* note 58, at 4; 21 U.S.C. § 881(a)(6) (1982).

70. *Asset Forfeiture*, *supra* note 58, at 3.

accordingly seizes the money pursuant to the arrest, along with any contraband.<sup>71</sup>

#### D. *Derivative Proceeds*

Only recently, the government also has made the fourth class, which the GAO report calls secondary or derivative proceeds, subject to forfeiture. This class includes almost any property with value, including corporate stock, real estate, bank accounts, interests in legitimate businesses, insurance policies, antiques, and art, that the accused purchases, maintains, or acquires with the proceeds of an illegal transaction.<sup>72</sup>

The establishment of these four classes provides clear lines for judicial interpretation in forfeiture cases. Although distinguishing different standards of due process for different kinds of property may seem to balkanize the constitution, this approach actually offers a principled and coherent method of resolving the apparent inconsistencies in modern forfeiture case law. One can interpret the decisions in forfeiture cases as a systematic determination by courts of the appropriate constitutional procedures for each class of property subject to forfeiture.

### III. CLASSIFYING FORFEITURE SEIZURES

#### A. *Forfeiture Seizures of Contraband*

Courts do not require preseizure hearings for governmental seizures of contraband or of property that poses a danger to the public. The leading Supreme Court case upholding this proposition is *Ewing v. Mytinger & Casselberry, Inc.*<sup>73</sup> In *Ewing* the government, without notice or a hearing, seized for forfeiture mislabeled drugs. The manufacturer of the drugs challenged the seizure as an unlawful taking under the fifth amendment. The Supreme Court rejected this contention.<sup>74</sup> In an opinion by Justice Douglas, the Court analogized the forfeiture seizure of items that can cause harm to the public to a government official's decision to arrest a suspected criminal.<sup>75</sup> The Court had earlier applied the same principle of protecting the public to justify the seizure of infected meat.<sup>76</sup> Lower courts have applied this principle to hazardous substances<sup>77</sup> and to other articles that pose a danger to the

---

71. *United States v. Bush*, 647 F.2d 357, 361 (3d Cir. 1981); *Asset Forfeiture*, *supra* note 58, at 4.

72. *Asset Forfeiture*, *supra* note 58, at 4.

73. 339 U.S. 594 (1950).

74. *Id.* at 600.

75. *Id.* at 599.

Discretion of any official may be abused. Yet it is not a requirement of due process that there be judicial inquiry before discretion can be exercised. It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination.

*Id.*

76. *North American Cold Storage Co. v. City of Chicago*, 211 U.S. 306, 315 (1908).

77. *United States v. Articles of Hazardous Substance*, 588 F.2d 39, 43 (4th Cir. 1978).

public.<sup>78</sup>

Another notable fact in *Ewing* was that the law required the law enforcement agency to secure approval for the forfeiture seizure from the Attorney General, who brought the action in the name of the United States. The Attorney General's pre-seizure review served to check the enthusiasm of an overzealous agency.<sup>79</sup> The Court wrote that the Attorney General was free to accept or decline the agency's recommendation for a seizure.<sup>80</sup> In modern drug forfeiture seizures the Attorney General not only reviews the request by an agency to conduct a forfeiture seizure, but initiates the seizure himself.<sup>81</sup> The constitutional questions become more difficult when the property seized is not per se contraband, but derivative contraband.

### B. Forfeiture Seizures of Derivative Contraband

The next group of cases concerns the seizure of derivative contraband, mostly boats, airplanes, and automobiles. The cases that best illustrate this second class of forfeiture seizures are seizures of property under 21 U.S.C. section 881(b) or under some version of the Uniform Controlled Substances Act.<sup>82</sup> Under section 881(b) the Attorney General may seize property for forfeiture when incident to an arrest for drug-related crimes or when the Attorney General has probable cause to believe that the property has been used or is intended to be used in violation of the Controlled Substances Act.<sup>83</sup>

*Calero-Toledo* interpreted the due process clause of the fifth amendment as applied to a derivative proceed, a yacht.<sup>84</sup> Since forfeiture of such property is incidental to the main purpose of reaching and destroying the forbidden drugs, liquor, or other contraband, an owner consequently possesses a diminished interest in the property.<sup>85</sup> The Supreme Court in *Calero-Toledo* reserved the question of whether the seizure of derivative contraband for forfeiture constituted an exception to the fourth amendment.<sup>86</sup> The Supreme Court left this question to the lower courts. Many of the lower court cases challenging the seizure of derivative contraband under the fourth amendment involved seizures pursuant to a lawful arrest and have been chal-

---

78. *United States v. An Article of Device "Theramatic,"* 715 F.2d 1339, 1342 (9th Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984).

79. *See Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599 (1950); *cf. Johnson v. United States*, 333 U.S. 10, 13-14 (1948) (fourth amendment protection includes inferences being drawn from detached magistrate rather than police officers engaged in detecting crime).

80. *Ewing*, 339 U.S. at 599.

81. 21 U.S.C. § 881(b) (1982).

82. UNIF. CONTROLLED SUBSTANCES ACT, 9 U.L.A. 195-640 (1979 & Supp. 1987). Many states have adopted the Comprehensive Drug Abuse Prevention and Control Act in the form of the Uniform Controlled Substances Act. Comment, *Rendering Illegal Behavior Unprofitable: Vehicle Forfeiture Under the Uniform Controlled Substances Act*, 8 CREIGHTON L. REV. 471, 474 (1974).

83. 21 U.S.C. § 881(b) (1982).

84. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 676-79 (1974).

85. *United States v. One Ford Coupe Automobile*, 272 U.S. 321, 333 (1926).

86. 416 U.S. at 680 n.14.

lenged in the context of a suppression hearing.<sup>87</sup>

In *Carroll v. United States*<sup>88</sup> the Supreme Court found that the fourth amendment generally requires police, when searching a car without a warrant, to have both probable cause and exigent circumstances.<sup>89</sup> Courts imply the exigent circumstances requirement from the mobility of an automobile, but the requirement still places genuine restrictions on the government's ability to conduct searches of automobiles.<sup>90</sup> The question in automobile cases is whether courts must apply the exigent circumstances part of the *Carroll* test to all seizures, or whether the courts can dispense with it in the context of a forfeiture seizure.<sup>91</sup>

The Supreme Court has referred in dictum to the "exception to the warrant requirement . . . which sustains a search in connection with the seizure of an automobile for purposes of forfeiture proceedings."<sup>92</sup> The Fourth, Third, and Fifth Circuits, although not expressly relying on this dictum, appear to recognize such a forfeiture exception for derivative proceeds.<sup>93</sup> According to these decisions, prior to a forfeiture seizure the police must have probable cause, but they need not show exigent circumstances.<sup>94</sup> Judge Friendly, in dictum from a Second Circuit case, also adopts this view.<sup>95</sup> The First Circuit appears split.<sup>96</sup> The Ninth and Tenth Circuits, however, apply the same rule for a forfeiture seizure as for any other search or seizure under the fourth amendment and require a showing of both exigent circumstances and probable cause.<sup>97</sup>

Many commentators have criticized the distinction between search and

87. *United States v. Spetz*, 721 F.2d 1457, 1460 (9th Cir. 1983); *United States v. Kemp*, 690 F.2d 397, 399 (4th Cir. 1982); *United States v. Bush*, 647 F.2d 357, 361 (3d Cir. 1981); *United States v. Pappas*, 613 F.2d 324, 326 (1st Cir. 1980).

88. 267 U.S. 132 (1925).

89. *Id.* at 153-54, 156; *accord* *Cardwell v. Lewis*, 417 U.S. 583, 589-90 (1974) (although warrant requirements for automobiles generally less stringent than homes or offices, warrantless searches still require exigent circumstances); *Chambers v. Maroney*, 399 U.S. 42, 51 (1970) (only in exigent circumstances may police conduct search without prior magistrate's determination of probable cause).

90. *See Coolidge v. New Hampshire*, 403 U.S. 443, 460-64 (1971) (when suspect voluntarily complied with police, police had known of car's location for some time, and no other person had access to car, no exigent circumstances existed).

91. *United States v. Kemp*, 690 F.2d 397, 401-02 (4th Cir. 1982).

92. *Cady v. Dombrowski*, 413 U.S. 433, 452 (1973) (Brennan, J., dissenting).

93. *Kemp*, 690 F.2d at 401-02; *United States v. Bush*, 647 F.2d 357, 368-69 (3d Cir. 1981); *United States v. One 1977 Lincoln Mark V Coupe*, 643 F.2d 154, 158 (3d Cir.), *cert. denied*, 454 U.S. 818 (1981); *United States v. One 1978 Mercedes Benz, Four-Door Sedan*, 711 F.2d 1297, 1302-03 (5th Cir. 1983).

94. *Kemp*, 690 F.2d at 401-02; *Bush*, 647 F.2d at 368; *One 1977 Lincoln*, 643 F.2d at 158; *One 1978 Mercedes Benz*, 711 F.2d at 1302-03.

95. *United States v. Francolino*, 367 F.2d 1013, 1022 (2d Cir. 1966), *cert denied*, 386 U.S. 960 (1967).

96. *Compare* *United States v. Pappas*, 613 F.2d 324, 327-28 (1st Cir. 1980) (absent exigent circumstances, probable cause must exist) *with* *United States v. One 1975 Pontiac Lemans, Vehicle I.D. No. 2F37M56101227*, 621 F.2d 444, 450 (1st Cir. 1980) (forfeiture seizure constitutes exception to warrant requirement).

97. *United States v. \$39,000 in Canadian Currency*, 801 F.2d 1210, 1219 n.8, 1220-21 (10th Cir. 1986); *United States v. Spetz*, 721 F.2d 1457, 1469-70 (9th Cir. 1983); *United States v. 1979 Mercury Cougar VIN 9H93H669155*, 545 F. Supp. 1087, 1089-90 (D. Colo. 1982).

forfeiture seizure as unsupported by policy or logic.<sup>98</sup> Whatever the merits of these scholarly criticisms, courts have applied a weaker fourth amendment standard to seizures of automobiles and boats, because such pieces of property are easily movable and involve a diminished interest in privacy.<sup>99</sup> It is one matter to apply a forfeiture exception for an automobile seizure, but another to apply a forfeiture exception to the seizure of a house or a bank account.<sup>100</sup>

### C. Forfeiture Seizures of Proceeds and Derivative Proceeds: New Legislation

In 1978 Congress amended the Comprehensive Drug Abuse Prevention and Control Act<sup>101</sup> to provide for the in rem forfeiture of property furnished in exchange for illegal drugs or proceeds traceable to such an exchange.<sup>102</sup> The statute lists money, negotiable instruments, securities, and other things of value. Courts have interpreted "other things of value" to include bank accounts, jewelry, horses, valuable coins, and gold bullion.<sup>103</sup> In 1984 Congress further amended this act to permit the forfeiture of real property.<sup>104</sup> The civil forfeiture provisions of the Drug Abuse Prevention Act now constitute the broadest of all forfeiture statutes and can reach property of almost any description, whether a direct or indirect proceed from the sale of

98. Charney, *The Need for Constitutional Protections for Defendants in Civil Penalty Cases*, 59 CORNELL L. REV. 478, 482-83 (1974); Kandaras, *Due Process and Federal Property Forfeiture Statutes; The Need for Immediate Post-Seizure Hearing*, 34 SW. L.J. 925, 939 (1980); Strafer, *Civil Forfeitures: Protecting the Innocent Owner*, 37 U. FLA. L. REV. 841, 861 (1985); Comment, *supra* note 54, at 967; Note, *Warrantless Searches and Seizures of Automobiles*, 87 HARV. L. REV. 835, 845-48 (1974); Note, *supra* note 54, at 1050.

99. See *supra* notes 88-97 and accompanying text.

100. See *In re Kingsley*, 802 F.2d 571, 580 (1st Cir. 1986) (Coffin, J., concurring) (due process does not permit forfeiture seizure of home without prior hearing or showing of extraordinary circumstances); *United States v. Certain Real Estate Property Located at 4880 S.E. Dixie Highway*, 612 F. Supp. 1492, 1498 (S.D. Fla. 1985) (warrantless seizure of real property pursuant to § 881 without exigent circumstances unconstitutional).

101. 21 U.S.C. §§ 801-970 (1982 & Supp. 1987).

102. *Id.* § 881(a)(6), as amended, reads as follows:

All moneys, negotiable instruments, securities, or other 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, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an 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.

103. *United States v. \$33,000 in U.S. Currency*, 640 F. Supp. 898, 900 (D. Md. 1986); *United States v. Banco Cafetero Int'l*, 608 F. Supp. 1394, 1403 (S.D.N.Y. 1985), *aff'd*, 797 F.2d 1154, (2d Cir. 1986).

104. 21 U.S.C. § 881(a)(7) (Supp. V 1987) reads as follows:

All real property, including any right, title, and interest in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an 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.

drugs.<sup>105</sup>

Seizures of proceeds and derivative proceeds under the civil forfeiture provisions of the Drug Abuse Prevention Act do not usually occur incident to an arrest,<sup>106</sup> but occur pursuant to the in rem procedures of the Supplemental Rules for Certain Admiralty and Maritime Claims (Supplemental Rules).<sup>107</sup> Rule C(3) of the Supplemental Rules states that, upon a filing of the complaint for forfeiture, the clerk shall promptly issue a warrant for the arrest and seizure of the property without prior certification of exigent circumstances.<sup>108</sup> In *Ewing* the government used rule C(3) to seize contraband and was able to survive a constitutional attack.<sup>109</sup> The Puerto Rican forfeiture statute used in *Calero-Toledo* does not appear to have contained a provision similar to rule C(3). Circuits that recognize a forfeiture exception to the fourth amendment, however, would probably sustain use of rule C(3) to seize boats, automobiles, and airplanes.<sup>110</sup>

Some courts have held the use of rule C(3) unconstitutional in the context of the original admiralty proceedings for which the rule was first designed.<sup>111</sup> In response to these decisions, Congress amended rule C(3) in 1985 to provide for a judicial hearing prior to the seizure of a vessel in admiralty cases.<sup>112</sup> The drafters of the amendment, relying on the authority of *Calero-Toledo*, specifically exempted forfeiture actions brought by government agencies.<sup>113</sup> The confidence of the drafters in the constitutionality of seizures pursuant to rule C(3) by government agencies, however, appears well placed only with respect to the first and perhaps the second categories

105. Compare 21 U.S.C. § 881(a) (1982 & Supp. V 1987) with 27 U.S.C. § 206(b) (Supp. VI 1988) (forfeiture limited to alcohol); 18 U.S.C. § 924(d) (forfeiture limited to firearms).

106. *In re Kingsley*, 802 F.2d 571, 572-74 (1st Cir. 1986); *United States v. Life Insurance Co. of Va. Single Premium Whole Life Policy*, 647 F. Supp. 732, 741-42 (W.D.N.C. 1986); *United States v. Certain Real Estate Property Located at 4880 S.E. Dixie Highway*, 612 F. Supp. 1492 (S.D. Fla. 1985).

107. Supplemental Rules for Certain Admiralty and Maritime Claims, 28 U.S.C. rule C(3) (1982 & Supp. V 1987).

108. *Id.* "In actions by the United States for forfeitures for federal statutory violations, the clerk, upon filing of the complaint, shall forthwith issue a summons and warrant for the arrest of the vessel or other property without requiring a certification of exigent circumstances." *Id.*

109. *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599 (1950).

110. *Cf.* Official Comment to Rule C(3), 28 U.S.C. rule C(3) (Supp. III 1985) (citing *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 (1974)).

111. *Alyeska Pipeline Serv. Co. v. Vessel Bay Ridge*, 509 F. Supp. 1115, 1122-23 (D. Alaska 1981), *appeal dismissed*, 703 F.2d 381 (9th Cir. 1983), *cert. dismissed*, 467 U.S. 1247 (1984); *Karl Senner, Inc. v. MV Acadian Valor*, 485 F. Supp. 287, 295 (E.D. La. 1980). *Contra Merchants Nat'l Bank v. Dredge Gen. G.L. Gillespie*, 663 F.2d 1338, 1351 (5th Cir. 1981), *cert. dismissed*, 456 U.S. 966 (1982). See generally 7A MOORE'S FEDERAL PRACTICE ¶ E.10, at E-459-60 (2d ed. 1983) (since due process questions in admiralty cases different than those in other civil cases, courts hopefully will not extend recent Supplemental Rules to admiralty); Morse, *The Conflict Between the Supreme Court Admiralty Rules and Sniadach-Fuentes: A Collision Course?*, 3 FLA. ST. U.L. REV. 1, 21 (1975) (mobility of ships explains difference in criteria for acceptable notice and hearing between admiralty and civil cases).

112. Official Comment to Rule C(3), 28 U.S.C. rule C(3) (Supp. V 1987). As the official comment says, the purpose of this amendment "is to eliminate any doubt as to the rule's constitutionality under the *Sniadach* line of cases." *Id.* (construing *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969)).

113. *Id.* (citing *Calero-Toledo*, 416 U.S. at 679).

of property.<sup>114</sup>

At the same time that it passed the amendments to the in rem civil forfeiture statute, Congress amended the Drug Abuse Prevention Act to include a new criminal in personam forfeiture law that permits the forfeiture of property of the same broad types as in civil in rem forfeiture proceedings.<sup>115</sup> In these forfeiture actions the government has the burden of proof, the innocence of the owner is a defense, and Congress has enacted carefully considered procedural constraints on the government's ability to seize property prior to conviction.<sup>116</sup> Under the criminal forfeiture procedures the government, in order to seize property prior to a criminal conviction, must make three showings: (1) that probable cause exists to seize the property; (2) that pre-seizure notice would likely render the property unavailable for forfeiture (i.e., an extraordinary situation); and (3) that less restrictive means, such as a bond, restraining order, or *lis pendens*, would not suffice to protect the government's interest.<sup>117</sup>

---

114. *United States v. \$38,000.00 in United States Currency*, 816 F.2d 1538, 1548 (11th Cir. 1987) (government's forfeiture complaint must state sufficient facts to draw nexus between seized money and illegal act); *In re Kingsley*, 802 F.2d 571, 578 (1st Cir. 1986) (seizure of home and entire contents allegedly purchased with drug proceeds more sweeping than ordinary seizures); *United States v. \$39,000 in Canadian Currency*, 801 F.2d 1210, 1220 (10th Cir. 1986) (government must support with specific facts claim that seized property related to drug transaction); *United States v. Pappas*, 613 F.2d 324, 330 (1st Cir. 1980) (warrantless seizure of property used to transport illegal items valid only in exigent circumstances); *United States v. Real Property Located at 25231 Mammoth Circle*, 659 F. Supp. 925, 927 (C.D. Cal. 1987) (probable cause required for forfeiture); *United States v. 124 East North Ave.*, 651 F. Supp. 1350, 1354 (N.D. Ill. 1987) (§ 881 subjects to forfeiture all real estate used to facilitate commission of narcotics violation); *United States v. One 1980 Ford Mustang VIN OF03D121959*, 648 F. Supp. 1305, 1308 (N.D. Ind. 1986) (government failed to show substantial connection between seized property and exchange of illegal drugs); *United States v. Life Ins. Co. of Va. Single Premium Whole Life Policy*, 647 F. Supp. 732, 747 (W.D.N.C. 1986) (judicial officer must determine probable cause prior to seizure of life insurance policy bought by proceeds from illegal drug sale); *United States v. A Parcel of Real Property Commonly Known as: 3400-3410 West 16th Street*, 636 F. Supp. 142, 145 (N.D. Ill. 1986) (no warrant required for property involved in distribution of illegal drugs); *United States v. \$128,035 in U.S. Currency*, 628 F. Supp. 668, 675 (S.D. Ohio 1986) (government may not seize real property without warrant); *cf. United States v. Certain Real Estate Property Located at 4880 S.E. Dixie Highway*, 612 F. Supp. 1492, 1496 (S.D. Fla. 1985) (pre-seizure hearing necessary for nonmovable property allegedly purchased with funds from illegal drug sale).

115. 21 U.S.C. §§ 853(a), (b) (Supp. III 1985).

116. *Id.* §§ 853(a), (d), (e), (f).

117. *Id.* §§ 853(e)(2), (f) read as follows:

(e)(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.

(f) The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant. If the court determines that there is probable



An individual can now forfeit the same property pursuant to a criminal in personam proceeding as in a civil in rem proceeding. The lax provisions of rule C(3) of the Supplemental Rules governing civil in rem forfeitures, however, provide the government with a means to accomplish the same goals as in a criminal in personam forfeiture without constraining the government with the strictures of the criminal statute.<sup>118</sup> The U.S. Attorney may obtain a seizure warrant simply by filing a verified complaint with the clerk.<sup>119</sup> The clerk, performing a purely ministerial function, issues the warrant, and a marshal seizes the property, whether it be a bank account or a person's home.<sup>120</sup>

The practical consequence of these statutes is that the U.S. Attorney now possesses the unsupervised power to initiate seizure proceedings and to seize virtually any property at will. The temptation increases to conduct a forfeiture seizure of a home under the loose procedures approved in *Calero-Toledo* and thereby avoid the strict requirements of the warrant requirement of the fourth amendment. In *Calero-Toledo* the Court upheld the forfeiture seizure of a yacht without judicial approval.<sup>121</sup> A broad reading of the case would permit a local United States Attorney to conduct a forfeiture seizure, without exigent circumstances, of almost any kind of property upon the individual assessment of the attorney that probable cause existed. The fourth amendment cases require probable cause and exigent circumstances before the government may conduct a search without judicial authorization.<sup>122</sup> The Supreme Court has held that the fourth amendment applies to forfeiture seizures because of their quasi-criminal nature.<sup>123</sup> The fourth amendment, however, requires that a neutral and detached judicial officer must determine

---

cause to believe that the property to be seized would, in the event of conviction, be subject to forfeiture and that an order under subsection (f) of this section may not be sufficient to assure the availability of the property for forfeiture, the court shall issue a warrant authorizing the seizure of such property.

*Id.* (footnote omitted).

118. *Id.* § 881(b) (1982 & Supp. III 1985) reads as follows:

Any property subject to forfeiture to the United States under this subchapter may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property, except that seizure without such process may be made when—

- (1) the seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;
- (2) the property subject to seizure has been the subject of a prior judgment in favor of the United States in a criminal injunction or forfeiture proceeding under this subchapter;
- (3) the Attorney General has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or
- (4) the Attorney General has probable cause to believe that the property is subject to civil or criminal forfeiture under this subchapter.

119. Supplemental Rules for Certain Admiralty and Maritime Claims, 28 U.S.C. rule C(3) (Supp. III 1985).

120. *Id.*

121. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 677 (1974).

122. *Coolidge v. New Hampshire*, 403 U.S. 443, 460 (1971); see also *supra* notes 89-90 and accompanying text.

123. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700-02 (1965).

that probable cause exists before a warrant may issue.<sup>124</sup> The seizure of a car allows a court to finesse and find exigent circumstances. Presented with a seizure of a home or a bank account, however, the fourth amendment cases collide violently with *Calero-Toledo*, and the incoherence in the broad reading of *Calero-Toledo* becomes manifest.

The question presented by the sudden expansion in types of property subject to forfeiture seizure is whether courts should dilute the fourth amendment or strengthen the fifth amendment. Strangely, although the 1978 amendments to the Drug Abuse Prevention Act, which first expanded the types of property subject to forfeiture, created the logical elements for the conflict in the case law, lower court cases did not begin to grapple seriously with the problem until 1984. The delay appears due to the fact that, until recently, when Congress permitted law enforcement agencies to keep for their own use some of the property seized by their agents,<sup>125</sup> forfeiture actions were considered an uninteresting legal backwater.<sup>126</sup> Furthermore, prior to 1984, forfeiture actions were not economical. The law required agents to use funds from their own budgets to pay for the care and maintenance of any seized property,<sup>127</sup> and, as a result, the agents were reluctant to make seizures. The 1984 amendments removed this disincentive and permitted law enforcement personnel to keep some of the seized proceeds to pay for the care and upkeep of the property while awaiting the outcome of legal proceedings.<sup>128</sup> By removing this economic disincentive, Congress also provided the law enforcement agencies with a strong economic incentive to bring forfeiture actions.<sup>129</sup>

Congress also mobilized the Justice Department. The government formed a permanent committee to coordinate forfeitures between the three Justice Department agencies involved in forfeitures: the Drug Enforcement Administration, the Federal Bureau of Investigation, and the Immigration and Naturalization Service.<sup>130</sup> The agencies created the National Asset Seizure and Forfeiture Office, a division of the Marshals Service, to manage the seized property.<sup>131</sup> Since 1984, the number of forfeiture seizures by Justice Depart-

---

124. *Whiteley v. Warden*, 401 U.S. 560, 564-65 (1971); *Spinelli v. United States*, 393 U.S. 410, 415-16 (1969), *overruled on other grounds*, 462 U.S. 213, 238 (1983); *Jones v. United States*, 362 U.S. 257, 270-71 (1960), *overruled on other grounds sub nom. United States v. Salvucci*, 448 U.S. 83, 89 (1980).

125. *Asset Forfeiture*, *supra* note 58, at 15.

126. *Id.* at i-v.

127. *Id.*

128. *Id.*

129. 21 U.S.C. § 881(e) (Supp. III 1985); Comprehensive Crime Control Act of 1984, S. REP. NO. 225, 98th Cong., 2d Sess. 216-17, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3399-40.

130. Memorandum of Understanding, Department of Justice Asset Forfeiture Responsibilities, Jan. 16, 1984, Signed by William H. Webster, Director, FBI, Stanley E. Morris, Director, USMS, Francis M. Mullen, Fr., Administrator, DEA, Allan C. Nelson, Commissioner, INS.

131. *Id.* Attorney General's Guidelines Regarding Seized and Forfeited Property, May 24, 1985, Signed by Edwin Meese, III; Memorandum from D. Lowell Jensen to All U.S. Attorneys and Marshals, Aug. 14, 1985; U.S. Department of Justice, U.S. Marshals Service, National Asset Seizure and Forfeiture Program, *Seized Assets Management Handbook*, Prepared by Seized Asset Management Branch (Mar. 1986).

ment agencies has mushroomed. In the late 1970s the value of government forfeitures averaged approximately \$10 million in property a year.<sup>132</sup> In 1984 seizures jumped to \$130 million. In 1985 they doubled to \$260 million. In 1986 the figures doubled again to over \$500 million.<sup>133</sup>

Some of the people making seizures appear to be a far cry from the disinterested public officials envisioned by the Supreme Court in *Calero-Toledo*. A December 1986 report by the GAO<sup>134</sup> cited a case in which the Drug Enforcement Administration's (DEA) Special Agent-in-Charge in Dallas had embellished his office with: an elegant coffee and end table set, two walnut china cabinets filled with decorative plates and rare figurines, several oil paintings, a video cassette recorder and console television, a stereo system, ornamental clocks, brass lamps, and other assorted bric-a-brac. The agent had converted this property to government use after the previous owner had forfeited it to the federal government.<sup>135</sup> In congressional hearings during the spring of 1987, the DEA found its agents driving seized Mercedes, Cadillacs, and other luxury cars.<sup>136</sup>

Managing the custody and eventual sale of seized property also appears to present problems. A GAO report dated July 15, 1983, recounted the following examples:

[The] U.S. marshal in Houston, Texas, placed a 1-day notice for the sale of a forfeited 1961 Beechcraft Queen Air aircraft. Four days later the marshal sold the plane for \$4,000 to one of a limited group of prospective buyers who expressed interest. The plane was initially valued at \$50,000 when seized.

This type of insufficient notice was particularly disconcerting to a private marina owner in Freeport, Texas, who stored a vessel after its seizure in April 1981. During the holding period, the owner received offers to buy the vessel—one was for \$24,000 and two were as high as \$40,000. The owner was personally willing to bid \$30,000. Although he requested the marshal to notify him of the sale, the marshall did not and sold the vessel and its equipment for \$13,000. At the time of seizure, the equipment had been appraised at \$10,000 and the vessel had been appraised at \$140,000.<sup>137</sup>

The July 1983 GAO report also described massive deterioration of seized property due to neglect of law enforcement officers. Aging, lack of care, in-

---

132. *Asset Forfeiture*, *supra* note 58, at 10, 12-13.

133. Stanley E. Morris, *United States Marshals Service First Year Implementation of the Comprehensive Crime Control Act of 1984*, Report to Robert W. Kastenmeier, Subcommittee on Courts, Civil Liberties and the Administration of Justice, House of Representatives (Jan. 8, 1986), reprinted in *In the Legislatures*, 38 Crim. L. Rep. (BNA) 2296 (Jan. 15, 1986) (excerpt from Marshals Service reports); Testimony of James Knapp, Deputy Associate Attorney General, before Committee on the Judiciary, Subcommittee on Crime, Mar. 9, 1987, in Miami, Fla.

134. Report to the Honorable Lawton Chiles, United States Senate, *Internal Controls—Drug Enforcement Administration's Use of Forfeited Personal Property*, GAO (Dec. 10, 1986).

135. *Id.*

136. Testimony of William Snider, Forfeiture Counsel, DEA, before Committee on the Judiciary, Subcommittee on Crime, Mar. 9, 1987, in Miami, Fla.

137. Report by the Comptroller General to the Committee on Government Operations, House of Representatives, *Better Care and Disposal of Seized Cars, Boats, and Planes Should Save Money and Benefit Law Enforcement*, GAO 27 (July 15, 1983).

adequate storage, and vandalism accounted for much of the loss. Such deterioration and loss may be particularly distressing to an innocent owner if he later is able to secure the return of the property.<sup>138</sup>

#### D. Cases Involving Proceeds and Derivative Proceeds

In the summer of 1985 the first federal district court case arose concerning the seizure of proceeds and derivative proceeds. *United States v. Certain Real Estate Property Located at 4880 S.E. Dixie Highway*<sup>139</sup> illustrates the amount of power that the new laws have handed the Attorney General's office. *Dixie Highway* involved government seizure of three pieces of property: a motel called the Manatee Resort, a restaurant called Charlie's-in-the-Pocket, and a boat company called Charlie's Locker, Inc., worth approximately four million dollars. The marshals making the seizure threw out everyone they found on the property, including the guests, managers, and owners. Among the guests forced to leave was a group of teachers participating in the Martin County Teachers' retreat. Government agents searched the guests as they left the property. The government later justified these searches as necessary to prevent the guests from absconding with property that had suddenly become government property.<sup>140</sup>

Apparently the government had Joseph Spina, the owner of the property, under criminal investigation, but had not charged him with any crime.<sup>141</sup> Spina had purchased the property from William Keen. The government later indicted Keen for drug offenses and alleged that Keen had originally purchased the property with drug money.<sup>142</sup> Under the government's theory, title had vested in the government at the time Keen purchased the property. Since the property was an indirect proceed of drug money, Keen possessed no power to convey it to Spina, and the property thereafter was subject to forfeiture.<sup>143</sup> The only reason for the seizure as stated in the complaint, however, was the conclusory allegation of the Assistant United States Attorney, based upon reports and information furnished by the Federal Bureau of Investigation, that the real property was subject to forfeiture to the United States of America.<sup>144</sup>

Upon the filing of the complaint, a deputy clerk of the district court issued the United States Attorney warrants for the seizure of the property pursuant to the procedures outlined in supplemental rule C(3). Under the authority of these warrants the government seized the property and ejected the guests. Five days later, the owners of the property filed an emergency motion for the return of the seized properties, and Judge Gonzalez heard the motion the next day.

---

138. *Id.* at ii.

139. 612 F. Supp. 1492 (S.D. Fla. 1985).

140. *Id.* at 1494.

141. *Id.*; *United States v. Spina*, No. 82-6032-CR-Conzalez (S.D. Fla.) (unpublished order dismissing indictment on July 1, 1986).

142. 612 F. Supp. at 1494.

143. 21 U.S.C. § 881(h) (Supp. III 1985).

144. 612 F. Supp. at 1494.

Seven days later, Judge Gonzalez issued an opinion striking down the seizure as a violation of the fifth amendment under the *Sniadach-Fuentes* line of cases.<sup>145</sup> The court interpreted *Calero-Toledo* to authorize warrantless seizures of movable property, but distinguished the case for immovable real property, when such exigent circumstances were unlikely.<sup>146</sup> The court emphasized the difference between a movable yacht and real property and discussed the alternative, less intrusive means, such as notices of lis pendens, available to the government to protect its interest in the property.<sup>147</sup> Finally, the court dismissed the complaint for failure to allege properly and objectively a claim for which relief may be granted and gave the government ten days to amend.<sup>148</sup> Instead of amending its complaint, the government filed notice of appeal. The government then, possibly on instructions from higher echelons in the Justice Department, withdrew its appeal.<sup>149</sup>

Several other lower courts have followed or cited with approval Judge Gonzalez's fifth amendment analysis in *Dixie Highway*.<sup>150</sup> In particular, these courts have adopted *Dixie Highway*'s distinguishing of *Calero-Toledo* based on the difference between a movable yacht and immovable real property.<sup>151</sup> Although Judge Gonzalez did not address the fourth amendment question in *Dixie Highway*, other courts can use his focus on the type of property seized to distinguish warrantless forfeiture seizures of automobiles.<sup>152</sup> The decision also has the merit of being consistent with Supreme Court cases such as *Ewing* that appear not to require pre-seizure judicial authorization prior to a forfeiture seizure of contraband.<sup>153</sup>

Although the court in *Dixie Highway* remained silent, it probably speculated that the government may have been trying to use the civil forfeiture laws to attack an individual suspected of criminal activity, but against whom the government lacked sufficient evidence to bring an indictment.<sup>154</sup> Two days after Judge Gonzalez's decision, the Tenth Circuit, faced with a similar problem, formulated an alternative method for resolving warrantless forfei-

---

145. *Id.* at 1495.

146. *Id.* at 1496.

147. *Id.* at 1497.

148. *Id.* at 1498.

149. *United States v. Certain Real Property Located at 4880 S.E. Dixie Highway*, 628 F. Supp. 1467, 1469 (S.D. Fla. 1986) (*Dixie Highway II*), *aff'd on other grounds*, No. 86-5245, slip op. 1896 (11th Cir. Mar. 11, 1988).

150. *United States v. 124 East North Ave.*, 651 F. Supp. 1350, 1355-56 (N.D. Ill. 1987); *United States v. Life Ins. Co. of Va. Single Premium Whole Life Policy*, 647 F. Supp. 732, 741 (W.D.N.C. 1986); *United States v. A Parcel of Real Property Commonly Known as: 3400-3410 West 16th Street*, 636 F. Supp. 142, 145 (N.D. Ill. 1986); *United States v. \$128,035 in U.S. Currency*, 628 F. Supp. 668, 674 (S.D. Ohio 1986).

151. *United States v. A Parcel of Real Property Commonly Known as: 3400-3410 West 16th Street*, 636 F. Supp. at 145; *United States v. 124 East North Ave.*, 651 F. Supp. at 1355-56.

152. 612 F. Supp. at 1496.

153. *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 598 (1950).

154. *United States v. Spina*, No. 82-6032-CR-Connalez (S.D. Fla.) (unpublished order dismissing indictment on July 1, 1986); *cf. United States v. \$39,000 in Canadian Currency*, 801 F.2d 1210, 1219 (10th Cir. 1986) (government's act of freezing suspect's assets through 10% civil forfeiture statutes while criminal investigation continues causes grave concern).

ture seizures. In *United States v. \$39,000 in Canadian Currency*<sup>155</sup> the court did not reach the question of the constitutionality of the forfeiture statute, but construed the pleading requirements of supplemental rule E(2)(a)<sup>156</sup> so as to avoid the constitutional question.<sup>157</sup> Rule E(2)(a) directs that the complaint in a forfeiture case shall state the circumstances from which the case arises with such particularity as to enable the defendant and claimant to frame responsive pleadings.<sup>158</sup> In the three consolidated cases that comprised *Canadian Currency*, the government's complaint against the property made the conclusory allegation that the property was subject to forfeiture under 21 U.S.C. section 881(a). The government alleged no specific facts as to why this property was subject to forfeiture. The court held that the government's pleadings had failed to meet the particularity requirements of supplemental rule E(2)(a).<sup>159</sup>

The Tenth Circuit's holding partially constitutes an exercise in technical jurisprudence to avoid a serious constitutional question, but the decision also has some teeth. In the usual civil in rem drug forfeiture case, the government prefers to file a complaint with conclusory allegations because concurrent parallel comprehensive criminal investigations often are proceeding.<sup>160</sup> In such circumstances, as the Tenth Circuit noted, the criminal rather than the civil forfeiture provisions are appropriate.<sup>161</sup> By strictly construing against the government the particularized pleading requirements of supplemental rule E(2)(a), a court avoids resolving the tension between the fifth amendment cases and the fourth amendment cases.<sup>162</sup> The Eleventh Circuit Court of Appeals also has adopted this mode of analysis.<sup>163</sup> Since filing particularized pleadings is a simple matter and the government continues to bring civil forfeiture cases without tandem criminal proceedings, this approach only postpones resolution of the difficult constitutional issue.

The First Circuit was the first court to adopt a third, and perhaps most popular, line of analysis. In its decision affirming a lower court's ruling that the government return seized property to its owner, the First Circuit indi-

155. 801 F.2d 1210 (10th Cir. 1986).

156. Supplemental Rules for Certain Admiralty and Maritime Claims, 28 U.S.C. rule E(2)(A) (1982).

157. 801 F.2d at 1219 n.8.

158. Supplemental Rules for Certain Admiralty and Maritime Claims, 28 U.S.C. rule E(2)(A) (1982).

In actions to which this rule is applicable the complaint shall state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading.

*Id.*

159. *Canadian Currency*, 801 F.2d at 1220-22.

160. *Id.* at 1218.

161. *Id.* at 1219 n.7. "Although the issue is not squarely presented in this case, the wholesale use of civil forfeiture proceedings causes us grave concern when the Government has clearly focused its law enforcement energies and resources upon a person and attempts to restrain his property in anticipation of formal criminal proceedings." *Id.*

162. *Id.* at 1219 n.8.

163. *United States v. Certain Real Property Located at 4880 S.E. Dixie Highway, No. 86-5245*, slip. op. 1896 (11th Cir. Mar. 11, 1988); *United States v. \$38,000 in U.S. Currency*, 816 F.2d 1538, 1547-48 (11th Cir. 1987).

cated in dictum that forfeiture seizures pursuant to the Supplemental Rules violated the fourth amendment.<sup>164</sup> In *In re Kingsley*<sup>165</sup> the government, on the basis of a secret affidavit, obtained a warrant from a magistrate for the seizure of all Kingsley's worldly goods, including his home, his girlfriend's car, her diamond ring, his clothes, food, toothbrush, dogs and cockateel, and several bank accounts, on the theory that Kingsley purchased all of his possessions with the proceeds of illegal drug sales. The government moved to impound the affidavits on the theory that disclosure of the affidavits would jeopardize the government's long-term investigation into the illegal narcotics activities of individuals mentioned in the affidavits. The government asserted that it could have conducted the seizure without a warrant, and therefore a seizure pursuant to a clerk's warrant did not violate the fourth amendment. The district court rejected the government's greater-includes-the-lesser argument, holding that the forfeiture statute still required the review of a detached judicial officer before the clerk could issue a warrant.<sup>166</sup>

The district court ordered Kingsley's possessions returned to him, but entered a preliminary injunction against Kingsley, restraining him from alienating the property pending the forfeiture proceeding.<sup>167</sup> Upon the government's appeal, the First Circuit affirmed.<sup>168</sup> Two of the three judges on the panel, however, would have applied an even more stringent test than the district judge. Judge Coffin wrote that due process required that the government demonstrate to a magistrate that preseizure notice would render the property unavailable and that a less restrictive means of protecting the governmental interest in the property did not exist.<sup>169</sup> Judge Coffin cited for authority the criminal forfeiture procedures, although the government brought the case under the civil in rem forfeiture procedures of section

---

164. *In re Kingsley*, 802 F.2d 571, 578 (1st Cir. 1986).

165. *Id.*

166. *In re Kingsley*, 614 F. Supp. 219, 223 (D. Mass. 1985). The court stated:

[I]f the government had merely gone before the clerk of the court as Rule C of the Supplemental Rules provides and procured a warrant for the arrest of petitioner's property upon the filing of a verified complaint, would that procedure—without more—be legal? The Court has concluded that it would not. The Court holds that it is necessary in § 881 cases for a magistrate or other detached judicial officer to review the clerk's warrant prior to its issuance to insure it satisfies the Fourth Amendment's requirements of probable cause and particularity.

*Id.*

167. *Id.* at 226.

168. 802 F.2d at 579.

169. *Id.* at 580. Judge Coffin wrote:

I also agree with my brother Torruella that the government's seizure of Kingsley's home in this case violated due process. Prior to initiating the preindictment seizure of a home pursuant to 21 U.S.C. § 881, the government must be required to demonstrate before a magistrate that preseizure notice would likely render the property unavailable for forfeiture *and* that less restrictive means to protect the legitimate governmental interest in the property do not exist. Absent such extraordinary circumstances, due process does not permit the government to initiate the forfeiture of a home by preindictment seizure without first affording the opportunity for an adversary hearing.

*Id.* (citation omitted) (emphasis in original).

881.<sup>170</sup> Like the court in *Canadian Currency*, Coffin appeared concerned that the government had used the civil forfeiture procedures to avoid the more stringent procedures of the criminal forfeiture laws, with the intention to punish the owner.<sup>171</sup> In his dissent Judge Torruella agreed with the majority's decision to affirm the district court's order that the government return Kingsley's property, but felt that the court should have found a substantive denial of due process in order to dismiss the government's case altogether.<sup>172</sup>

The *Kingsley* court's analysis resolved the problem posed by *Calero-Toledo* by rendering the fifth amendment analysis of due process almost irrelevant to forfeiture seizures. The analysis implied that, at least in the case of forfeiture seizures, citizens possess greater rights under the fourth amendment than under the fifth amendment. The question remains, however, of whether the *Kingsley* court intended to overrule *sub silentio* its holding in *United States v. One 1975 Pontiac Lemans*,<sup>173</sup> which held a warrantless seizure of an automobile used in bookmaking constitutional.<sup>174</sup> One might interpret Judge Torruella's favorable citation to *Dixie Highway*<sup>175</sup> as indicating a less hostile, if not different, result in the next case of an automobile seizure.

## V. CONCLUSION

The 1984 amendments placed an enormous amount of power in the government's hands and gave the government an incentive to abuse that power. The facts in some of the cases are so egregious that the government, at least in one instance, has proven reluctant to appeal adverse decisions.<sup>176</sup> Many cases border on violations of substantive due process.<sup>177</sup>

When litigants challenge governmental seizures of property pursuant to rule C(3), courts sometime merely dismiss the government's complaint without prejudice to refile, or quash the warrant without prejudice to reapply for a new one.<sup>178</sup> Since the government can present evidence to show probable cause at the hearing on the constitutionality of the seizure, the government may be able to show the court that probable cause exists to issue a judicial warrant before being required to return the property. This fact permits the

170. *Id.*

171. *Cf.* *United States v. \$39,000 in Canadian Currency*, 801 F.2d 1210, 1219 (10th Cir. 1986).

172. *In re Kingsley*, 802 F.2d at 581.

173. 621 F.2d 444 (1st Cir. 1980).

174. *Id.* at 450.

175. 802 F.2d at 582 (citing *Dixie Highway*, 612 F. Supp. 1492 (S.D. Fla. 1985)).

176. *Dixie Highway II*, 628 F. Supp. 1467, 1469 (S.D. Fla. 1986), *aff'd on other grounds*, No. 86-5245, slip op. 1896 (11th Cir. Mar. 11, 1988).

177. *In re Kingsley*, 614 F. Supp. 219, 226 (D. Mass. 1985) ("Such an intrusion borders on a substantive due process violation, *cf. Rochin v. California*, 342 U.S. 165 (1952), and the public interest demands it be redressed.").

178. *United States v. 124 East North Ave.*, 651 F. Supp. 1350, 1357 (N.D. Ill. 1987); *United States v. \$128,035.00 in U.S. Currency*, 628 F. Supp. 668, 676 (S.D. Ohio 1986). *Contra United States v. A Parcel of Real Property Commonly Known as: 3400-3410 West 16th Street*, 636 F. Supp. 142, 147 (N.D. Ill. 1986).



government to correct its behavior without suffering a penalty for violation of the constitution. The lawyers for the owners, faced with the likelihood that they will achieve little by a motion to quash or a motion to dismiss on grounds of an illegal seizure, may consider filing the motion as a waste of time.

In *Dixie Highway* Judge Gonzalez permitted the government to refile its complaint, but also required the government to pay attorneys' fees and damages to the owners.<sup>179</sup> This penalty appeared to create an effective method to halt governmental abuses. If failure to follow constitutional procedures will result in a stiff judgment for attorneys' fees, the government may use more care. Payment of attorneys' fees is possible under Federal Civil Procedure Rule 11<sup>180</sup> and under the Equal Access to Justice Act.<sup>181</sup> Common law also allows civil damages in certain circumstances.<sup>182</sup> Absent such a penalty, however, nothing prevents law enforcement officers from continuing to circumvent the criminal process through the use of seizure warrants issued under supplemental rule C(3).

The driving force behind the surge in the number of forfeiture abuses appears to be the provision of the law permitting the law enforcement officials to keep seized property.<sup>183</sup> This provision and the expansion of types of property now subject to government forfeiture provide law enforcement officials with vast new powers and incentives. Upon the U.S. Attorney's assessment of probable cause, the government may seize private property. Few, if any, limitations exist on the government's power to make seizures under the drug statutes. A preseizure judicial review would place a minimal burden on law enforcement officers, provide an important safeguard against erroneous deprivations of property, and meet the constitutionally required constraint on what is otherwise the unrestricted power of the government to seize private property under the ancient name of forfeiture.

---

179. *Dixie Highway*, 612 F. Supp. at 1498; *Dixie Highway II*, 628 F. Supp. at 1472.

180. FED. R. CIV. P. 11.

181. Title II, Pub. L. No. 96-481, §§ 201-208, 94 Stat. 2325 (1980), *extended and amended*, Pub. L. No. 99-80, 1985 U.S. CODE CONG. & ADMIN. NEWS (99 Stat.) 132 (codified as amended at 5 U.S.C. § 504 (1982 & Supp. III 1985), 15 U.S.C. § 643b (1982 & Supp. III 1985), 28 U.S.C. § 2412 (1982 & Supp. III 1985), 42 U.S.C. § 1988 (1982 & Supp. III 1985)); *see also Dixie Highway II*, 628 F. Supp. at 1471-72; *Lee v. Johnson*, 801 F.2d 115, 116-17 (3d Cir. 1986) (awarding attorneys' fees discourages unnecessary litigation, thereby implementing policies of Equal Access to Justice Act), *aff'd on other grounds*, No. 86-5245, slip. op. 1896 (11th Cir. Mar. 11, 1988).

182. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 395 (1971) (damages may be obtained from government for injuries consequent upon violation of fourth amendment).

183. *See supra* notes 129-38 and accompanying text.