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UNITED STATES V. DUSENBERY: SUPREME COURT
SILENCE AND THE LINGERING ECHO OF DUE PROCESS
VIOLATIONS IN CIVIL FORFEITURE ACTIONS

DAVID F. BENSON*

INTRODUCTION

Civil forfeiture¹ is a statutory tool created to ensure that individuals do not profit from crime,² whereby all property substantially connected to illegal activity is forfeited to the federal government (“government”).³ This practice extends to nearly every area of the law,⁴ but is most commonly associated with drug trafficking.⁵ Accordingly, today civil forfeiture is an integral part of our criminal justice system,⁶ as the government uses proceeds from such actions to help finance the war on drugs⁷ and to build new prisons.⁸

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1. This Comment addresses civil forfeiture in the context of 21 U.S.C. § 881 (1994). For an overview of the numerous other civil forfeiture statutes governing nearly all areas of the law, consult *infra* note 2.

2. David Pimentel, *Forfeiture Procedure in Federal Court: An Overview*, 183 F.R.D. 1, 6 (1999).

3. See *United States v. A Single Family Residence located at 900 Rio Vista Blvd.*, 803 F.2d 625, 629 (11th Cir. 1986) (“[T]he government is not required to show property is owned by drug trafficker, but rather that it has a substantial connection to a drug transaction.”).

4. See Pimentel, *supra* note 2, at app. A (listing 165 examples of property subject to civil forfeiture in areas of the law ranging from agriculture to intellectual property to wildlife resources).

5. See *id.* at 13. For example, under 21 U.S.C. § 881(a), nearly everything associated with the manufacture, sale, and distribution of illegal drugs can be forfeited to the government, including firearms, money, cars, and homes. See *id.* at 7.

6. Shannon T. Noya, Comment, *Hoisted by Their Own Petard: Adverse Inferences in Civil Forfeiture*, 89 J. CRIM. L. & CRIMINOLOGY 493, 493 n.4 (1996) (quoting UNITED STATES DEPARTMENT OF JUSTICE, CRIMINAL DIVISION, ASSET FORFEITURE OFFICE, FORFEITURES

Seeing that filings of civil forfeiture cases are expected to increase,⁹ the Supreme Court recently attempted to provide the circuits with guidance on this issue, directing that all defendants in such cases “must receive notice and an opportunity to be heard before the [g]overnment deprives them of property.”¹⁰ While this instruction has clarified one aspect of civil forfeiture claims, the Court did not determine how to resolve cases in which due process has been violated because the defendant did not receive proper notice of an administrative forfeiture proceeding and the statute of limitations for filing a judicial forfeiture action expired before the government became aware of this fact.¹¹

This was precisely the question presented before the Sixth Circuit in *United States v. Dusenbery*.¹² With limited case law available on the issue,¹³ the *Dusenbery* court concluded that the proper remedy was to restore the right that a timely Rule 41(e) motion under the Federal Rules of Criminal Procedure (“Rule 41(e) motion”)¹⁴ would have provided—“the right to judicially contest the forfeiture and to put the [g]overnment to its proofs under a probable cause standard.”¹⁵

VOLUME I: INTRODUCTION TO CIVIL STATUTES V (1984) (“[Civil] forfeiture has become one of the primary law enforcement tools’ because it is a “powerful” weapon against crime.”)).

7. *Id.* at 493–94.

8. *Id.* at 493 n.6 (citing Arthur W. Leach & John W. Malcolm, *Criminal Forfeiture: An Appropriate Solution to the Civil Forfeiture Debate*, 10 GA. ST. U. L. REV. 241, 251 nn.37–38 (1994)).

9. Pimentel, *supra* note 2, at 3.

10. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 48 (1993). Notably, the Supreme Court concluded that the adequacy of such notice is determined under the *Mullane* test of “reasonableness under the circumstances.” *Dusenbery v. United States*, 534 U.S. 161, 122 S. Ct. 694, 699 (2002) (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)). For a detailed explanation of this case, see *infra* note 45.

11. The circuits apparently agree that if the defendant does not receive proper notice, and the government becomes aware of this fact prior to the running of the statute of limitations, the government may “correct its error and . . . commence a judicial forfeiture proceeding.” *United States v. Volanty*, 79 F.3d 86, 88 (8th Cir. 1996).

12. 201 F.3d 763, 766 (6th Cir. 2000) (defining the issue before the court as: “What is the proper remedy for a due process violation in an administrative forfeiture proceeding when the statute of limitations for filing a judicial forfeiture action has expired?”).

13. The *Dusenbery* court acknowledged that only three other circuits had previously ruled on this issue. *Id.* See *United States v. Marolf*, 173 F.3d 1213 (9th Cir. 1999); *Clymore v. United States*, 164 F.3d 569 (10th Cir. 1999); *Boero v. DEA*, 111 F.3d 301 (2d Cir. 1997).

14. The relevant portion of Rule 41(e) states that “[a] person aggrieved by an unlawful search and seizure or by the deprivation of property may move the district court for the district in which the property was seized for the return of the property on the ground that such person is entitled to lawful possession of the property.” To be timely, a Rule 41(e) motion must be filed within six years from the time the property was forfeited. *Marolf*, 173 F.3d at 1220 n.1 (Rymer, J., concurring).

15. *Dusenbery*, 201 F.3d at 768.

Part I of this Comment details the procedures and judicial history of civil forfeiture necessary to analyze the *Dusenbery* decision. Specifically, this section discusses the four scenarios that may result in a civil forfeiture proceeding, and examines the rulings and reasoning adopted by other circuits leading up to this case. Part II presents the facts of *Dusenbery*, details the procedural posture of this case, and evaluates the Sixth Circuit's application of the law to these facts. Part III inquires into the *Dusenbery* court's rationale supporting the majority's holding, and suggests that, based upon better reasoned case law, the Supreme Court should have granted certiorari and reversed the Sixth Circuit's holding by endorsing the *Dusenbery* dissent's logic.¹⁶

I. CIVIL FORFEITURE: PROCEDURES AND JUDICIAL HISTORY

The government is statutorily required to commence all civil forfeiture actions "within five years after the time when the alleged offense was discovered."¹⁷ Such actions begin when the government seizes the property in question.¹⁸ Within sixty days of this seizure, the government must provide all interested parties written notice of its intent to forfeit.¹⁹ The interested parties are then given twenty days from the time of notice to contest the forfeiture.²⁰ If the parties fail to

16. The Supreme Court has indicated that it may be necessary, "in an appropriate case," to reevaluate this area of civil forfeiture, given the current practice under 21 U.S.C. § 881. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 82 (Thomas, J., dissenting). Interestingly, while *Dusenbery* appeared to be such an "appropriate" case, as it not only demonstrates the current practice under § 881, but also highlights the current conflict between the circuits regarding the relationship between the due process notice requirement and the statute of limitations in civil forfeiture cases, the Supreme Court denied *Dusenbery*'s petition for writ of certiorari on October 10, 2000. *Dusenbery v. United States*, 531 U.S. 925 (2000).

17. *Marolf*, 173 F.3d at 1215. Although Congress enacted 21 U.S.C. § 881 to give the government the power of forfeiture in drug related offenses, the procedures for such forfeitures are found in the Tariff Act of 1930, which "permits 'administrative forfeitures' of property valued \$500,000 or less." *United States v. Woodall*, 12 F.3d 791, 792 (8th Cir. 1993) (citing 21 U.S.C. §§ 1607-1609).

18. See, e.g., *Marolf*, 173 F.3d at 1215 (fifty-five foot boat seized after investigation); *Boero*, 111 F.3d at 303 (wallet and currency seized upon arrest); *United States v. Volanty*, 79 F.3d 86, 87 (8th Cir. 1996) (drugs, firearm, and \$19,996 seized upon arrest); *Woodall*, 12 F.3d at 792 (cash seized during booking).

19. See *Dusenbery v. United States*, 534 U.S. 161, 122 S. Ct. 694, 699 (2002) (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)) (noting that the government is not required to provide actual notice to the interested parties; rather, the adequacy of such notice is determined under the *Mullane* test of "reasonableness under the circumstances").

20. To properly contest an administrative civil forfeiture, an interested party must file a claim with the government and attach "a cost bond . . . or a declaration of an inability to file the cost bond." *Boero*, 111 F.3d at 304.

contest, the property is administratively forfeited to the government.²¹ If the forfeiture is contested, however, the government is required to refer the claim to the United States Attorney for the district where the seizure occurred in order to commence judicial forfeiture proceedings.²² During the judicial proceedings, the government need only establish that probable cause exists to carry its burden of proof.²³ Once probable cause is shown, the claimant bears the burden to demonstrate, by a preponderance of the evidence, that the property is not subject to forfeiture because either (1) the property is not related to illegal drug activity or (2) the claimant is an innocent owner lacking knowledge of the property's connection with the sale, manufacture, or distribution of drugs.²⁴

In light of these procedural requirements, a civil forfeiture case may progress in one of four manners, each requiring a unique resolution. First, if the government affords the interested parties sufficient notice of the pending claim, commences the civil forfeiture action within the five-year statute of limitations, and the interested parties do not challenge the action, the property is administratively forfeited without court involvement.²⁵ Second, if the government follows the requisite procedures, and the interested parties contest the government's claim, a district court judge must decide the case on its merits.²⁶ Third, if the interested parties contest where the government

21. *Woodall*, 12 F.3d at 793.

22. *Boero*, 111 F.3d at 304. As noted in *Woodall*, it is well established that "[j]udicial review is a fundamental safeguard against government agencies and public officials who wrongfully seize or hold a citizen's property." 12 F.3d at 793 (citing *Land v. Dollar*, 330 U.S. 731, 738 (1947); *United States v. Lee*, 106 U.S. 196, 220-21 (1882)). Venue for such claims is valid in "(1) the district in which the forfeiture 'accrues,' (2) the district where the property is found, as well as, (3) any district into which the property is brought." *Pimentel*, *supra* note 2, at 12 (citing 28 U.S.C. § 1395).

23. "Probable cause" requires only that the government have "reasonable ground for belief of guilt supported by less than prima facie proof, but more than mere suspicion." *United States v. A Single Family Residence* located at 900 Rio Vista Blvd., 803 F.2d 625, 628 (11th Cir. 1986) (internal citations omitted). Because this determination is made in light of the "realities of normal life," the government appears to experience little difficulty in establishing probable cause. *Id.* (internal citations omitted).

24. *Boero*, 111 F.3d at 304-05.

25. Before arguing that the government violated his due process rights by failing to provide adequate notice of its intent to forfeit, the defendant in *Woodall* had \$1,811 administratively forfeited. 12 F.3d at 792. The Eighth Circuit remanded the case to determine if the defendant had received proper notice, stating that if he was not apprised with sufficient notice, the government could either return his property or start a judicial forfeiture proceeding in district court. *Id.* at 795. The statute of limitations was not at issue in *Woodall*. See *id.* at 792.

26. The interested parties in *A Single Family Residence* followed this procedure, but were unable to demonstrate, beyond a preponderance of the evidence, that the home in question was not subject to forfeiture under 21 U.S.C. § 881(a)(6). 803 F.2d at 628-29.

pursues a civil forfeiture action within the statutory time period, without providing adequate notice, the government may “begin anew and . . . file forfeiture proceedings in district court.”²⁷ The fourth situation occurs when the government fails both to apprise the interested parties of the pending civil forfeiture proceedings, and to commence the action within the statute of limitations. This situation is currently the cause of great disagreement among the circuits, resulting in two views as to the proper remedy: (1) void the forfeiture, thereby returning the property to the interested party regardless of guilt,²⁸ or (2) grant a judicial hearing on the merits.²⁹

On April 14, 1997, the Second Circuit became, arguably,³⁰ the first federal appellate court to rule on a civil forfeiture case involving both insufficient notice and the running of the statute of limitations in *Boero v. Drug Enforcement Administration*.³¹ In *Boero*, the defendant “[sought] the return of \$1,799.46 in cash that was administratively forfeited by the Drug Enforcement Agency (“DEA”) on January 31, 1991,” after being convicted under federal narcotics laws.³² With the DEA admitting that it did not give Boero adequate notice of its intent to forfeit his funds, the court concluded that Boero was entitled to a hearing on the merits in district court.³³ The court failed to explicitly comment on the statute of limitations issue, stating only that the district court should have determined the merits of the forfeiture rather than “allow[] Boero to pursue an administrative remedy, over five years from the date of the initial seizure, as if an improper forfeiture had never occurred.”³⁴

Nearly two years later, in *Clymore v. United States*, the Tenth Circuit specifically addressed both the notice and statute of limitations issues.³⁵ There, after pleading guilty to marijuana charges, Clymore filed a Rule 41(e) motion demanding the return of property

27. *United States v. Volanty*, 79 F.3d 86, 88 (8th Cir. 1996).

28. *See United States v. Marolf*, 173 F.3d 1213 (9th Cir. 1999); *Clymore v. United States*, 164 F.3d 569 (10th Cir. 1999).

29. *See United States v. Dusenbery*, 201 F.3d 763 (6th Cir. 2000); *Boero*, 111 F.3d 301.

30. In his concurring opinion in *Marolf*, Judge Rymer questioned whether the *Boero* court really addressed the statute of limitations issue in its holding, as she stated “[n]othing in *Boero* suggests that the court actually considered and ruled on the import of the statute of limitations.” 173 F.3d at 1221 (Rymer, J., concurring).

31. 111 F.3d at 301.

32. *Id.* at 303.

33. *Id.* at 307.

34. *Id.* at 305.

35. 164 F.3d 569 (10th Cir. 1999).

forfeited to the government.³⁶ Clymore based his motion upon the fact that he had not received sufficient notice concerning the government's intent to forfeit and argued that the government was precluded from commencing judicial forfeiture proceedings because the statute of limitations had expired.³⁷ In ruling for Clymore, the court concluded that (1) "a forfeiture accomplished without adequate notice is void and must be vacated" and (2) "the statute of limitations . . . should be . . . allowed to operate, subject, of course, to any available government arguments against it."³⁸

With the Circuits now split, the Ninth Circuit was next to decide this issue in *United States v. Marolf*.³⁹ The DEA seized Marolf's fifty-five foot boat on July 12, 1991, during a marijuana smuggling investigation, but failed to send him notice of the seizure, despite knowing that he was the vessel's actual owner.⁴⁰ On May 18, 1992, Marolf pled guilty to marijuana charges, and was sentenced to prison.⁴¹ Marolf filed a Rule 41(e) motion on December 2, 1996, requesting the monetary equivalent of his boat, relying on the fact that he had not been given adequate notice of the government's intent to forfeit.⁴² Recognizing that the statute of limitations expired on July 11, 1996,⁴³ the court followed the *Clymore* court's rationale by concluding that (1) the administrative forfeiture was void because Marolf did not receive proper notice, and (2) the expiration of the statute of limitations prevented the government from initiating forfeiture proceedings.⁴⁴

36. *Id.* at 570. Specifically, Clymore sought the return of nine items of property, including: (1) a 1990 Honda Accord; (2) a Cessna TU 206 aircraft; (3) a 1988 Ford truck; (4) \$2,000 in United States currency; (5) a second Cessna TU 206 aircraft; (6) another \$4,510 in United States currency; (7) approximately three million Mexican pesos; (8) an ICOM portable transceiver; and (9) a battery pack for the transceiver. *Id.* at 571-72.

37. *Id.* at 572.

38. *Id.* at 574.

39. 173 F.3d 1213 (9th Cir. 1999).

40. *Id.* at 1215.

41. *Id.*

42. *Id.* at 1215-16. The parties agreed that the government had sold Marolf's boat; thus it was impossible for the government to return the actual property. *Id.* at 1216. Accordingly, the proper remedy was to compensate Marolf for his loss, which, in this case, was the monetary value of his boat. *See id.* at 1220.

43. *Id.* at 1215.

44. *Id.*

II. *UNITED STATES V. DUSENBERY*A. *Facts*

Larry Dean Dusenbery was convicted for possessing and distributing cocaine in 1986.⁴⁵ While incarcerated, he continued to supervise his cocaine distribution network, which led to a “1994 conviction for engaging in a continuing criminal enterprise.”⁴⁶ In connection with Dusenbery’s 1994 conviction, the government administratively forfeited cash and checks totaling \$119,568.90 and two automobiles at various times between 1990 and 1992.⁴⁷ On July 10, 1996, Dusenbery moved for the return of this personal property, claiming that the government failed to provide adequate notice of its intent to forfeit his belongings.⁴⁸ Notably, in his Rule 41(e) motion, Dusenbery did not claim “that the statute of limitations had already expired when the [g]overnment sent the allegedly defective notices.”⁴⁹

45. *United States v. Dusenbery*, 201 F.3d 763, 764 (6th Cir. 2000). “In connection with this conviction, the [g]overnment obtained civil forfeiture of several items of Dusenbery’s property, including \$21,940.00 in U.S. Currency and a 1984 Chevrolet Monte Carlo.” *Id.* at n.1. In an action separate from the instant case, Dusenbery contested this first civil forfeiture action in 1996 on the grounds that his due process rights were violated because he did not receive actual notice of the government’s intent to forfeit his property. *See United States v. Dusenbery*, 223 F.3d 422, 424 (6th Cir. 2000). The court refused to recompense Dusenbery because it concluded that the government had provided him sufficient notice of the civil forfeiture proceedings by sending a certified letter to his attention at the prison where he was incarcerated. *Id.* Furthermore, the court noted that regardless of notice, he could not be recompensed for property that he “admitted that he purchased . . . with proceeds from drug sales.” *Id.* Understanding that his admission precluded him from recovering under the theory that “one never acquires a property right to drug proceeds,” Dusenbery renewed his challenge of the forfeiture proceedings on the basis that the government’s use of certified mail did not constitute sufficient notice under the Due Process Clause. *Id.* at 425 (quoting *United States v. Salinas*, 65 F.3d 551, 553 (6th Cir. 1995)). The Supreme Court concluded that the government’s use of “certified mail addressed to [Dusenbery] at the correctional facility where he was incarcerated” satisfied due process requirements under the *Mullane* test of reasonableness under the circumstances. *Dusenbery v. United States*, 534 U.S. 161, 122 S. Ct. 694, 700 (2002).

The Supreme Court’s holding has no bearing on the analysis presented in the Comment since the Sixth Circuit reached its decision on the assumption that Dusenbery’s due process rights had been violated and his contention that he was not at the federal prison where the Government allegedly sent him notice “because he had been transferred to a local jail to await trial.” *Dusenbery*, 201 F.3d at 764.

46. *Id.*

47. *Id.* Dusenbery’s property was forfeited chronologically as follows: (1) Oct. 19, 1990: \$18,672.74 and \$80,141.93; (2) Apr. 20, 1992: a 1990 Oldsmobile Delta 88 convertible; (3) Apr. 28, 1992: a 1956 Corvette convertible; and (4) July 29, 1992: a cashier’s check in the amount of \$20,754.23. *Id.*

48. *Id.* As previously mentioned, the personal property connected with Dusenbery’s 1986 conviction is not at issue in this case. *See supra* note 45.

49. *Dusenbery*, 201 F.3d at 764.

B. The District Court's Holding: Hearing on the Merits Constitutes a Proper Remedy

The district court denied Dusenbery's Rule 41(e) motion, finding that he had received proper notice, and that the government had adhered to civil forfeiture administrative procedures.⁵⁰ Dusenbery appealed, and the Sixth Circuit reversed and remanded the case for an evidentiary hearing, stating that the record failed to demonstrate that he had been provided sufficient notice of forfeiture.⁵¹ On remand, the government filed documents with the district court indicating that Dusenbery "never received actual notice of the pending forfeitures of his property" and submitted a motion for summary judgment that "assumed insufficient notice," thus making the evidentiary hearing unnecessary.⁵² The district court then began a judicial forfeiture proceeding, despite Dusenbery's objection that such a proceeding was "barred by the five-year statute of limitations."⁵³ After Dusenbery failed to rebut the government's showing of probable cause, the district court entered a forfeiture judgment in favor of the government.⁵⁴

C. The Sixth Circuit's Holding: Hearing on the Merits Constitutes a Proper Remedy

On appeal, the Sixth Circuit affirmed the district court's decision that a hearing on the merits is the proper remedy for a civil forfeiture action in which the government violated due process by failing to provide adequate notice and allowed the five-year statute of limitations to run.⁵⁵ In reaching this conclusion, the *Dusenbery* court considered *Boero*, *Clymore*, and *Marolf* before ultimately adopting the reasoning in *Boero*.⁵⁶

In *Dusenbery*, the Sixth Circuit rejected the reasoning in *Clymore* and *Marolf* by stating that the statute of limitations has no bearing under these circumstances because "the [g]overnment is not

50. *Id.*

51. *Id.* at 764–65.

52. *Id.* at 765.

53. *Id.*

54. *Id.*

55. *Id.* at 768.

56. *Id.* at 767–68.

required to institute ‘new’ forfeiture proceedings.”⁵⁷ The Sixth Circuit then stated that the ineffective notice should be treated as voidable, not void, so that it has the effect of tolling the statute of limitations.⁵⁸ In other words, the *Dusenbery* court concluded that because the government attempted to commence the civil forfeiture proceeding within the statutory period, a decision on the merits should not be barred simply because the interested party, namely Dusenbery, was not placed on notice.

The *Dusenbery* court proffered four reasons for its decision. First, the court stated that “[w]e fail to see the equity in allowing the claimant more than he would have been accorded in the first place; namely the fortuitous benefit of avoiding the forfeiture process altogether.”⁵⁹ Second, the court noted that the government made an effort to send notice of forfeiture to the defendant; thus, as an equitable remedy, the case should be decided on its merits.⁶⁰ Third, the court observed that despite the fact that Dusenbery never received actual notice of forfeiture, he was not “completely blindsided, because the property in question had obviously been out of his possession since the date of seizure.”⁶¹ Finally, the court cautioned that to hold otherwise “might encourage some claimants with borderline notices and nothing to lose . . . to sit on their Rule 41(e) motions until the five-year statute of limitations has run.”⁶²

D. Judge Cole’s Dissenting Opinion: Forfeiture Is Void and Further Proceedings Are Time-Barred

Judge Cole dissented from the majority’s decision in *Dusenbery* on three grounds. First, Judge Cole argued that there is “no reason to determine the merits of a challenged forfeiture when the original notice was constitutionally defective and the statute of limitations has run” because “[i]nadequate notice is void.”⁶³ Second, he asserted that “there is simply no reason to disregard the statute of limitations” because there are safeguards in place, specifically “the application of

57. *Id.* at 768. Apparently, had the *Dusenbery* court categorized the forfeiture proceedings conducted after the statute of limitations had passed as “new,” then these proceedings would have been time-barred. *See id.*

58. *Id.*

59. *Id.* at 768.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 769 (Cole, J., dissenting).

laches or equitable tolling,” to prevent the “scenario the majority fears” in which “a claimant receives borderline notice and sits on a Rule 41(e) motion until the five-year statute of limitations has run.”⁶⁴ Finally, Judge Cole urged that “due process protections ought to be diligently enforced, and by no means relaxed, where a party seeks the traditionally disfavored remedy of [civil] forfeiture.”⁶⁵

III. THE SUPREME COURT OF THE UNITED STATES SHOULD HAVE GRANTED CERTIORARI AND REVERSED *DUSENBERY* BY ADOPTING JUDGE COLE’S DISSENTING OPINION

Based on a fair reading of *Boero*, *Clymore*, and *Marolf*, it is apparent that *Dusenbery* was incorrectly decided; the Sixth Circuit should have adopted Judge Cole’s dissenting opinion. Realizing that the circuits do not agree on the proper remedy for civil forfeiture cases where improper notice and the expiration of the statute of limitations are at issue, *Dusenbery* was an appropriate case for the Supreme Court to adjudicate. The Court should have granted *Dusenbery*’s petition for writ of certiorari and reversed the Sixth Circuit’s decision in *Dusenbery* because the reasons the majority cites to buttress its holding have no foundation in the law.

First, the majority stated that dismissing the civil forfeiture proceeding would have allowed *Dusenbery* to avoid the “forfeiture process altogether,” which is more than a Rule 41(e) motion affords claimants.⁶⁶ While this logic at first seems appealing, upon further inspection, it may compromise the due process rights guaranteed by the Fifth Amendment of the Constitution of the United States.⁶⁷ Specifically, the majority’s holding allows the government to forfeit property related to illegal drug activity under 21 U.S.C. § 881, and then disregards the most significant statutory protections, notice and

64. *Id.*

65. *Id.* (citing *Clymore v. United States*, 164 F.3d 569, 574 (10th Cir. 1999)).

66. *Id.* A claimant who, like *Dusenbery*, files a Rule 41(e) motion for the return of property, is given the right to a judicial hearing in “the district court for the district in which the property was seized” to determine if “such person is entitled to lawful possession of the property” in question. *Dusenbery v. United States*, 534 U.S. 161, 122 S. Ct. 694, 698 (2002). Under 21 U.S.C. § 881, if the evidence indicates that the government had probable cause to forfeit the property, and the claimant is unable to establish a defense by showing that either (1) the property is not related to illegal drug activity or (2) they are “innocent owners,” then the forfeiture stands. These are not universal defenses to all civil forfeiture statutes. See *Pimentel*, *supra* note 2, at 11 (“[t]here are many other statutes that provide for forfeiture as a criminal penalty or as a remedy available ‘upon conviction’ of a crime”).

67. See *Noya*, *supra* note 6, at 494.

the statute of limitations, once the forfeiture is challenged. Therefore, the government is able to use Congress' power to take an individual's property, and then completely ignore the statute once possession of the property is perfected. Not only is this likely contrary to Congress' intent, but also likely violates the Due Process Clause of the Fifth Amendment, which "guarantees that '[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.'"⁶⁸

Second, the fact that "this is not a situation where the government never bothered to send notices of forfeiture"⁶⁹ is irrelevant because, in its motion for summary judgment, the government conceded that Dusenbery received "insufficient notice" of its intent to forfeit his property.⁷⁰ While it is true that the government does not need to provide the defendant or his attorney with actual notice of its intent to forfeit, due process demands that notice be, at a minimum, "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."⁷¹ Here, the government's attempt to provide notice to Dusenbery was not reasonably calculated under the circumstances because the government allegedly sent notice of the pending action to Dusenbery's prison cell during a time when "he had been transferred to a local jail to await trial."⁷² Furthermore, there is no doubt that "notice could have easily been given to him,"⁷³ as the government subsequently never attempted to contact Dusenbery, despite the fact that he had been incarcerated since 1986, including when he filed his Rule 41(e) motion, and had been in the government's custody during each of the administrative forfeitures.⁷⁴ Since "[t]he forfeiture statutes 'impose no duty on a defendant to prevent the government from losing its rights through carelessness,'"⁷⁵

68. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 48 (1993).

69. *Dusenbery*, 201 F.3d at 768.

70. *Id.* at 765.

71. *Dusenbery v. United States*, 534 U.S. 161, 122 S. Ct. 694, 700 (2002) (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 309–10 (1950)).

72. *Dusenbery*, 201 F.3d at 764.

73. *See Boero v. DEA*, 111 F.3d 301, 307 (2d Cir. 1997). Like Dusenbery, Boero was also "a prisoner in custody, having been transferred to his place of incarceration directly from a federal facility, and notice could have been easily given to him." *Id.*

74. *Id.*

75. *United States v. Marolf*, 173 F.3d 1213, 1217 (9th Cir. 1999) (citing *United States v. Giovanelli*, 998 F.2d 116, 119 (2d Cir. 1993)).

there is no justification in further punishing⁷⁶ Dusenbery by taking his property when the government erred by failing to take reasonable measures to ensure that he received adequate notice and letting the statute of limitations run. Further, as Judge Cole astutely noted in his dissent, “[i]nadequate notice is void and constitutionally defective.”⁷⁷

Third, the fact that Dusenbery was not “completely blindsided”⁷⁸ by the forfeiture of his property is also of no consequence. It may be true that Dusenbery was not surprised to learn his property had been forfeited; nevertheless, the majority’s holding denied him of his constitutional right to be “informed that the matter is pending” so that he could “choose for himself whether to appear, default, acquiesce, or contest.”⁷⁹ As the Supreme Court recently noted, such notice is of paramount importance “to protect [an individual’s] use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property.”⁸⁰

Fourth, the majority’s concern that to hold otherwise “might encourage some claimants with borderline notices and nothing to lose . . . to sit on their Rule 41(e) motions until the five-year statute of limitations has run”⁸¹ has no basis in the law. Specifically, as Judge Cole observed in his dissent,⁸² should a claimant postpone filing a Rule 41(e) motion until after the statute of limitations has expired, the merits of the case will still be tried if the government “assert[s] the affirmative defense of laches,” or if the court chooses to “equitably toll a statute of limitations in the interest of justice.”⁸³ Consequently,

76. Civil forfeiture, like all civil penalties, “may constitute punishment for double jeopardy purposes if it is not remedial in nature, but serves ‘only as a deterrent or retribution.’” *United States v. Volanty*, 79 F.3d 86, 89 (8th Cir. 1996) (quoting *United States v. Halper*, 490 U.S. 435, 449 (1989)). Such an argument finds support in the Eleventh Circuit’s comment that “[t]he purpose of Section 881(a)(6) is to deter drug smuggling by depriving drug traffickers of the fruits of their labor—money and property acquired with drug proceeds.” *United States v. A Single Family Residence located at 900 Rio Vista Blvd.*, 803 F.2d 625, 631 (11th Cir. 1986). This was not at issue in *Dusenbery*.

77. *Dusenbery*, 201 F.3d at 769.

78. *Id.* at 768.

79. *United States v. Woodall*, 12 F.3d 791, 793 (8th Cir. 1999) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)).

80. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993) (quoting *Fuentes v. Shevin*, 407 U.S. 67, 80–81 (1972)).

81. *Dusenbery*, 201 F.3d at 768.

82. *Id.* at 769 (Cole, J., dissenting).

83. *United States v. Marolf*, 173 F.3d 1213, 1218 n.3 (9th Cir. 1999). The *Marolf* court explained that “[t]o assert the affirmative defense of laches, the party seeking immunity from suit must demonstrate that: (A) the opposing party inexcusably delayed the pursuit of its claim and (B) prejudice resulted from this delay. *Id.* at 1218. A court may equitably toll the statute of

if a defendant were to intentionally delay filing a Rule 41(e) motion, despite the grim picture the majority paints, it is highly unlikely that such a claimant would be successful in “avoiding the forfeiture process altogether.”⁸⁴

Finally, the majority’s holding is inequitable, as it has the practical effect of tolling the statute of limitations in civil forfeiture cases where property owners do not receive adequate notice. There is no reason to grant the government this procedural advantage, realizing that the government need only establish probable cause to carry its burden of proof in civil forfeiture cases, and has sufficient time, five years, to bring such cases. Additionally, the *Dusenbery* decision may have the practical effect of encouraging the government to negligently file civil forfeiture claims, since under the majority’s holding, there is no real penalty for failing to follow the procedures promulgated in the civil forfeiture statutes. Further, as Judge Cole warned in his dissent, courts should be wary of expanding the government’s power under these statutes, “for they impose ‘quasi-criminal’ penalties without affording property owners all of the procedural protections afforded to criminal defendants.”⁸⁵

CONCLUSION

Because Judge Cole’s dissent succinctly presents a balanced, logical solution for the treatment of civil forfeiture cases where the defendant was not afforded adequate notice of an administrative proceeding, and the statute of limitations for filing a judicial forfeiture has expired, the Supreme Court should have granted certiorari, adopted his reasoning, and settled the current disagreement among the circuits. Instead, by denying *Dusenbery*’s petition for writ of certiorari, the Supreme Court not only failed its responsibility of resolving circuit splits,⁸⁶ but also did nothing to prevent constitutional principles from being compromised,⁸⁷ or to ensure that civil forfei-

limitations “when (1) the defendant misleads the plaintiff into allowing the statutory period to expire . . . or (2) extraordinary circumstances beyond the plaintiff’s control make it impossible for him to file suit on time.” *Id.* at 1218 n.3.

84. *Dusenbery*, 201 F.3d at 768.

85. *Id.* at 769 (Cole, J., dissenting).

86. *Id.* at 766 (“Few circuits have addressed this issue, and those that have are divided.”).

87. See Noya, *supra* note 6, at 494.

tures are “enforced only when within both the letter and the spirit of the law.”⁸⁸

88. *Marolf*, 173 F.3d at 1217 (citing *United States v. One 1936 Model Ford V-8 De Luxe Coach*, 307 U.S. 219, 226 (1939)).