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Exactly How Much Process is Due? The Federal Courts Grapple with the Shifting Burdens of Proof in Civil In Rem Forfeiture Under 21 U.S.C. § 881(a)

BY DAVID A. COHEN*

“Individual freedom finds tangible expression in property rights.”¹

INTRODUCTION

As conceived and as practiced, civil forfeiture in the context of a drug-trafficking prosecution under 21 U.S.C. § 881(a) is one of the most schizophrenic concepts in modern law.² Prosecutors love it, both because it affords them the chance to collect much needed revenue³ and because it does so without the exacting standards and greater

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¹United States v. James Daniel Good Real Property, 510 U.S. 43, 61 (1993).

²The other common use of civil forfeiture is in the context of a prosecution for money laundering under 18 U.S.C. § 981 (1986). This Note will focus on the statutory material contained in 21 U.S.C. § 881(a) (1984), which deals explicitly with property acquired in connection with drug dealing.

³See, e.g., Steven L. Kessler, *For Want of a Nail: Forfeiture and the Bill of Rights*, 39 N.Y.L. SCH. L. REV. 205, 206 (1994) (discussing “routine use of forfeited assets by prosecutors to fill their agency’s coffers”).

Former Attorney General Richard Thornburgh remarked in a panel discussion that “it’s satisfying to think that it’s now possible for a drug dealer to serve time in a forfeiture-financed prison after being arrested by agents driving a forfeiture-provided automobile while working in a forfeiture-funded sting operation.” Arthur W. Leach & John G. Malcolm, *Criminal Forfeiture: An Appropriate Solution to the Civil Forfeiture Debate*, 10 GA. ST. U.L. REV. 241, 251 nn.38-39 (1994) (quoting *Seized Drug Funds to Pay for Prisons*, WASH. TIMES, Sept. 28, 1989, at A10).

burden of proof demanded in a criminal proceeding.⁴ Claimants despise it because they begin at a disadvantage and because of the myriad hurdles placed in the path to possible recovery of their property.⁵

What of the courts? Those who speak for the courts will be the first to admit they are just plain confused, trapped between the competing factions.⁶ Particularly disadvantaged are the federal trial and appellate courts, which are charged with enforcement while Congress and the Supreme Court redraw the playing field. The courts are confronted by the complicated and arcane mechanics of the forfeiture process.⁷ They also are forced to balance the competing interests of claimants and the government, ensuring that each party receives its appropriate measure of due process.⁸

⁴ The fundamental difference in burdens of proof is at the heart of the American justice system. In a criminal proceeding, the prosecution is required to present evidence that would satisfy a jury that the defendant is *the* person who committed the offense. This standard is characterized as proof beyond a reasonable doubt. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 1.8, at 67-85 (2d ed. 1986). By contrast, the plaintiff in a civil action (here the government, which is seeking forfeiture) is only required to meet a preponderance standard, making the events in question more probable than not in the minds of the jury or the court. See FLEMING JAMES, JR. & GEOFFERY C. HAZARD, CIVIL PROCEDURE § 7.6, at 316-18 (3d ed. 1985).

⁵ See Kessler, *supra* note 3, at 206 ("In forfeiture actions, those claiming an interest in or ownership of the subject property lose their individual characteristics to those of the label, usually that of 'criminal,' 'friend of drug dealer,' or the like.").

⁶ Vito J. Titone, an Associate Justice on the New York Court of Appeals, has described civil forfeiture as "an Alice-in-Wonderland universe in which the property owner generally has the burden of proof, lack of criminal culpability is often not a defense and the government's rights vest from the time of the illegality rather than the time of the judgment of forfeiture." *Curtail Use of Civil Forfeiture*, N.Y. L.J., June 29, 1993, at 2 (citing 1 DAVID B. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES ¶ 1.02, at 1-6 (1992)).

⁷ One commentator has described civil forfeiture as, "arcane and complex . . . (it simply is not glamorous)." Susan R. Klein, *Civil In Rem Forfeiture and Double Jeopardy*, 82 IOWA L. REV. 183, 226 (1996).

⁸ For a somewhat radical evaluation of problems for civil forfeiture claimants in the drug context, see Nkechi Taifa, *Civil Forfeiture vs. Civil Liberties*, 39 N.Y.L. SCH. L. REV. 95 (1994). Taifa takes the position that while civil in rem forfeiture was brought into being to serve the interests of justice and fight the war on drugs (favoring the government), it has been subject to such egregious abuses by law enforcement that it tips the scales against claimants and serves largely to produce revenues that state taxes are unable to provide.

Perhaps the most complicated element of the process is the administration of a system that by design favors the government.⁹

This Note will examine what happens when the federal courts confront the rigors and strictures of the civil forfeiture process under § 881(a). Part I will characterize the history of forfeiture and discuss recent decisions of the Supreme Court that call into question the extreme degree of deference previously afforded to congressionally designed forfeiture proceedings. Part II will examine recent decisions by the United States Courts of Appeals for the Second and Ninth Circuits that apply the Supreme Court's recently formulated closer scrutiny of the forfeiture statutes at the appellate level. In Part III, consideration is given to how the other circuits have approached, or might approach, these issues. Part IV will address proposals to reform the forfeiture laws through congressional rather than judicial action.

Ultimately, this Note will posit that the Second and Ninth Circuits are moving civil forfeiture jurisprudence in the right direction. The original shape of forfeiture in the context of the so-called war on drugs seems to have been a by-product of its time. That is to say, it was born in the 1970s and came of age in the 1980s, a period in American history when many things were outsized or overblown. As a consequence, the focus was as much on the appearance of results as on real effectiveness. Civil forfeiture suffers from the same malady: in an effort to combat the American drug problem, this "get tough" legislation essentially gutted the due process rights of defendants and of claimants of forfeited property, all in the name of producing results.

Recognizing the due process problem, this Note will conclude that the federal judiciary is taking appropriate steps to restore the balance that Congress legislated away. It will further conclude that recent congressional actions reinforce the apparent need for forfeiture reform, because even the legislative branch now recognizes that the due process infirmities of the present system go too far.

⁹ See *infra* notes 28-33 and accompanying text for discussion of the forfeiture process itself. It is worth mentioning at this juncture that Congress intended the burden to lie largely with the claimant. This is apparent from the structure of 21 U.S.C. § 881(a), which assigns the government a relatively low burden of proof (reasonable suspicion), then shifts the burden to the claimant to prove innocence of the claimed property by a preponderance of the evidence.

I. HOW DID WE GET HERE?
A SHORT HISTORY OF CIVIL FORFEITURE
AND RECENT JURISPRUDENCE¹⁰

A. *The Historical Background of Forfeiture Statutes*

Civil forfeiture is by no means a new idea, but rather dates from the Old Testament and the concept of noxal surrender.¹¹ Under this procedure, one whose ox gored another person was obliged to turn the ox over to the government for ritual slaughter.¹² At common law, this idea of noxal surrender was extended to cover both animate and inanimate chattels that caused the death of a King's subject.¹³ Common examples included slaves, beasts of burden, and inanimate objects like wagons and trees.¹⁴ Known as "deodands,"¹⁵ the King's bench required that the guilty chattel be turned over to the sovereign that it might do no further harm. It is critical to note that the res itself was considered guilty, separate from the person who used it.¹⁶ This culpability of the res originally was viewed in terms of demonic

¹⁰ This discussion of the roots of forfeiture is by no means dispositive. For judicial treatment, the reader is advised to consult Justice Brennan's excellent summary in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-85 (1974). Many commentaries also contain excellent short histories of forfeiture. See Jimmy Gurule, *The Ancient Roots of Modern Forfeiture Law*, 21 J. LEGIS. 155, 156-59 (1995); Terence Fennessy, Comment, *Constitutional Law - Search and Seizure*, 18 SUFFOLK TRANSNAT'L L. REV. 371, 373-75 (1995); Jon E. Gordon, Note, *Prosecutors Who Seize Too Much and the Theories They Love: Money Laundering, Facilitation, and Forfeiture*, 44 DUKE L.J. 744, 746-51 (1995); Shannon T. Noya, Comment, *Hoisted by Their Own Petard: Adverse Influences in Civil Forfeiture*, 86 J. CRIM. L. & CRIMINOLOGY 493, 497-505 (1996); David Scott Romantz, Note, *Civil Forfeiture and the Constitution - A Legislative Abrogation of Rights and the Judicial Response: The Guilt of the Res*, 28 SUFFOLK U. L. REV. 387, 393-96 (1994); see also Klein, *supra* note 7, at 191-97.

¹¹ See *Exodus* 21:28.

¹² See Jacob J. Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 TEMP. L.Q. 169, 180-83 (1973).

¹³ See *id.* at 181-83.

¹⁴ See *id.* at 181.

¹⁵ The word "deodand" derives from the Latin *Deo dandum*, "to be given to God." *Id.* at 180 n.35. For a useful analysis on the evolution of the deodand, see OLIVER W. HOLMES, *THE COMMON LAW* 24-26 (1881).

¹⁶ This condemnation of the property itself led to some rather unusual results. For example, if a man fell from his horse into a river and was carried downstream

possession, but the increasingly secular nature of English society transformed the deodand into a species of homicide tax.¹⁷ The forfeited property was viewed as a kind of levy for wrongdoing, and the proceeds from its disposition might be used to say Mass for the soul of the departed.¹⁸ A form of statutory forfeiture also existed and was used as a punishment for treason or the commission of a felony.¹⁹

The next major innovation regarding the forfeiture laws occurred in the English admiralty courts in the seventeenth century.²⁰ Here, forfeiture was applied largely as a penalty for smuggling. The justification was that it might be impossible to locate the record owner of the contraband. Consequently, administrative convenience dictated a proceeding directly against the res, which might produce a timely resolution of the matter. The merchant class displayed enthusiasm for this remedy because it allowed for more rapid adjudication – a major concern if the merchant had a creditor demanding satisfaction.²¹ Forfeiture in admiralty survived the ocean crossing to become a part of the Colonial legal canon, despite some misgivings about the power of the admiralty courts left behind in England.²² It eventually evolved into a tool designed for the collection of revenue due the government.²³

and crushed in a grist mill, both the horse and the mill wheel could be subject to forfeiture. *See* Finkelstein, *supra* note 12, at 185.

¹⁷ *See* Finkelstein, *supra* note 12, at 179-80; *see also* *Calero-Toledo*, 416 U.S. at 680-81. It is important to note that the deodand was a creature of statute, while the noxal surrender was largely a religious device.

¹⁸ *See* *Calero-Toledo*, 416 U.S. at 681.

¹⁹ *See id.* at 682 (“The convicted felon forfeited his chattels to the Crown and his lands escheated to his lord; the convicted traitor forfeited all of his property, real and personal, to the Crown.”).

²⁰ *See* *Austin v. United States*, 509 U.S. 602, 612 (1993) (discussing the use of civil forfeiture in maritime claims).

²¹ For further discussion of the merchant classes and maritime forfeiture, see George F. Steckley, *Merchants and the Admiralty Court During the English Revolution*, 22 AM. J. LEGAL HIST. 137, 143-51 (1978). Proceedings in the Exchequer Court under the Navigation Acts of the mid-seventeenth century are discussed in James R. Maxeiner, Note, *Bane of American Forfeiture Law – Banished at Last?*, 62 CORNELL L. REV. 768, 775-78 (1977).

²² Despite the colonists’ misgivings, an admiralty forfeiture statute eventually was promulgated by Congress, in 1789. Both of these ideas are discussed in *United States v. One 1976 Mercedes Benz 280S*, 618 F.2d 453 (7th Cir. 1980).

²³ Early cases bear out the idea that the United States viewed civil forfeiture as a tool for collection of tax revenues and customs duties. *See, e.g.,* Dobbins’s

As a tool for law enforcement, civil forfeiture remained a largely dormant device in this country until 1970, when Congress enacted the Controlled Substances Act.²⁴ 21 U.S.C. § 881 provides for civil forfeiture of property upon violation of the drug laws, regardless of whether or not a criminal conviction for the offense is ever obtained.²⁵ Many categories of property are subject to forfeiture, including houses and real property, cars, boats, and sums of currency.²⁶ The Congressional motive in enacting

Distillery v. United States, 96 U.S. 395 (1877); *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 91 (1844); *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827).

²⁴ 21 U.S.C. §§ 801-904 (1970).

²⁵ 21 U.S.C. § 881 was codified in 1984 and was not part of the original Controlled Substances Act.

²⁶ The most-used portions of the statute provide in pertinent part:

(a) Subject property

The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.

...

(4) All conveyances, including aircraft, vehicles, 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 property described in paragraph (1), (2), or (9), except that -

(A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this subchapter or subchapter II of this chapter;

(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State; and

(C) no conveyance 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, consent, or willful blindness of the owner.

(5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this subchapter.

(6) All moneys, negotiable instruments, securities, or other things of

§ 881 is clear: to remove from the drug dealer the spoils of his occupation, thereby making drug dealing a less attractive proposition. Because of this goal, the procedure is canted to allow the government to prevail.²⁷

Forfeitures under § 881(a) follow a distinct pattern. The first step is for the prosecutor to allege that the property in question is involved with a drug transaction. Assuming the facts alleged are sufficient, a warrant in rem will then be issued by a magistrate for the "arrest" of the property. If the forfeiture is not opposed by a defendant or claimant, the proceeding remains largely administrative in character.²⁸ A claimant (not necessarily the defendant) may request an evidentiary hearing, which converts the proceedings to a judicial action even if there is no criminal proceeding concerning the drug transaction.²⁹

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.

(7) All real property, including any right, title, and interest (including any leasehold 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.

21 U.S.C. § 881(a).

²⁷ The inherent disparity in burdens of proof of claimants and the government makes it unlikely at the outset that a claimant will prevail. As noted in the Introduction, this is an indicator that Congress was willing to sacrifice a measure of basic fairness for an opportunity to successfully wage its war on drugs. For additional descriptive material on the difference in burdens of proof, see *infra* notes 30-34 and accompanying text.

²⁸ See *Kiefer v. United States Dep't of Justice*, 687 F. Supp. 1363, 1365 (D. Minn. 1988).

²⁹ See *id.*

The government is required to prove the connection between the property and the transaction in question by a standard that approximates probable cause.³⁰ If the government produces sufficient evidence, the burden of proof then shifts to the claimant to prove by a preponderance of the evidence that the property is innocent, or that the claimant had no knowledge of the illicit use.³¹ If the government prevails, there is a disposition of the assets, with the proceeds going to the Federal Asset Forfeiture Fund maintained by the Treasury Department.³² Given the relatively light burden placed on the government and the much heavier burden that the claimant bears, it is unusual for a claimant to prevail. Forfeitures are more often overturned on appeal because the seizure of the property was somehow defective than because the claimant was able to mount a successful defense.³³

As will be further explored below, this burden shifting raises serious due process concerns. Particularly for a claimant who is invoking an innocent-owner defense, there is something inherently unfair about the shifting burden of proof.³⁴ This unfairness is magnified by the requirement that the claimant adduce greater proof to recover the property than the

³⁰ Courts have characterized the level of proof needed by the government as a "substantial connection" or a nexus, with the latter appearing to be the preferred version at present. *See* *United States v. Daccarett*, 6 F.3d 37, 55-56 (2d Cir. 1993).

³¹ The burden-shifting mechanism is set out in 19 U.S.C. § 1615 (1984).

³² The Asset Forfeiture Fund has been the focus of intense scrutiny because the monies therein are shared between the Department of Justice, the Drug Enforcement Agency, and state and local law enforcement agencies. The unfortunate consequence of this arrangement is that prosecutors have sometimes viewed forfeiture as a convenient way to make up budgetary shortfalls. For a discussion of the ways in which Fund monies are used, see *Civil Asset Forfeiture: Hearings on Asset Forfeiture before the Committee on the Judiciary of the U.S. House of Representatives*, July 22, 1996, 1996 WL 410099 (Statement of Stefan Cassella, Deputy Chief of Asset Forfeiture and Money Laundering Section, Criminal Division); *see also* Taifa, *supra* note 8, at 97-107 (discussing the problems created by overzealous use of the forfeiture laws).

³³ *See, e.g.*, *United States v. Lot Six (6), Block One (1), Mills Second Subdivision*, 48 F.3d 289 (8th Cir. 1995) (voiding forfeiture due to the lack of a pre-seizure hearing).

³⁴ Innocent-owner defenses are available for those subsections of 21 U.S.C. § 881 dealing with conveyances under (a)(4), money and secure instruments under (a)(6), and real property under (a)(7). The innocent-owner defenses require that the claimant lacked knowledge of the drug transaction or did not consent to it. The claimant cannot have been willfully blind to the transaction.

government must present to institute the forfeiture proceeding.³⁵ In recent cases the Supreme Court has recognized the questionable constitutionality of this inherent disparity, and has begun to move away from the extreme deference previously afforded Congress's statutory scheme.

B. Recent Supreme Court Jurisprudence on Civil Forfeiture

The Supreme Court has so far identified two areas in which civil forfeiture implicates constitutional concerns, namely the Due Process Clause of the Fifth Amendment³⁶ and the Excessive Fines Clause of the Eighth Amendment.³⁷ The leading case in the former category is *United States v. James Daniel Good Real Property*.³⁸ Good was convicted under Hawaii law for possession of drugs and drug paraphernalia in his home. Some four years later, the government filed an action of forfeiture under § 881(a)(7), seeking to forfeit Good's house because it had been used to facilitate a drug transaction. The house, which was rented to others while Good was living in Nicaragua, was seized without notice and without a pre-seizure hearing.³⁹ The government executed an occupancy agreement with the tenants, but garnished the rent monies as part of the seizure.⁴⁰ Good returned to Hawaii and filed a motion to claim the property, but the district court granted the government's motion for summary judgment. On appeal, the Ninth Circuit held unanimously that the lack of both notice and a hearing violated the Due Process Clause.⁴¹ Following a grant of certiorari, the Supreme Court agreed with the Ninth Circuit, ruling that except in the most exigent circumstances, the government may not seize forfeited property without notice to the record owner and a pre-seizure hearing to evaluate the reasonableness of the government's suspicion of a nexus between the drugs and the property.⁴²

³⁵ See *supra* notes 30-31 and accompanying text (describing the relative burdens of proof).

³⁶ "No person shall be deprived of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. V.

³⁷ "Excessive bail shall not be required, nor excessive fines imposed . . ." U.S. CONST. amend. VIII.

³⁸ *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993).

³⁹ See *United States v. James Daniel Good Real Property Titled in the Name of James Daniel Good*, 971 F.2d 1376, 1378 (9th Cir. 1992), *aff'd in part, rev'd in part by* 510 U.S. 43 (1993).

⁴⁰ See *Good*, 510 U.S. at 47.

⁴¹ See *Good*, 971 F.2d at 1378.

⁴² See *Good*, 510 U.S. at 53-62.

In evaluating the seizure in *Good*, the Court borrowed a three-prong test from *Mathews v. Eldridge*,⁴³ which concerned the claimant's loss of federal workers' compensation benefits without an administrative hearing.⁴⁴ In evaluating whether the claimant had a vested right that required the protections of due process, the Court weighed the import of evenly administering the workers' compensation system against the rights and reliance interest of the claimant.⁴⁵ The *Eldridge* Court concluded that the claimant's due process rights had not been violated, even though he did not receive an evidentiary hearing before loss of his benefits.⁴⁶ This conclusion was predicated on the twin notions that sufficient protections existed to safeguard a claimant's interest and further protections beyond those already in place would unduly burden administration of the system.⁴⁷

The Court reached the opposite result in *Good*. Justice Kennedy concluded that because rights in real property are so central to society,⁴⁸ and because protection of due process is critical where real property may be lost, the government has an affirmative obligation to protect the claimant's interests even in the forfeiture context. The Court concluded that alternative procedural safeguards could not replace the protections that

⁴³ *Mathews v. Eldridge*, 424 U.S. 319 (1976).

⁴⁴ *See id.* at 323-25.

⁴⁵ *See id.* at 348. In *Eldridge*, Justice Powell described the three-prong test used to determine whether a claimant has been afforded his or her full measure of due process:

[O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 334-35. The comparable formulation of this test is found in *Good*, 510 U.S. at 53.

⁴⁶ *See Mathews*, 424 U.S. at 348-49.

⁴⁷ *See id.*

⁴⁸ Justice Kennedy wrote:

The seizure of a home produces a far greater deprivation than the loss of furniture, or even attachment. It gives the Government not only the right to prohibit sale, but also the right to evict occupants, to modify the property, to condition occupancy, to receive rents, and to supersede the owner in all rights pertaining to the use, possession, and enjoyment of the property.

Good, 510 U.S. at 54.

would be afforded by timely notice and the opportunity to be heard (the twin hallmarks of due process protection in constitutional jurisprudence).⁴⁹

The leading recent case on the Excessive Fines Clause of the Eighth Amendment is *Austin v. United States*.⁵⁰ Richard Austin pled guilty to a drug-trafficking offense under South Dakota state law, and the government sought forfeiture of both his mobile home and his body shop under § 881(a)(4) and (a)(7) as facilitating property. Austin opposed the forfeiture, but the district court granted the government's motion for summary judgment.⁵¹ On appeal, the Eighth Circuit "'reluctantly agreed with the government' and affirmed."⁵² The Supreme Court granted certiorari to address a growing split within the circuits regarding whether a civil forfeiture is subject to the Excessive Fines Clause. The Court addressed whether a federal court should grant forfeiture of the entirety or apply a proportionality test in determining what property should be forfeited.⁵³

Justice Blackmun framed the issue as whether civil forfeiture is considered punishment, and thus subject to the Eighth Amendment's protections.⁵⁴ He concluded that the primary purpose of modern civil forfeiture is to punish. Although it may serve a remedial purpose, it serves largely to extract punitive payments due the government, and as such is subject to the strictures of Excessive Fines Clause analysis.⁵⁵ Rather than adopt a uniform standard for analyzing forfeiture cases under the dictates

⁴⁹ *See id.* at 62. Applying the *Eldridge* factors, Justice Kennedy concluded that the correct factors to balance were Good's ownership interest in the property, the minimal due process protection afforded where the government seizes property with no notice and no pre-seizure hearing, the poor quality of relief that may be provided if the government attempts to cure a defective seizure with a post-seizure hearing, and the government's minimal interest in seizing the property without notice where no exigent circumstances exist that might cause loss of the property. *See id.* at 53-59. Speaking for the Court, Justice Kennedy wrote, "Unless exigent circumstances are present, the Due Process Clause requires the Government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture." *Id.* at 62.

⁵⁰ *Austin v. United States*, 509 U.S. 602 (1993).

⁵¹ *See id.* at 605.

⁵² *Id.* at 605-06 (quoting *United States v. One Parcel of Property*, 964 F.2d 814, 817 (8th Cir. 1992), *overruled by Austin v. United States*, 509 U.S. 602 (1993)).

⁵³ *See id.* at 606.

⁵⁴ *See id.* at 602, 610-20.

⁵⁵ *See id.* at 622.

of the Eighth Amendment, the Court elected to remand, allowing the circuit courts to adopt their own preferred standards on a case-by-case basis.⁵⁶

The import of these decisions is uncertain.⁵⁷ Until the cases were decided in 1993, the posture of the federal courts had been extremely deferential to the congressional design implicit in the civil forfeiture laws. In the aftermath of the decisions, the federal courts were presented with reasonable indicators that the Supreme Court would more closely examine forfeitures for possible constitutional infirmities. In this atmosphere, it was not surprising when the circuit courts began to express doubts of their own.

II. THE APPELLATE COURTS WEIGH IN

A. *The Maverick Second Circuit*

Perhaps because the city of New York, still a crossroads for American commerce and culture, is found within its confines, the Second Circuit Court of Appeals tends to be something of a leader in developing areas of the law. For example, at the time *Austin* was decided by the Supreme Court, the Second Circuit was the only circuit to have ruled dispositively on the issue of whether civil forfeitures should be subjected to excessive fines analysis.⁵⁸ In this context, it should come as no surprise that the Second is one of two circuits to have spoken regarding the constitutionality of the burden-shifting mechanism in civil in rem forfeiture under § 881(a).

The first case addressing these due process concerns (whether civil forfeitures should be analyzed under the Excessive Fines Clause) is *United States v. Daccarett*.⁵⁹ If Hollywood had produced a draft script for a drug

⁵⁶ See *id.* at 622-23. For an in-depth discussion of proportionality analysis in the aftermath of *Austin*, see Sarah N. Welling & Medrith Lee Hager, *Defining Excessiveness: Applying the Eighth Amendment to Civil Forfeiture After Austin v. United States*, 83 KY. L.J. 835 (1994-95).

⁵⁷ It should be noted that the decision in *Good* has by no means undermined the strong presence of the federal asset forfeiture scheme in the civil context. Within three years after the Court questioned civil forfeiture in *Good* and *Austin*, it firmly upheld 21 U.S.C. § 881(a) in *Bennis v. Michigan*, 516 U.S. 442, *reh'g denied*, 116 S. Ct. 1560 (1996), and *United States v. Usery*, 518 U.S. 267 (1996), also considered seminal cases.

⁵⁸ See *United States v. 38 Whalers Cove Drive*, 954 F.2d 29, 35-39 (2d Cir. 1992) (finding the Eighth Amendment applicable to in rem civil forfeiture, but nevertheless ruling that the forfeiture ordered in the case was not disproportionate to the drug offense in question).

⁵⁹ *United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993).

case, it could not have told a story better than the real-life facts of the case.⁶⁰ In the late 1980s and early 1990s, members of the Cali cocaine cartel concluded there was a need to launder their drug profits through banks in Europe and the United States. The money was moved from banks in Colombia and Panama to the United States and on to European nations by means of electronic funds transfers (“EFTs”), after accounts were opened at the European banks by employees of the cartel.⁶¹ Interpol⁶² eventually became aware of the illicit financial activity, and followed the cartel employees to Luxembourg.⁶³ There the employees were arrested on money laundering charges in connection with the EFTs. In a cooperative

⁶⁰ This recital of the facts is intended to be summary in nature. The reader is strongly encouraged to consult *id.* at 43-45. The reader may also wish to consult the statement of facts in the district court decision, *United States v. All Funds on Deposit in any Accounts Maintained at Merrill Lynch, Pierce, Fenner & Smith*, 801 F. Supp. 984, 987-89 (E.D.N.Y. 1992).

⁶¹ See *Daccarett*, 6 F.3d at 43. Judge Pratt described the electronic funds transfer procedure in this fashion:

When a customer wants to commence an EFT, its bank sends a message to the transfer system’s central computer, indicating the amount of money to be transferred, the sending bank, the receiving bank, and the intended beneficiary. The central computer then adjusts the account balances of the sending and receiving banks and generates a printout of a debit ticket at the sending bank and a credit ticket at the receiving bank. After the receiving bank gets the credit ticket, it notifies the beneficiary of the transfer. If the originating bank and the destination bank belong to the same wire transfer system, then they are the only sending and receiving banks, and the transfer can be completed in one transaction. However, if the originating bank and the destination bank are not members of the same wire transfer system, which is often the case with international transfers, it is necessary to transfer the funds by a series of transactions through one or more intermediary banks.

Id. at 43-44. The United States banks in question acted as intermediaries, passing the money from the Latin American banks on to Europe. See *id.*

⁶² Interpol is the International Criminal Police Organization, created in 1923 to facilitate international police cooperation to combat criminal activity. Interpol is funded by its member nations and allows for cooperative efforts to build evidence and cases against individuals involved in crime on an international level. Its goals are to “provide and promote assistance among all criminal police authorities under the laws of each nation and to help all institutions that can act effectively in the cause of prevention and suppression of crime.” PETER G. LEE, INTERPOL 18-25 (1976).

⁶³ See *Daccarett*, 6 F.3d at 44.

effort with international law enforcement, the United States moved to attach EFT proceeds that were temporarily on the books of U.S. banks.⁶⁴ This move was intended to keep the illicit funds from being moved back to the cartel's accounts in Latin America.⁶⁵ The government then moved to forfeit the funds under § 881(a)(6).⁶⁶

Seventeen claimants sought to recover portions of the forfeited EFT funds. Some were legitimate clothing export firms from Colombia, while others were dummy corporations established solely for the purpose of laundering the drug money. The district judge held an *in camera* hearing to evaluate the government's claim of probable cause and found it sufficient, and the case proceeded to trial.⁶⁷ Of the twenty-two forfeited amounts in question, the jury eventually concluded that eighteen were properly forfeited to the government in connection with drug trafficking.⁶⁸

What makes *Daccarett* a significant case in the due process context is not the unusual subject matter of the forfeiture, but rather the evaluative discussion in both the trial and appellate opinions of the burden-shifting mechanism. All seventeen claimants presented evidence to counter the government's forfeiture claims, but only two prevailed. To District Judge Weinstein, this spoke volumes about the structure of the forfeiture statutes. Although the judge conceded that he was bound by Second Circuit precedent upholding the constitutionality of the shifting burden of proof,⁶⁹ his reservations were grave. Indeed, Judge Weinstein bluntly stated, "The structure of this kind of case is inherently unfair to claimants . . ."⁷⁰

This sentiment resonates in Judge Pratt's majority opinion for the Second Circuit. His initial concern was that the uses of forfeiture continue to expand, creating ever more need for the courts to be vigilant regarding due process concerns,⁷¹ and ever more opportunities for the government to

⁶⁴ See *supra* note 61 (describing the mechanics of the EFT procedure).

⁶⁵ See *Daccarett*, 6 F.3d at 44.

⁶⁶ See *id.* at 43-45.

⁶⁷ See *id.* at 45.

⁶⁸ See *id.*

⁶⁹ The Second Circuit had previously ruled on a constitutional challenge to the burden-shifting mechanism, stating, "We find nothing unconstitutional in congress's [sic] allocation of the burdens of proof in forfeiture cases . . ." *United States v. 228 Acres of Land and Dwelling Located on White's Hill Road*, 916 F.2d 808, 814 (2d Cir. 1990).

⁷⁰ *United States v. All Funds on Deposit in any Accounts Maintained at Merrill Lynch, Pierce, Fenner & Smith*, 801 F. Supp. 984, 991 (E.D.N.Y. 1992).

⁷¹ See *Daccarett*, 6 F.3d at 46 ("Given that the reach of civil forfeiture is constantly expanding to new realms – in this case, to electronic funds transfers between

tread on claimants' due process rights. Judge Pratt went on to uphold the forfeitures in the case, but it is clear that the Second Circuit was quite troubled by the structure of the forfeiture laws.⁷² Citing Judge Weinstein's characterization of inherent unfairness, Pratt went on to point out that the Second Circuit had previously upheld the constitutionality of the burden-shifting mechanism. Nevertheless, he bluntly stated, "We therefore stress the need for courts to ensure that what little due process is provided for in the statutory scheme is preserved in practice."⁷³

The irony in this is manifest, because this was the same Judge Pratt who penned the majority opinion upholding the constitutionality of the burden-shifting mechanism only three years earlier. In *United States v. 228 Acres of Land and Dwelling Located on White's Hill Road*,⁷⁴ the defendant was prosecuted for trafficking in heroin. In defending against the forfeiture of his real property, Saverio Moreno raised an explicit as-applied constitutional challenge to the burden-shifting mechanism. Writing for a unanimous panel of the appellate court, Judge Pratt stated, "We find nothing unconstitutional in congress's [sic] allocation of the burdens of proof in forfeiture cases . . ."⁷⁵ By contrast, *Daccarett* presented no explicit constitutional challenge, but the Second Circuit *sua sponte* indicated that the constitutionality of the burden-shifting mechanism was an open question.⁷⁶ However, the court left resolution of that question for another day.

banks – the courts must ensure that constitutional and procedural safeguards remain intact."). One of the opinions in *Good* expressed a collateral concern about the ever-expanding use of civil forfeiture. See *Good*, 510 U.S. 43, 82 (Thomas, J., concurring in part and dissenting in part) ("Given that current practice . . . appears to be far removed from the legal fiction upon which the civil forfeiture doctrine is based, it may be necessary – in an appropriate case – to reevaluate our generally deferential approach to legislative judgments in this area . . .").

⁷² Judge Pratt cited to the Second Circuit's earlier decision in *United States v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896 (2d Cir. 1992), wherein the court observed, "We continue to be enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes." *Id.* at 905.

⁷³ *Daccarett*, 6 F.3d at 57.

⁷⁴ *United States v. 228 Acres of Land and Dwelling Located on White's Hill Road*, 916 F.2d 808 (2d Cir. 1990).

⁷⁵ *Id.* at 814.

⁷⁶ In concluding the opinion, Judge Pratt wrote, "Given the relative ease with which the statutory scheme allows the government to seize suspect properties, it is imperative for courts to analyze carefully the forfeiture process in light of the fifth amendment's due process demands and the fourth amendment's probable-cause and warrant requirements." *Daccarett*, 6 F.3d at 59. While every first-year law student knows that a court will decline to rule on an issue not raised by one of the parties, commentators give thanks for this kind of insight into the working judicial

The Second Circuit revisited the burden-shifting issue three years later in *United States v. 194 Quaker Farms Road*.⁷⁷ Richard Scianna was charged in connection with a drug-trafficking operation designed to move cocaine from Colombia and Brazil into the eastern United States.⁷⁸ Following Scianna's arrest on drug charges, the government sought forfeiture of his home as facilitating property under § 881(a)(7). Scianna's case is unusual in that he expressly waived the probable cause hearing at the outset of the forfeiture proceeding. The district court issued a warrant in rem for the property and subsequently ordered the house forfeited. Scianna submitted evidence in his favor at trial, but was unable to prevail.⁷⁹

On appeal, the Second Circuit was once again required to evaluate the constitutional viability of the burden-shifting mechanism. As Judge Winter noted, because Scianna waived the probable cause hearing, the inquiry could not embrace the sufficiency of the government's probable cause, but was confined to the claimant's burden of proof.⁸⁰ He began his analysis by recalling that Second Circuit precedent favors the congressional apportionment of the burden of proof between the government and the claimant.⁸¹ Judge Winter was quick to point out that the Supreme Court's decisions in *Good* and *Austin* leave as "an open question whether Section 881(a)(7) warrants civil or criminal due process protections, or possibly some hybrid of the two."⁸² As with Judge Pratt's opinion in *Daccarett*, Judge Winter declined to squarely address the issue of whether the burden-shifting mechanism in civil forfeiture violates a claimant's due process rights.⁸³

⁷⁷ *United States v. 194 Quaker Farms Road*, 85 F.3d 985 (2d Cir.), *cert. denied sub nom. Scianna v. United States*, 117 S. Ct. 304 (1996).

⁷⁸ *See Scianna v. McGuire*, Civ. No. 3:94CV761 (AHN), 1996 WL 684400, at *2 (D. Conn. Mar. 21, 1996).

⁷⁹ *See 194 Quaker Farms Road*, 85 F.3d at 987-88.

⁸⁰ *See id.* at 989 ("Scianna's present challenge must be limited to the constitutionality of requiring a claimant to prove by a preponderance of the evidence the affirmative defense of innocent owner.").

⁸¹ *See supra* notes 69, 72 and accompanying text; *see also United States v. \$2,500 in United States Currency*, 689 F.2d 10 (2d Cir. 1982) (declining to overturn the forfeiture statute's burden of proof).

⁸² *194 Quaker Farms Road*, 85 F.3d at 989.

⁸³ It is difficult to gauge which way this reluctance to discuss the issue cuts. It is axiomatic that courts will not decide issues admittedly present but not raised by one of the parties. However, this did not prevent Judge Pratt from analyzing the due process issue in *Daccarett*. In *194 Quaker Farms Road*, Judge Winter might merely have been conforming to the judicial tradition of side-stepping constitutional issues if a case can be decided on other bases. *See, e.g., United States v. \$49,576.00 U.S.*

In lieu of explicitly addressing the larger constitutional issue, the Second Circuit in *194 Quaker Farms Road* opted to echo the earlier sentiments of *Daccarett*. Thus, the court stated that although Congress may allocate the greater burden of proof to the claimant, it remains to be determined in the aftermath of *Good* and *Austin* exactly what quantum of proof the government needs to present to seize the property and instigate the forfeiture process.⁸⁴ Further, it remains an open question, after the Supreme Court decisions, what burden of proof must be placed on the government to satisfy due process before the burden shifts to the claimant.⁸⁵

In contrast to *Daccarett*, *194 Quaker Farms Road* has less to say on the putative constitutionality of the burden-shifting mechanism. This is precisely the import of the case. Three years after the decision in *Daccarett*, the Second Circuit still found itself waiting for the appropriate fact pattern to rule dispositively on the constitutional issue. In the meantime, the court is content to reserve the question for another day, so long as those within its jurisdiction are mindful that the question is by no means settled.⁸⁶

B. *The Ninth Circuit Joins the Parley*

Nestled at the opposite end of the country from the Second Circuit, the Ninth is no less of an innovator in making law. One need merely recall that the original due process decision in *Good* was penned by the Ninth Circuit, which unanimously found the government's action violative of the

Currency, 116 F.3d 425, 429 (9th Cir. 1997) (Hall, J., concurring in part) (criticizing the majority for reaching constitutional issues unnecessarily). More likely, Judge Winter opted to echo the rationale from *Daccarett* to avoid proffering another opinion in what already is an unsettled area of the law.

⁸⁴ See *194 Quaker Farms Road*, 85 F.3d at 990.

⁸⁵ Judge Winter wrote:

[W]e also note that it is an open issue "whether the due process clause requires the government to sustain a burden falling between the extremes of probable cause and proof beyond a reasonable doubt" before a seizure is made and a claimant is put to proof of the innocent owner defense.

Id. at 991 (citing Peter Petrou, Note, *Due Process Implications of Shifting the Burden of Proof in Forfeiture Proceedings Arising Out of Illegal Drug Transactions*, 1984 DUKE L.J. 822, 827).

⁸⁶ See *id.* at 990-91 n.2. Judge Winter takes the position that the Supreme Court has called the viability of the statute under a due process analysis into question, and that the Second Circuit will reserve judgment for another day because "*Good* and *Austin* without a doubt reopen the issue." *Id.*

claimant's rights.⁸⁷ From this, it is apparent that the Ninth Circuit is on an equal footing with the Second, serving as a west coast watchdog for due process violations in forfeiture proceedings.

This overt concern with claimants' rights was expressed in the court's decision in *United States v. \$49,576.00 U.S. Currency*,⁸⁸ decided in June of 1997. The court's decision follows the pattern of many currency forfeiture cases, in that it requires evaluation of whether carrying a large sum of cash creates a presumption that the claimant is involved in drug-related activities. The District Court for the Central District of California thought so; however, the Ninth Circuit disagreed.⁸⁹

In January 1994, claimant Francisco Lombera boarded an American Airlines flight in Dallas. The flight was bound for Ontario, California, and gate agents alerted DEA personnel in California that Lombera had purchased a one-way ticket with cash moments before boarding the plane.⁹⁰ The ticket was purchased under the name of "Jacinto Rodriguez," and when agents confronted Lombera upon arrival, they had in their possession the bag checked in Rodriguez's name. The bag contained a large amount of cash rolled up inside a pair of blue jeans.⁹¹ A search of Lombera's person revealed that he was carrying a resident alien identification card in his own name, a California driver's license in the name of Rodriguez, and some \$2000 in addition to the money in the suitcase. Lombera refused to discuss the origins of the money, but accompanied the DEA agents to their office. The money was subsequently confiscated but Lombera was released.⁹²

The government sought to subject the money to forfeiture under § 881(a)(6) as the proceeds of drug-related activity. The district court ruled that the government had probable cause to believe the money was drug-related and shifted the burden to Lombera to prove otherwise. When he was unable to meet this burden, the court ordered the money forfeited. On appeal, Lombera challenged both the probable cause ruling and the constitutionality of the shifting burden of proof.⁹³

⁸⁷ See *United States v. James Daniel Good Property Titled in the Name of James Daniel Good*, 971 F.2d 1376 (9th Cir. 1992), *aff'd in part, rev'd in part* by 510 U.S. 43 (1993).

⁸⁸ *United States v. \$49,576.00 U.S. Currency*, 116 F.3d 425 (9th Cir. 1997).

⁸⁹ See *id.* at 427.

⁹⁰ See *id.* at 426-27.

⁹¹ See *id.* at 427.

⁹² See *id.*

⁹³ See *id.*

The Ninth Circuit disagreed with the district court and reversed the forfeiture.⁹⁴ The court found the forfeiture constitutionally infirm on the basis of the proof that the government adduced to prove probable cause. The government had relied on the fact that a drug dog detected the presence of narcotics on the money.⁹⁵ However, the court took notice of the fact that virtually all paper money currently in circulation bears some traces of drug contamination.⁹⁶ The government also relied on the presumptive relationship between carrying large sums of currency and drug activity, but the court concluded that this presumption will not withstand Fourth Amendment scrutiny in the absence of fully realized proof.⁹⁷ Judge Kozinski acknowledged that use of such a “drug courier profile” might serve to establish suspicion, but failed to rise to the level of probable cause sufficient to institute an in rem forfeiture.⁹⁸

Because the court found that the seizure of Lombera’s money would not pass constitutional muster on a probable cause basis, it was unnecessary to rule on the as-applied constitutional challenge to the shifting burden of proof. Nevertheless, the court included some dicta discussing the evolving state of due process in the forfeiture context. Judge Kozinski began by noting that the Ninth Circuit had explicitly affirmed the constitutionality of the burden-shifting mechanism in *United States v. One 1970 Pontiac GTO*.⁹⁹ He went on to note that in the aftermath of *Good* and *Austin*, the Ninth Circuit could no longer justify blanket adherence to viewing the burden-shifting mechanism as constitutional. In this analysis, Judge Kozinski looked explicitly to the ruling by the Second Circuit in *194 Quaker Farms Road*, and in particular to the notion that the Supreme Court decisions leave the constitutionality of the burden-shifting mechanism an open question.¹⁰⁰

⁹⁴ See *id.* at 428.

⁹⁵ See *id.* at 427-28.

⁹⁶ *Id.* (citing *United States v. United States Currency*, \$30, 060.00, 39 F.3d 1039, 1043 (9th Cir. 1994)).

⁹⁷ See *id.* at 428.

⁹⁸ *Id.* The factors indicative of suspicious behavior but failing to rise to the level of probable cause included use of false identification, nervous behavior during questioning, and evasive or dishonest answers during questioning. See *id.*

⁹⁹ *United States v. One 1970 Pontiac GTO*, 529 F.2d 65 (9th Cir. 1976) (“[W]e conclude that the challenged forfeiture statutes are not criminal enough to prevent Congress from imposing the burden of proof on the claimant, and we uphold the constitutionality of 21 U.S.C. § 881 . . .”). *Id.* at 66.

¹⁰⁰ See *\$49,576.00 U.S. Currency*, 116 F.3d at 428-29.

Writing for two members of the panel,¹⁰¹ Kozinski suggested two fundamental reasons that the burden-shifting mechanism offends due process. First, he characterized allowing the government to forfeit property in a proceeding where there is such a disparity in the relative burdens of proof as a “constitutional anomaly.”¹⁰² Next, he echoed the sentiments expressed by Justice Kennedy in *Good* regarding the critical role that real and personal property play in American society:

The stakes are exceedingly high in a forfeiture proceeding: Claimants are threatened with permanent deprivation of their property, from their hard-earned money, to their sole means of transport, to their homes. We would find it surprising were the Constitution to permit such an important decision to turn on a meager burden of proof like probable cause.¹⁰³

Unsurprisingly, Judge Kozinski’s opinion concluded, “We leave the ultimate resolution of this question for another day.”¹⁰⁴

A pattern emerges. By its ruling in *Daccarett*, the Second Circuit left the matter unresolved, providing little guidance other than adverse precedent for the panel deciding *194 Quaker Farms Road*. A similar difficulty exists in the Ninth Circuit, where the court has reserved the constitutionality question for another day. The problem, simply stated, is that until the Ninth Circuit rules dispositively, *1970 Pontiac GTO*’s presumption of constitutionality is still the law. District court judges and even other members of the appellate bench are to be forgiven if they are not quite sure where things stand.

This point was brought to bear by the Central District of California less than a month after \$49,576.00 was decided. *United States v. Marolf*¹⁰⁵

¹⁰¹ Judge Hall included a terse concurring opinion in which she indicated that the court ought not to have reached the constitutional issue at all. She opined, “Judge Kozinski’s disquisition in Part III on the constitutionality of burden-shifting in forfeiture proceedings is entirely dictum. Moreover, it is dictum on an important constitutional issue, thus violating our rule against reaching constitutional questions unless we must in order to dispose of a case.” *Id.* at 429 (Hall, J., concurring in part).

¹⁰² *Id.* (citing 1 DAVID B. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES ¶ 2.04, AT 2-37 (1996)). The judge went on to indicate that if, as the Supreme Court has suggested, burdens of proof are intended to indicate the relative importance of each party’s role, this allocation sends the wrong message. *See id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *United States v. Marolf*, 973 F. Supp. 1139 (C.D. Cal. 1997).

concerned forfeiture under § 881(a)(4) of a boat used to smuggle marijuana into the United States. Because the claimant was unable to present evidence sufficient to rebut the government's reasonable doubt, the court ordered forfeiture of the vessel.¹⁰⁶ In a footnote, Judge Stotler recognized the divergence of opinions regarding the constitutionality of the shifting burden of proof. However, despite the Ninth Circuit's strong questioning of the mechanism in *\$49,576.00*, "in the absence of a determination otherwise, the district court is bound to follow *One 1970 Pontiac GTO*."¹⁰⁷

This position will become untenable if it persists for very long. The trial courts may weigh in on the issue, as did Judge Weinstein in *All Funds* (later *Daccarett*), but ultimately it is the courts of appeals that will speak directly to the issue. Holding constitutionality as an open question may in fact make things worse for claimants, both because it promotes an air of uncertainty and because it forecloses the Supreme Court from ruling on the issue.¹⁰⁸

III. WHAT MIGHT THE OTHER CIRCUITS DO?

Given the preliminary conclusion by the Second and Ninth Circuits that the burden-shifting mechanism of in rem forfeiture is probably violative of due process, the obvious question becomes whether the other circuits will agree. In considering this question, it is helpful to look at four common characteristics that courts use in evaluating forfeiture cases, and which provide clues as to how the circuits might rule.

The first characteristic is imputed from the way in which the circuit courts talk about the shifting burden of proof in civil forfeiture cases. It is unlikely that the Department of Justice distributes a manual of literary style to be used when discussing forfeitures, but readers of the cases might be forgiven for concluding otherwise. The opinions follow a predictable

¹⁰⁶ *See id.* at 1152.

¹⁰⁷ *Id.* at 1152 n.17.

¹⁰⁸ Obviously, the Supreme Court cannot review a circuit court decision on the constitutionality of the burden-shifting mechanism until one of the circuits rules dispositively. In the interim, the question is styled in a fashion that the law despises: an intriguing idea, but one to which as yet no one is fully committed. Simply put, until a statement about constitutionality is the holding of an appellate opinion, it remains *obiter dicta*.

It should be noted that this Note confines itself to analyzing the due process issue. Excessive Fines Clause analysis remains a contested issue in the aftermath of *Austin*. For a useful overview of Excessive Fines Clause jurisprudence, the reader is encouraged to consult Welling & Hager, *supra* note 56.

pattern: The court lays out the factual details of the case on appeal, briefly describes the structure of the burden-shifting mechanism, and then goes on to discuss whatever other aspects of the law are implicated by the case.¹⁰⁹

Two conclusions can be drawn from this pattern. The first is that the circuits regard the burden-shifting as presumptively constitutional, so that little effort is required to detail the mechanism and proceed to the other matters at hand. The second conclusion, really a variant of the first, is that the recitation is a tautology: The courts give great deference to the scheme Congress established without giving it much thought. This possibility is reinforced by Justice Thomas' separate opinion in *Good*, where he notes that even the members of the highest federal bench have used a "generally deferential approach to legislative judgments in this area. . . ."¹¹⁰ This sentiment is echoed by the Seventh Circuit, which has stated, "The procedures and standard of proof employed in forfeiture proceedings are well established."¹¹¹ This kind of writing coming from the judicial pen seems to indicate a paucity of evaluation. The attitude expressed is that Congress established a system that is widely and effectively used, so why examine it critically? This point is brought to bear most forcefully by those cases in which the forfeiture is initially sought under the wrong subsection of the statute.¹¹² Rather than overrule the forfeiture because of sloppy

¹⁰⁹ See *United States v. One Lot of U.S. Currency* (\$36,634), 103 F.3d 1048, 1053-54 (1st Cir. 1997); *United States v. \$87,118.00 in United States Currency*, 95 F.3d 511, 518 (7th Cir. 1996); *United States v. Thirty-Nine Thousand Eight Hundred Seventy-Three and No/100 Dollars* (\$39,873.00), 80 F.3d 317, 318 (8th Cir. 1996); *United States v. 9844 South Titan Court, Unit 9*, 75 F.3d 1470, 1477 (10th Cir. 1996); *United States v. Two Parcels of Real Property Located in Russell County, Alabama*, 92 F.3d 1123, 1126 (11th Cir. 1996); *United States v. One 1973 Rolls Royce*, 43 F.3d 794, 804 (3d Cir. 1994); *United States v. Scrapp Investment Co., Inc.*, 39 F.3d 1179 (4th Cir. 1994) (unpublished opinion); *United States v. 1988 Chevrolet Silverado*, 16 F.3d 660, 663-64 (5th Cir. 1994); *United States v. Rural Route 1, Box 137-B*, 24 F.3d 845, 848 (6th Cir. 1994).

¹¹⁰ *United States v. James Daniel Good Real Property*, 510 U.S. 43, 82 (1993) (Thomas, J., concurring in part and dissenting in part).

¹¹¹ *\$87,118.00*, 95 F.3d at 518.

¹¹² See *United States v. All Assets & Equipment of West Side Bldg. Corp.*, 58 F.3d 1181, 1184 n.2 (7th Cir. 1995), *cert. denied sub nom. Penny v. United States*, 116 S. Ct. 698 (1996) (stating that "[t]his lack of care on the part of the government is hard to understand," but sustaining the forfeiture); *United States v. Various Tracts of Land in Muskogee and Cherokee Counties*, 98 F.3d 1350 (10th Cir. 1996) (unpublished opinion) (substituting *sua sponte* § 881(a)(6) for mistaken use of § 881(a)(7)).

lawyering, the courts are willing to correct what is characterized as a clerical error and proceed to the other matters at hand.¹¹³ This behavior suggests that the circuits tacitly approve of the burden-shifting mechanism, and are more concerned with the result than the means used to achieve it.

A second factor that is common when courts sustain forfeitures over challenges to the shifting burden of proof is their disregard of acquittals in criminal proceedings collateral to the forfeiture action. The circuits seem to think that criminal acquittals count for very little when it comes time for the claimant to present evidence about the guilt or innocence of the res. This attitude creates inconsistency, in that it raises the question of how the property can be guilty if the former criminal defendant (now the claimant) is not. Nevertheless, it is plain that this kind of evidence is afforded little weight, and therefore has little impact on the claimant's burden of proof.¹¹⁴ By contrast, a *conviction* in a collateral proceeding does not seem to affect the court's view of the claimant, nor does it decrease the chance that the claimant will prevail.¹¹⁵ In this respect, the circuits maintain proper objectivity, in that their thinking is not swayed positively or negatively by the outcome of a collateral proceeding. However, this behavior gives little clue to the constitutional status of burden-shifting, because it deprives scholars and practicing attorneys of a concrete basis for understanding judicial thinking on civil forfeiture.

The third factor courts rely on is rebuttable presumptions. One example is the drug courier profile cited in *United States v. \$49,576.00 U.S. Currency*.¹¹⁶ As was pointed out in that case, the use of such archetypes is only useful if the government can produce evidence to back up its claim.¹¹⁷ Another more common example is the presumption that carrying a large

¹¹³ See *supra* note 112.

¹¹⁴ See *United States v. One Urban Lot Located at Road 143 K 36.1*, 14 F.3d 45 No. 93-1452, 1994 WL 9790 (1st Cir. Jan. 18, 1994) ("The outcome of related criminal proceedings against [the defendant] therefore does not affect the probable cause determination, or the burden shifting, in the civil forfeiture trial.").

¹¹⁵ See *United States v. RR #1, Box 224*, 14 F.3d 864, 871 (3d Cir. 1994) (stating that a collateral conviction does not trigger *res judicata* or collateral estoppel as to the forfeiture issue). Cf. *United States v. 9844 South Titan Court, Unit 9*, 75 F.3d 1470, 1477 (10th Cir. 1996) (stating that where husband was convicted in a collateral criminal proceeding, wife retained the opportunity to present evidence and claim the property).

¹¹⁶ *United States v. \$49,576.00 U.S. Currency*, 116 F.3d 425 (9th Cir. 1997).

¹¹⁷ See *id.* at 427-28.

sum of cash indicates involvement in drug activity.¹¹⁸ Many of the circuits have been willing to hang their hats on this presumption in upholding forfeitures, which suggests a belief that the system is correctly structured and should be perpetuated. If there is a constitutional infirmity in this, the circuits are willing to overlook it.

The fourth and strongest factor that can be gleaned from a close reading of the cases is an explicit statement by a circuit court that the burden-shifting mechanism is constitutional or does not violate due process. Two such cases are *White's Hill Road*¹¹⁹ and *One 1970 Pontiac GTO*.¹²⁰ Clearly, these rulings have been tempered by the later decisions in *Daccarett*¹²¹ and *\$49,576*,¹²² respectively. At present, there appears to be only one other circuit court opinion that contains such an explicit statement. In *United States v. Chandler*,¹²³ the Fourth Circuit was confronted with an as-applied constitutional challenge to the burden-shifting mechanism where the claimant's farm was forfeited under § 881(a)(7). In turning aside the challenge, the court reiterated its earlier holding "that it is not unconstitutional to shift the burden to the claimant, after the probable cause showing, to prove his entitlement to the property."¹²⁴

One explicit statement out of countless opinions in nine possible circuits does not approach statistical significance. Two possible conclu-

¹¹⁸ See *United States v. One Lot of U.S. Currency (\$36,634)*, 103 F.3d 1048, 1054 (1st Cir. 1997) (listing, in factors weighing against claimant, carrying a large amount of cash); *United States v. \$87,118.00 in United States Currency*, 95 F.3d 511, 519 (7th Cir. 1996) ("The amount, denomination and location of the currency seized by the agents is also suspicious."); *United States v. Thirty-Nine Thousand Eight Hundred Seventy-Three and No/100 Dollars (\$39,873.00)*, 80 F.3d 317, 319 (8th Cir. 1996) ("[W]e have recognized that possession of a large amount of cash (here, nearly \$40,000) is strong evidence that the cash is connected with drug trafficking.").

¹¹⁹ *United States v. 228 Acres of Land and Dwelling Located on White's Hill Road*, 916 F.2d 808 (2d Cir. 1990); see *supra* notes 74-75 and accompanying text..

¹²⁰ *United States v. One 1970 Pontiac GTO*, 529 F.2d 65 (9th Cir. 1976); see *supra* notes 99-100 and accompanying text.

¹²¹ *United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993); see *supra* notes 59-73 and accompanying text.

¹²² *United States v. \$49,576.00 U.S. Currency*, 116 F.3d 425 (9th Cir. 1997); see *supra* notes 88-98 and accompanying text.

¹²³ *United States v. Chandler*, 36 F.3d 358 (4th Cir. 1994).

¹²⁴ *Id.* at 367 ("Undoubtedly, Congress may alter the burden of proof in a civil proceeding as it sees fit, *without constitutional implications.*" *Id.* (citing *United States v. Santoro*, 866 F.2d 1538, 1544 (4th Cir. 1989) (emphasis added))).

sions present themselves. One is that the members of the federal appellate bench rarely contemplate the issue, which seems unlikely. The other, more promising, idea is that judges consider this a settled issue – not settled in the sense that there is nothing further to be said about it, but rather in the sense that they believe the status quo is workable. In the same way that the tone of judicial opinions concerning the burden-shifting mechanism presumes its correctness, courts' failure to explicitly address the constitutionality issue suggests a belief that there is no problem. Admittedly, it is difficult to reconcile this reasoning with the decisions of the Second and Ninth Circuits, but change moves slowly, especially in the law.

In closing this analysis, a word about another thing the opinions do not say, for explicit statements about constitutionality are not the only things missing. Scholars differ on the probative value of legislative history materials, but many believe they provide invaluable insight about how a germ of an idea became a piece of legislation. Scholars studying common-law decisions do not have the benefit of a similar road map for the workings of the judicial mind. When judges think out loud their musings are called "dicta" and are disregarded in favor of specific holdings and rationales. What this means in practice is twofold. First, it means that one cannot be sure exactly what motivated the Second and Ninth Circuits to move in the direction of discarding their previous rulings on the constitutional status of the burden-shifting mechanism. There are no notes in the margins of the opinions, no transcript of what was said at the Friday morning conferences where the cases were decided.

Moreover, it means that one cannot predict which (if any) circuit might rule next, or what might cause it to do so. In a well-constructed system of justice, it is ironic that the answers to these questions are usually found in memoirs penned after the robe has been laid aside and the last opinion written. Such musings are the motherlode for the historian, but give little comfort to practitioners charged with defending clients in an area of the law whose shape is in flux.

IV. A LOOK AT LEGISLATIVE REFORM PROPOSALS

Any examination of civil in rem forfeiture makes clear that while the system looks good on paper, it suffers from substantial problems in practice. The Supreme Court, by its decisions in *Good*¹²⁵ and *Austin*,¹²⁶ has already suggested the need to reform the forfeiture laws. This is apparent

¹²⁵ *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993).

¹²⁶ *Austin v. United States*, 509 U.S. 602 (1993).

from the small steps the Court has taken to protect claimants' rights.¹²⁷ This section will look briefly at proposed reform legislation that awaits congressional action.¹²⁸

A. *The Hyde Bill*

Representative Henry Hyde of Illinois has become the de facto standard bearer for reform of the civil forfeiture statutes.¹²⁹ The 105th Congress will mark Hyde's third attempt to get a bill passed that will restructure the forfeiture process, making it fairer to claimants and increasing their remedies while simultaneously increasing prosecutors' burdens.¹³⁰ House Bill 1835 alters the government's burden of proof from probable cause to clear and convincing evidence.¹³¹ Representative Hyde chose this standard because it relieves the government from the need to prove guilt of the res beyond a reasonable doubt, but raises the burden from the unnecessarily low standard of probable cause.¹³² This move would roughly equalize the relative burdens of the prosecution and the claimant, which should serve to prevent continued abuses of the system. The shifting burden of proof appears nowhere in the language of House Bill 1835, the theory being that proof of the offense should lie with the government.¹³³

¹²⁷ See Part I.B.

¹²⁸ Professor Bruce Voss notes that "[t]he irony is unmistakable – by the time the Supreme Court finally forces the government to play by the rules, Congress is ready to change them." Bruce Voss, *Even a War Has Some Rules: The Supreme Court Puts the Brakes on Drug-Related Civil Forfeitures*, 16 U. HAW. L. REV. 493, 538 (1994).

¹²⁹ See HENRY HYDE, CATO INSTITUTE, FORFEITING OUR PROPERTY RIGHTS (1995).

¹³⁰ See H.R. 1835, 105th Cong., 1st Sess. (1997). Hyde's bill was previously introduced as H.R. 3315, 103d Cong., 1st Sess. (1994), and again as H.R. 1916, 104th Cong., 1st Sess. (1996).

¹³¹ See H.R. 1835, § 2, 105th Cong., 1st Sess. (1997).

¹³² In a statement before the House Committee on the Judiciary, Representative Hyde explained that he chose "clear and convincing evidence" because it seemed more reasonable and equitable than the other choices, probable cause, preponderance of the evidence, and reasonable doubt. The first two choices were characterized as being too weak given the interests at stake, while the last seemed too strident a standard for a civil proceeding where no personal liberty is at stake. See *Crime Prevention and Criminal Justice Reform Act: Hearings on H.R. 3315 Before the Subcomm. on Crime and Criminal Justice of the House Committee on the Judiciary*, Feb. 22, 1994, 1994 WL 14168815 (statement of Rep. Henry Hyde).

¹³³ See *id.*

House Bill 1835 also seeks to alter other aspects of the civil forfeiture process. It would eliminate the cost bond, which is a percentage of the subject property's value that must be deposited with the court before a claimant can oppose the forfeiture.¹³⁴ The bill also includes a provision that would allow claimants to recover monetary damages for wrongful destruction, injury, or loss while the government holds the property.¹³⁵ Finally, Hyde's legislation provides that claimants who are indigent may have court-appointed representation.¹³⁶ This final reform is especially significant, as many in rem forfeitures go unopposed because the claimant can afford neither the cost bond nor the cost of representation.¹³⁷ In sum, the measure is intended "[t]o provide a more just and uniform procedure for Federal civil forfeitures."¹³⁸

B. *The Conyers Bill*

The bill originally proposed by Representative John Conyers of Michigan is no longer pending legislation, having been allowed to die without a vote.¹³⁹ House Bill 3347 proved the adage that it is never wise to try and fix everything at once. Conyers' solution was to completely eliminate civil in rem forfeiture, allowing the government to forfeit property only after the claimant was convicted in a collateral proceeding. The bill found little support in the House, probably because it sought to disband a system that has the potential to be workable with proper reformation. Conyers himself is now a co-sponsor of the Hyde bill.

C. *The Schumer Bill*

It should come as no surprise that the Department of Justice ("DOJ") has claimed a central role in the effort to reform the forfeiture process, largely to keep the mechanisms favorable to the government. The Department has joined forces with New York Representative Charles Schumer to proffer the other pending reform bill.¹⁴⁰

¹³⁴ See H.R. 1835.

¹³⁵ See *id.* § 5.

¹³⁶ See *id.* § 2.

¹³⁷ See LEONARD LEVY, A LICENSE TO STEAL: THE FORFEITURE OF PROPERTY 130-37 (1996).

¹³⁸ H.R. 1835.

¹³⁹ See H.R. 3347, 103d Cong., 1st Sess. (1993).

¹⁴⁰ See H.R. 1745, 105th Cong., 1st Sess. (1997).

Unlike the Hyde¹⁴¹ proposal, Schumer's House Bill 1745 restructures the cost bond requirement, making it waivable where the Attorney General determines "that the posting of a bond is not required in the interests of justice."¹⁴² The Schumer bill makes no provision for court-appointed legal representation of an indigent claimant. Similarly, there is no mechanism for recovering damages where the government loses, destroys, or injures subject property.

For purposes of this Note, the most significant aspect of the Schumer/DOJ legislative proposal is that it retains the shifting burden of proof. Unlike the present statute, however, the burdens are equalized. After instituting a forfeiture proceeding, the government must prove its case against the res by a preponderance of the evidence.¹⁴³ If the prosecution proves that the property in question is subject to forfeiture, the burden then shifts to the claimant. The claimant is still required to prove by a preponderance of the evidence that her interest should not be forfeited.¹⁴⁴ Claimants generally will view this proposal as less appealing than the Hyde bill's elimination of a claimant's greater burden of proof, but it is still a significant improvement over the disparity inherent in the present statute.

D. Evaluation of Legislative Reform Attempts

From the previous discussion, it should be clear that civil in rem forfeiture is a system with a number of problems. It lacks fundamental fairness, and it places virtually insurmountable obstacles in the paths of those whose guilt has not been proven. Given its historical roots in the common law, it might even rightly be termed an anachronism. However, it is critical to recall that forfeiture under 21 U.S.C. § 881(a) was meant to be an extreme measure, conceived to combat the equally extreme problem of drug trafficking in America.

That said, a critical look at the proposals themselves. It is clear that the Conyers bill went too far, because the evils that civil forfeiture seeks to combat are still present. Also, there may be cases where the forfeitable property can be destroyed before its seizure, so that waiting for a conviction in a collateral proceeding is not a realistic possibility.¹⁴⁵

¹⁴¹ See *supra* notes 129-38 and accompanying text.

¹⁴² H.R. 1745, § 101(a).

¹⁴³ See *id.* § 201(e).

¹⁴⁴ See *id.*

¹⁴⁵ See *United States v. James Daniel Good Real Property*, 510 U.S. 43, 50-52, 57-58 (1993) (discussing the need to seize property for preservation while other

The Schumer and Hyde bills are fundamentally at odds with each other, because of their differing views on the shifting burden of proof. The wisest solution seems to be to re-draft the statute so that the burden of proof is the same for both parties, regardless of whether the quantum of proof required is preponderance of the evidence, probable cause, or clear and convincing evidence. Hyde's choices here seem preferable, because they roughly equalize the burdens of proof and make the government's job somewhat more arduous. By contrast, the Schumer bill has the preferable provision regarding the cost bond: It is foolish to eliminate it entirely, because it prevents some frivolous claims. By the same token, the bond should be waivable where a federal trial judge determines that a claimant has a legitimate stake in forfeited property but cannot afford the bond required to institute a proceeding for recovery.

As a final thought, it should be noted that the outcome will be the same regardless of what reform proposal is adopted. The government will still win those cases where it adduces sufficient proof to legitimately forfeit property. It will no longer prevail in those instances where the unequal burden of proof is the linchpin of a prosecution. If such results become the norm following passage of forfeiture reform, both fairness and justice will be served.

CONCLUSION

In rem civil forfeiture in the context of drug-trafficking prosecutions has been a fact of life for close to three decades. Despite its inherent problems, Congress is still expanding the ways in which civil forfeiture is used.¹⁴⁶ What this suggests is that even with its inequities, forfeiture will be a tool of federal law enforcement for the foreseeable future. How are the courts to respond to the tensions created when claimants compete against the government for the right to claim property?

The Supreme Court already has suggested, in *Good*¹⁴⁷ and *Austin*,¹⁴⁸ that it will no longer defer to all congressional judgments about civil forfeiture. The restrictions in these cases, stemming from the Fifth and Eighth Amendments, have started to map out the new shape of civil

proceedings are pending).

¹⁴⁶ See *United States v. Marolf*, 973 F. Supp. 1139, 1145-46 (C.D. Cal. 1997) ("There are over 100 forfeiture statutes in the United States Code.") (citing JUDITH SECHER, ASSET FORFEITURE: PRACTICE & PROCEDURE (1995)).

¹⁴⁷ *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993).

¹⁴⁸ *Austin v. United States*, 509 U.S. 602 (1993).

forfeiture, where claimants' due process rights figure more prominently than they have in the past. Following these examples, the Second and Ninth Circuits have taken the first searching look at the next constitutionally infirm area of forfeiture, the shifting burden of proof.

Because those courts have reserved ruling on the constitutionality of the burden-shifting mechanism, scholars are constrained to conjecture about how the issue will be resolved. The Fourth Circuit has plainly stated that it thinks burden-shifting passes constitutional muster – but not very long ago the Second and Ninth Circuits shared that opinion. Which circuit will speak next remains to be seen, but it seems certain that one of the courts will rule dispositively on the issue.

This certainty stems from three sources. The first is that in the post-*Good* and *-Austin* environment, the civil forfeiture statutes are no longer inviolable. The Supreme Court has shown the way, and the circuits will surely follow. Second, the existence of legislative reform proposals suggests that even Congress recognizes it is time to reform the inequities created by the present allocation of burdens of proof. Finally, as suggested by Justice Thomas in *Good*, the day is coming when the Supreme Court will “reevaluate [its] generally deferential approach to legislative judgments in the area of civil forfeiture.”¹⁴⁹ This speaks directly to the issue: Reform of civil in rem forfeiture is coming, and the question is not if, but who, how, and when.

¹⁴⁹ *Good*, 510 U.S. at 82 (Thomas, J., concurring in part and dissenting in part).