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Dusenbery v. United States: Setting the Standard for Adequate Notice

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CASENOTES

DUSENBERY V. UNITED STATES: SETTING THE STANDARD FOR ADEQUATE NOTICE

I. INTRODUCTION

Civilized countries have long recognized asset forfeiture as a means for law enforcement to remove the profit motive from crimes of greed.[1] In response to escalating crime in America, Congress has increased law enforcement's authority to seize and forfeit the instrumentalities and proceeds of crimes.[2] However, the Due Process Clause in the Fifth Amendment to the United States Constitution[3] safeguards the rights of the innocent and acts as a check on the power of law enforcement officials.[4] In an effort to steady the tumultuous balance between law enforcement and private property rights, courts have tried to establish guidelines for the Due Process Clause.[5]

Courts have generally established that "notice" and "opportunity to be heard" are fundamental to the notion of due process.[6] No forfeiture process can withstand a due process attack unless both notice and opportunity to be heard are afforded.[7] While courts have consistently held parties responsible for providing no-

1. Marc S. Roy, *United States Federal Forfeiture Law: Current Status and Implications of Expansion*, 69 MISS. L.J. 373, 374–76 (1999).

2. Douglas Kim, Comment, *Asset Forfeiture: Giving Up Your Constitutional Rights*, 19 CAMPBELL L. REV. 527, 527 (1997).

3. U.S. CONST. amend. V.

4. *See* Dusenbery v. United States, 534 U.S. 161, 167 (2002); Kim, *supra* note 2, at 564.

5. *See Dusenbery*, 534 U.S. at 167–68.

6. *See, e.g.*, Grannis v. Ordean, 234 U.S. 385, 394 (1914).

7. *Id.*

tice and an opportunity to be heard, courts have used inconsistent standards to determine the adequacy of notice.[8]

In particular, courts have struggled to determine the adequacy of notice to those incarcerated by the government.[9] Recently, in *Dusenbery v. United States*,[10] the United States Supreme Court clarified the due process requirements of notice to persons in the custody of the federal government.[11] This note discusses the controversies and implications of the Court's holding. Part II explains the history and evolution of notice requirements through case law. Part III discusses the facts, history, and holding of the *Dusenbery* case. Part IV outlines important topics in the majority and dissenting opinions in *Dusenbery*. Finally, Part V reveals the implications of the *Dusenbery* holding and the orientation of the law following the decision.

II. NOTICE IN ASSET FORFEITURE CLAIMS

A. *History of Asset Forfeiture*

Asset forfeiture has been recognized in American jurisprudence since the foundation of the Union.[12] Its origins can be traced as far back as early Rome and Greece, but are more specifically derived from English common law.[13] In cases of treason or felony, the English government could attach a defending party's property to the criminal charges, and, if found guilty, the Crown could declare the property forfeited.[14] The United States has adopted similar provisions in both criminal and civil laws.[15] Any property

8. *See, e.g.*, United States v. One Toshiba Color Television, 213 F.3d 147 (3d Cir. 2000); Yeung Mung Weng v. United States, 137 F.3d 709 (2d Cir. 1998); United States v. Clark, 84 F.3d 378 (10th Cir. 1996). For further discussion, see *infra* Part II.B.

9. *See infra* Part II.B.

10. 534 U.S. 161 (2002).

11. *Id.* at 166–67.

12. Kim, *supra* note 2, at 528.

13. Roy, *supra* note 1, at 374.

14. *Id.* at 375.

15. Kim, *supra* note 2, at 527. Asset forfeiture laws in the United States began "in connection with felonies or treason." *Id.* at 532. An offender could be denied property ownership because of violations of criminal laws. *Id.* Civil statutes regulating customs and revenue also included forfeiture statutes. *Id.* Following the adoption of the Constitution, forfeiture laws were enacted under federal law. *Id.* at 532–33. Currently, over 350 statutory forfeitures are allowed under federal law. Roy, *supra* note 1, at 377.

connected to a criminal act or civil violation may be subject to asset forfeiture laws and may be sold or destroyed by the federal government.[16] Hoping to diminish profits from crime, deter future illegal activity, and help finance the war against crime, Congress has periodically expanded law enforcement's asset forfeiture powers.[17] As a result of the increased leeway given to law enforcement authorities, asset forfeiture provisions now dance a fine constitutional line, often bordering on violations of the Due Process Clause in the Fifth Amendment.[18]

Before the government can declare property forfeited, due process requires the acting government agency to send notice to any parties with a potential claim to the property.[19] The interested parties must be given an opportunity to present their objections before an impartial tribunal.[20] Until 1950, courts generally held that publication of notice was enough to satisfy due process.[21] However, in 1950, the United States Supreme Court held in *Mullane v. Central Hanover Bank & Trust Co.*[22] that publication alone is not sufficient when the parties' identities and whereabouts are known or can be reasonably ascertained.[23] The Court also held that notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action."[24] Six years later, in *Walker v. City of Hutchinson*[25]

16. *See* Kim, *supra* note 2, at 534–35. Criminal forfeiture laws are accompanied by a greater burden of proof than civil forfeiture laws. *Id.* The Fourth Circuit, for example, requires that all "elements of the criminal offense . . . be proven beyond a reasonable doubt" and a preponderance of evidence must show that the property furthered the crime or was a proceed of the crime. *Id.* at 538. In civil forfeiture actions, the burden is relaxed, and the government must simply show reasonable grounds (but more than mere suspicion) that the property is connected to an unlawful act. *Id.* at 539–40.

17. *Id.* at 527.

18. *See id.*

19. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

20. Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) ("The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases.").

21. JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE § 3.19 (3d ed. 1999).

22. 339 U.S. 306 (1950). In 1946, Central Hanover Bank & Trust Co. established a common trust fund with 113 participants. *Id.* at 309. Many of the beneficiaries were not residents of New York. *Id.* Notice of the first accounting was given to the beneficiaries by publication in a local New York newspaper. *Id.* An attorney, who had been appointed special guardian of the trust fund, filed a complaint claiming that notice of the accounting was inadequate. *Id.* at 310–11.

23. *Id.* at 318–19.

24. *Id.* at 314.

25. 352 U.S. 112 (1956). The City of Hutchinson, Kansas, filed an action to condemn

the Supreme Court expanded the *Mullane* decision by holding that publication was insufficient because the property owner's name was known to the city through city records.[26]

In the 1972 case of *Robinson v. Hanrahan*,[27] the Supreme Court held that notice mailed only to a property owner's residence was insufficient because the state knew that the owner was in prison.[28] The Court relied upon the *Mullane* standard to conclude that notice was not "reasonably calculated" to reach the owner.[29] However, four years later, in *Mathews v. Eldridge*,[30] the Court used a balancing test instead of using the *Mullane* standard to determine the adequacy of notice.[31] While at first glance this seems like a drastic departure from the Court's consistent use of

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part of the petitioner's property in order to widen a city street. *Id.* at 112–13. The District Court of Reno County, Kansas, appointed three commissioners to determine the compensation for the taking of property as well as any other damages. *Id.* at 113. As required by law, the commissioners published notice of their proceedings in Hutchinson's official city paper. *Id.* at 114. The commissioners fixed the damages at $725 and deposited the money in the city treasury. *Id.* The petitioner did not appeal within the statutory thirty days. *Id.* Some time after the thirty days, the petitioner filed a complaint in the district court alleging that he never received notice of the condemnation proceedings and that notice by publication did not satisfy the Fourteenth Amendment's due process requirements. *Id.*

26. *Id.* at 116.

27. 409 U.S. 38 (1972). Robinson was arrested and charged with armed robbery. *Id.* at 38. The State of Illinois commenced forfeiture proceedings on Robinson's automobile. *Id.* The State mailed notice of the forfeiture proceedings to Robinson's home, but not to the jail facility. *Id.* Robinson did not receive notice of the proceedings until after his release, at which time the forfeiture proceedings had already been concluded. *Id.* at 39. Robinson filed a motion requesting that the forfeiture be set aside because notice was inadequate to satisfy the due process requirements under the Fourteenth Amendment. *Id.*

28. *Id.* at 40.

29. *Id.*

30. 424 U.S. 319 (1976). Eldridge was awarded Social Security disability benefits in 1968 because of chronic anxiety and back strain. *Id.* at 323, 324 n.2. In 1972, Eldridge received and completed a questionnaire from the state agency responsible for his case. *Id.* at 323–24. Two months later, the state agency determined that Eldridge was no longer disabled and discontinued the disability payments. *Id.* at 324. Notification was sent to Eldridge advising him of his right to seek review and reconsideration by the state agency within six months. *Id.* Eldridge commenced an action challenging the validity of the administrative procedures used to review his disability. *Id.* at 324–25. The Supreme Court balanced the following three factors to determine the adequacy of due process:

> 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 335 (citation omitted).

31. *See id.* at 335.

the *Mullane* standard, it is easy to see why a balancing test was needed in this particular case. In *Mathews*, the Court was not only examining the adequacy of notice, but was also determining whether Eldridge was denied due process when the Social Security Administration terminated his benefits without a hearing.[32] In making this determination, the Court balanced the government's interests and administrative burdens against Eldridge's private interests.[33]

Ten years later, in *Greene v. Lindsey,*[34] the Court returned to the *Mullane* standard, holding that posting an eviction notice on the door of a residence was insufficient because the deputies knew that children often removed the notices before the tenants could read them.[35] Relying on the *Mullane* standard,[36] the Court concluded that notice was insufficient because it was not reasonably calculated to reach those for whom it was intended, especially when notice by other means, such as certified mail, would have guaranteed notice.[37] Furthermore, in *Tulsa Professional Collection Services, Inc. v. Pope,*[38] the Court demonstrated the reach of the *Mullane* decision, holding that notice by mail must be sent to any creditor of an estate who is reasonably ascertainable.[39]

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32. *Id.*

33. *Id.* at 334–35.

34. 456 U.S. 444 (1982). The appellees were tenants of a Louisville, Kentucky, housing project. *Id.* at 446. The Housing Authority of Louisville filed for repossession of the defendant's apartments. *Id.* The deputy sheriffs charged with serving process posted notice on the door of the apartment in accordance with state law. *Id.* The residents filed a class action complaint alleging that they never received notice and that posting did not satisfy the due process requirements of the Fourteenth Amendment. *Id.* at 446–47.

35. *Id.* at 453.

36. *Id.* at 449–50.

37. *Id.* at 453–55.

38. 485 U.S. 478 (1988). H. Everett Pope, Jr., died testate in 1979, survived by his wife JoAnne Pope. *Id.* at 482. JoAnne Pope was named executrix of her husband's estate and, as statutorily required, published notice to creditors in the *Tulsa Daily Legal News* for two consecutive weeks. *Id.* Appellant Tulsa Professional Collection Services, Inc. ("Tulsa") was a subsidiary of St. John Medical Center, where the decedent was treated prior to his death. *Id.* After the expiration of the two month claims period, Tulsa filed an order to compel payment of the medical expenses. *Id.* During a rehearing, Tulsa claimed that notice by publication did not satisfy due process requirements because the identity of the creditor was readily accessible. *Id.* at 483.

39. *Id.* at 491.

B. *Confusion in the Lower Courts*

While the *Mullane* standard set a clear precedent for the lower courts to follow in most circumstances, confusion remained concerning how the standard should be applied to inmates under the control of a state or federal institution.[40] Much of this confusion centered around the issue of whether due process required actual notice.

In *Yeung Mung Weng v. United States*,[41] the United States Court of Appeals for the Second Circuit ruled that if the property owner is incarcerated, the government must take steps to determine the inmate's location and ensure actual receipt of notice.[42] Specifically, the Second Circuit held that mailing notice to the institution where an inmate is detained does not "constitute[ ] adequate notification of the forfeiture if the notice is not in fact delivered to the prisoner-owner."[43] To justify this requirement of actual notice, the court used a balancing test, weighing "the nature of the interests involved, the likelihood that others similarly situated will protect a property owner's interests, and the reasonableness of imposing more onerous requirements on the entity obligated to give notice."[44] The court found that it was not an undue hardship for a federal agency to deliver the notice in a manner that ensures receipt and concluded that merely mailing the notice did not satisfy the *Mullane* standard.[45]

In contrast, the Tenth Circuit held in *United States v. Clark*[46] that simply sending notice by certified mail to the inmate at the

40. *See* Dusenbery v. United States, 534 U.S. 161, 166 (2002).

41. 137 F.3d 709 (2d Cir. 1998). Weng was arrested by the FBI on narcotics charges in 1990. *Id.* at 710. During the arrest, FBI agents seized $19,150 in jewelry and $65,900 in cash. *Id.* at 711. While Weng was in federal custody, the FBI initiated forfeiture proceedings, sending notice by certified mail to Weng's residence and the detention facility in New York City where it was documented that he was incarcerated. *Id.* Weng filed a complaint stating that he was transferred to different facilities several times and never received notice. *Id.* at 712.

42. *Id.* at 714–15.

43. *Id.* at 714.

44. *Id.*

45. *Id.* at 715.

46. 84 F.3d 378 (10th Cir. 1996). In 1994, Clark was arrested for attempting to buy six kilograms of cocaine from an undercover FBI agent. *Id.* at 379–80. After the arrest, the FBI seized $101,760 from Clark. *Id.* at 380. Notice of the forfeiture proceedings was sent by certified mail to the jail where Clark was incarcerated, to his last known residence, and by publication in the *New York Times*. *Id.* The return receipt to the residence was signed

place of incarceration was sufficient to satisfy due process, even if the inmate never actually received the notification.[47] The court stated that "due process does not require that the interested party actually receive the notice."[48] Rejecting Clark's claim that notice must be received by the inmate in order to satisfy due process, the court said that Clark would have to show extraordinary circumstances that merited actual notice.[49] The Tenth Circuit refused to create an actual notice requirement "[a]bsent extraordinary circumstances."[50]

Taking the middle ground, the Third Circuit held in *United States v. One Toshiba Color Television*[51] that certified mail was acceptable as long as the government could show that procedures were in place at the institution to ensure proper delivery.[52] In *Toshiba*, the court examined the decisions in both *Clark* and *Weng* and used a combination of both holdings.[53] The court held that "the government need not prove actual notice," but if the government relied on anything less than actual notice, they bore the burden of showing that procedures were in place to ensure actual notice.[54]

In *Toshiba*, the Third Circuit noted, "[o]ur sister circuits have differed on what kind of notice is the constitutional minimum for incarcerated individuals whose property is subject to forfeiture."[55] In *Weng*, the Second Circuit used a balancing test and required actual notice,[56] whereas in *Clark*, the Tenth Circuit used *Mullane*

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by someone thought to be Clark's mother-in-law. *Id.* After the money was forfeited, Clark filed a complaint alleging that notice was inadequate because even though it was sent to the correct facility, he never received it. *Id.*

47. *Id.* at 381.

48. *Id.* at 380.

49. *Id.* at 381.

50. *Id.*

51. 213 F.3d 147 (3d Cir. 2000). Reginald McGlory was arrested in 1989 on drug charges. *Id.* at 150. During the arrest, officers seized several items including a Toshiba television, two answering machines, a computer, and jewelry. *Id.* at 150–51. Notice of forfeiture proceedings was mailed to the county jail where McGlory was being held. *Id.* at 151. Notice was received and signed for by the jail personnel. *Id.* Notice was also sent to McGlory's previous address, to his ex-wife, and to an attorney; as well as published in a general circulation newspaper. *Id.* McGlory filed an action claiming that because he never received notice, the due process requirements had not been met. *Id.*

52. *Id.* at 155.

53. *Id.* at 153–55.

54. *Id.* at 155.

55. *Id.* at 153.

56. Yeung Mung Weng v. United States, 137 F.3d 709, 714–15 (2d Cir. 1998).

and specifically held that actual notice was not necessary.[57] The United States Supreme Court granted certiorari in *Dusenbery v. United States*[58] in order to determine the appropriate test and establish one clear standard for all federal courts to apply.[59]

III. HISTORY OF THE *DUSENBERY* CASE

In April 1986, the FBI arrested Larry Dean Dusenbery at a house trailer in Atwater, Ohio.[60] Executing a search warrant, FBI officers seized drugs, drug paraphernalia, firearms, a knife, an automobile, and $21,939 in cash.[61] In June 1986, Dusenbery pleaded guilty to possession of 813 grams of cocaine with the intent to distribute.[62] The United States District Court for the Northern District of Ohio sentenced Dusenbery to twelve years of imprisonment and six years of parole.[63] Unable to determine the rightful owner, the FBI destroyed the firearms and the knife in 1988 by order of the district court.[64]

The FBI sent notice of pending forfeiture actions for the cash and the automobile to the Federal Correctional Institution where Dusenbery was located, to the address where Dusenbery was arrested, and to an address in Randolph, Ohio where Dusenbery's mother lived.[65] The FBI also published notice consecutively in three Sunday editions of the *Cleveland Plain Dealer*.[66] Having received no response to the notices after twenty days, the FBI declared the cash and the car forfeited and turned the cash over to the United States Marshals Service.[67]

Five years later, Dusenbery filed a motion to reclaim the property.[68] The United States District Court for the Northern District

57. United States v. Clark, 84 F.3d 378, 380 (10th Cir. 1996).
58. 534 U.S. 161 (2002).
59. *Id.* at 166–67.
60. *Id.* at 163.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.* at 164.
66. *Id.*
67. *Id.*
68. *Id.* at 164–65.

of Ohio denied the motion, ruling that "any challenge to the forfeiture proceedings should have been brought in a civil action, not as a motion ancillary to petitioner's now-closed criminal case."[69] The Court of Appeals for the Sixth Circuit remanded the proceedings back to the district court, holding that the district court should have construed the motion as a "civil complaint seeking equitable relief for a due process challenge to adequacy of the notice."[70] On remand, the district court held that notice by certified mail to the place of incarceration satisfied due process requirements.[71] The Sixth Circuit affirmed, adding that absence of proof that Dusenbery actually received notice was irrelevant.[72]

The United States Supreme Court granted certiorari and affirmed the Sixth Circuit's decision.[73] Writing for a narrow 5–4 majority, Chief Justice Rehnquist[74] held that notice by mail to Dusenbery's place of incarceration was "'reasonably calculated, under all the circumstances, to apprise [petitioner] of the pendency of the action'" and, therefore, satisfied due process requirements.[75]

IV. ANALYSIS

A. *Majority Opinion*

1. The *Mullane* Standard

Despite arguments from Dusenbery, Chief Justice Rehnquist relied heavily on the *Mullane* standard to reach the majority's holding.[76] Dusenbery argued that the Court should apply the balancing test used in *Mathews v. Eldridge*.[77] The majority, however,

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69. *Id.* at 165.

70. *Id.*

71. *Id.* at 166.

72. *Id.*

73. *Id.* at 166–67.

74. Chief Justice Rehnquist delivered the opinion of the Court in which Justices O'Connor, Scalia, Kennedy, and Thomas joined. *Id.* at 162.

75. *Id.* at 172–173 (alteration in original) (quoting Mullane v Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

76. *Id.* at 167–68.

77. *Id.* at 167. For a discussion of the *Mathews* balancing test see *supra* notes 30–33 and accompanying text.

determined that *Mullane* was the correct standard, noting that *Mathews* has never been used as an "all-embracing test for deciding due process claims."[78] The majority argued that the Court has consistently turned to the *Mullane* standard when faced with similar notice issues.[79]

In applying the *Mullane* test, the Court asked whether notice was "reasonably calculated under all the circumstances" to apprise Dusenbery of the pending forfeiture.[80] The majority held that the actions taken by the FBI to send notice to Dusenbery were sufficient to satisfy the *Mullane* standard.[81] Specifically, the majority determined that sending notice by certified mail to the institution where Dusenbery was incarcerated was enough to meet the "reasonably calculated" threshold.[82]

2. Actual Notice

The issue of whether due process requires actual notice when the property owner is incarcerated has been particularly troubling for the lower courts.[83] The Supreme Court attempted to clarify this ambiguity in the *Dusenbery* decision.[84] The majority opinion noted that the Court has never required actual notice in forfeiture proceedings.[85] The majority argued that while due process does require a calculated and good faith effort, it does not re-

78. *Dusenbery*, 534 U.S. at 168.
79. *Id.*
80. *Id.*
81. *Id.* at 172–73.
82. *Id.*
83. Examples of cases that have not required actual notice include *United States v. Clark*, 84 F.3d 378 (10th Cir. 1996) (holding that mailing notice to prison is sufficient), *United States v. Derenak*, 27 F. Supp. 2d 1300 (M.D. Fla. 1998) (holding that mailing notice to prison, home address, and newspaper publication satisfies due process even if defendant did not receive notice), and *Scott v. United States*, 950 F. Supp. 381 (D.D.C. 1996) (finding that regardless of whether notice is actually received, mailing notice to prison and publication is adequate). Other courts have held that actual notice is required. *See* United States v. $5,000 in United States Currency, 184 F.3d 958 (8th Cir. 1999) (holding that the government must show that the prisoner received actual notice); Yeung Mung Weng v. United States, 137 F.3d 709 (2d Cir. 1998) (finding that mailing notice to prison is inadequate if notice is not delivered to prisoner); United States v. Cupples, 112 F.3d 318 (8th Cir. 1997) (holding that the government is required to give actual notice to the prisoner or his counsel).
84. *Dusenbery*, 534 U.S. at 166–67.
85. *Id.* at 170.

quire "heroic efforts by the government."[86] The majority cited personal service as an example of an unnecessary heroic effort.[87] Instead, the Court placed a burden on the government to show that their chosen method was "'reasonably calculated' to apprise a party of the pendency of the action."[88]

B. *Dissenting Opinion*

1. The *Mullane* Standard

In the dissenting opinion,[89] Justice Ginsburg argued that the method of notice used by the FBI to notify Dusenbery failed to meet the *Mullane* standard because there was a feasible alternative that was more likely "'to bring home notice'" than the method used.[90] The dissent viewed the delivery process differently from the majority in two ways. First, while the majority made a distinction between the FBI and the Bureau of Prisons ("BOP"),[91] the dissent said that there was no distinction because both are "part of the same Government."[92] Second, the dissent separated the two mail systems being used to deliver notice—the United States Postal Service ("USPS") and the prison's internal mail system.[93] Looking at the mail system from this vantage point, the dissent argued that the government must reasonably calculate that the mail would not only reach its intended recipient through the USPS system, but *also* through the prison's mail system.[94] The dissent argued that while notice sent through the postal service satisfied the *Mullane* standard because of USPS's proven efficiency and reliability, the government never satisfied its burden

86. *Id.*

87. *Id.*

88. *Id.* (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)).

89. Justice Ginsburg filed a dissenting opinion in which Justices Stevens, Souter, and Breyer joined. *Id.* at 173 (Ginsburg, J., dissenting).

90. *Id.* at 178 (Ginsburg, J., dissenting) (quoting *Mullane*, 339 U.S. at 315).

91. *Id.* at 168–69.

92. *Id.* at 178 (Ginsburg, J., dissenting).

93. *Id.* at 179 (Ginsburg, J., dissenting).

94. *Id.* at 179–80 (Ginsburg, J., dissenting).

of showing that the mail in the prison was "reasonably calculated" to reach its recipient.[95]

Justice Ginsburg argued that the FBI employed a system that was "'substantially less likely to bring home notice [to prison inmates]' than a 'feasible . . . substitut[e].'"[96] Justice Ginsburg proposed that "substantial improvements in reliability could have been had . . . at minimal expense and inconvenience" to the government.[97] Justice Ginsburg found that recent modifications to the notification system illustrated the feasibility of such improvements.[98] Under the cited system, inmates sign a logbook upon receipt of mail.[99] Should an inmate refuse to sign, a prison officer documents that refusal.[100] Additionally, any mail marked "'congressional, judicial, law enforcement, and attorney correspondence,'" which would include asset forfeiture notification, is opened in the inmate's presence to ensure that the inmate reads the mail.[101]

2. Actual Notice

While the majority held the FBI responsible only for its method of sending notice,[102] the dissent held the FBI responsible until notice reached its intended destination, requiring actual receipt.[103] The dissent argued that public policy requires actual notice because in many cases no other protections would safeguard an owner's interest.[104] The dissent distinguished *Mullane* by pointing out that even if notice only reached a few trustees, those few would naturally protect all other trustees' interests.[105] Justice

95. *Id.* (Ginsburg, J., dissenting). The dissent concluded that the government "introduced nothing to show the reasonableness or reliability" of the prison mail system. *Id.* at 180 (Ginsburg, J., dissenting).

96. *Id.* at 178 (Ginsburg, J., dissenting) (alterations in original) (quoting *Mullane*, 339 U.S. at 315).

97. *Id.* at 180 (Ginsburg, J., dissenting).

98. *Id.* (Ginsburg, J., dissenting).

99. *Id.* (Ginsburg, J., dissenting).

100. *Id.* (Ginsburg, J., dissenting).

101. *Id.* (Ginsburg, J., dissenting) (quoting Brief for the United States at 29 n.19, Dusenbery v. United States, 534 U.S. 161 (2002) (No. 00-6567)).

102. *Id.* at 168–69.

103. *Id.* at 179–80 (Ginsburg, J., dissenting).

104. *Id.* at 178 (Ginsburg, J., dissenting).

105. *Id.* (Ginsburg, J., dissenting).

Ginsburg argued that the situation is much different for prisoners because no others share an interest in the property, and "[n]o others are similarly situated"; therefore, there is no one else to safeguard prisoners' interests absent actual notice.[106]

V. IMPACTS OF THE *DUSENBERY* HOLDING

A. *An Affirmation of the* Mullane *Standard*

1. Determining the Appropriate Standard

The majority's use of the *Mullane* test is supported by a significant amount of case law.[107] The Court has consistently employed *Mullane's* "reasonably calculated" test when determining the sufficiency of notice.[108] In addition to numerous Supreme Court decisions utilizing the *Mullane* test,[109] the majority of lower courts apply *Mullane's* "reasonably calculated" test when deciding notice issues involving prison inmates.[110]

While the Court has used the *Mathews* balancing test to determine if failure to give any form of notice can withstand a due process attack,[111] it is not applicable in determining the adequacy of the method used to give notice.[112] The *Mathews* factors assess the risks of "erroneous deprivation" of individual property rights and balance those risks against the overall interest of the gov-

106. *Id.* (Ginsburg, J., dissenting).

107. *Id.* at 168.

108. *Id.*; *see, e.g.*, Tulsa Prof'l Collection Servs., Inc. v. Pope, 485 U.S. 478, 484–85 (1988); Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 797 (1983); Greene v. Lindsey, 456 U.S. 444, 448–49 (1982); Robinson v. Hanrahan, 409 U.S. 38, 39–40 (1972); Walker v. City of Hutchinson, 352 U.S. 112, 115–16 (1956).

109. *See* cases cited *supra* note 108.

110. *See, e.g.*, Whiting v. United States, 231 F.3d 70 (1st Cir. 2000); Krecoich v. United States, 221 F.3d 976 (7th Cir. 2000); Allen v. United States, 38 F. Supp. 2d 436 (D. Md. 1999), *aff'd*, 238 F.3d 415 (4th Cir. 2000); Concepcion v. United States, 983 F. Supp. 134 (E.D.N.Y. 1996).

111. Matthews v. Eldridge, 424 U.S. 319, 349 (1976); *see, e.g.*, Gilbert v. Homar, 520 U.S. 924, 932–33 (1997) (holding that the due process rights of an employee were not violated when the employee was demoted without notice or an opportunity to be heard pending criminal drug charges); United States v. James Daniel Good Real Prop., 510 U.S. 43, 53 (1993) (holding that pre-deprivation notice was not required before seizing real property related to a drug conviction if justified by the *Mathews* test).

112. *Dusenbery*, 534 U.S. at 167–68.

ernment and the costs of additional safeguards.[113] However, the important determination made by the Court in *Dusenbery* was the character of the FBI's method, "not the possibility of 'conceivable injury.'"[114] Because the Court was analyzing the method of notice, not the failure of the notice, an assessment of the risks of failed receipt of notice was not necessary.[115] Had the FBI neglected to attempt to send any notice to the facility where Dusenbery was incarcerated, then the *Mathews* test might have been appropriate.[116]

In *Dusenbery*, the Court affirmed—in no unclear terms—that the *Mullane* standard is the appropriate analytical framework for determining whether a method of delivery of notice satisfies the due process requirements in the Fifth and Fourteenth Amendments.[117] By choosing the *Mullane* analysis, the Court focused on the method of delivery of notice instead of on the result of the delivery.[118] In turn, this specific focus on method enabled the majority to reach its conclusion that the government's notice to Dusenbery satisfied due process.[119]

2. Applying the *Mullane* Standard

According to the Court in *Mullane*, the intent of the notifying agency is a critical aspect of the "reasonably calculated" test.[120] The Court made it clear in *Mullane* that "a mere gesture" or simply going through the procedural motions is not enough.[121] The Court explained that "[t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."[122] The agency must intend for the prop-

113. *Mathews*, 424 U.S. at 334–35.

114. *Dusenbery*, 534 U.S. at 170–71 (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950)).

115. *Id.* at 168–69.

116. *See Mathews*, 424 U.S. at 334–35 (assessing the effects on due process rights if notice is not sent at all).

117. *Dusenbery*, 534 U.S. at 167.

118. *See id.* at 170 ("[W]e have allowed the Government to defend the 'reasonableness and hence the constitutional validity of any chosen method . . . .'" (quoting *Mullane*, 339 U.S. at 315)).

119. *Id.* at 172–73.

120. *Mullane*, 339 U.S. at 315.

121. *Id.*

122. *Id.*

erty owner to receive notice and must use a means designed to accomplish that end.[123]

The facts in *Dusenbery* are easily distinguished from those in *Greene v. Lindsey*,[124] where the deputies knew there was a good chance that notice would never be received by the intended recipients.[125] In *Dusenbery*, the Court found that the FBI sent certified mail to the facility where Dusenbery was being held and that the prison staff signed for the mail and entered it into a logbook.[126] This was all the evidence that the Court needed to conclude that the *Mullane* threshold of actually attempting to inform the property owner had been met.[127]

Once the government offered evidence showing reasonably calculated notice, the burden shifted to Dusenbery to show why the FBI's efforts did not meet the *Mullane* threshold.[128] Instead of contesting the FBI's use of certified mail, Dusenbery argued that notice was insufficient because the methods employed by the prison staff, not the FBI, were insufficient.[129] In the majority opinion, Chief Justice Rehnquist never discussed the FBI's knowledge of the prison mail system.[130] But one can infer from the facts that the FBI had no reason to expect an unsuccessful delivery and probably believed in good faith that the certified mail would reach Dusenbery.[131] Dusenbery never challenged this inference.[132]

123. *Id.*

124. 456 U.S. 444 (1982); *see supra* notes 34–37 and accompanying text.

125. *Greene*, 456 U.S. at 448. In *Sarit v. United States Drug Enforcement Administration*, 987 F.2d 10 (1st Cir. 1993), the First Circuit stated that "an implicit bad faith standard" would invalidate notice even when all procedures had been correctly followed if the agency knew or had reason to know that notice would be ineffective. *Id.* at 14. In *Owens v. United States*, No. 96-CV-5928, 1997 U.S. Dist. LEXIS 21706 (E.D.N.Y. Apr. 3, 1997), the United States District Court for the Eastern District of New York concluded that notice by certified mail is reasonable if the government lacked "reason to believe that its notice never reached the addressee." *Id.* at *9.

126. Dusenbery v. United States, 534 U.S. 161, 165–66 (2002).

127. *Id.* at 172–73.

128. *See id.* at 168–69.

129. *Id.* at 169.

130. *See id* at 163–73.

131. *See id.* at 168–69

132. *Id.* at 169.

B. *Actual Notice: No Exceptions for Inmates*

1. Majority Opinion: Burdens Outweigh the Due Process Risks

The Supreme Court's holding clarified any ambiguity among the lower courts—and within its own previous decisions—regarding the requirements of notice.[133] The Court concluded that actual notice is not necessary as long as the method of notice delivery meets the *Mullane* standard.[134] Case law supports this position, as the Court has never ruled that actual notice is a prerequisite for forfeiture.[135] In *Mullane* the Court stated that "reasonable risks that notice might not actually reach every beneficiary are justifiable."[136] According to *Mullane*, a certain degree of risk that the mail will not reach its destination is acceptable, provided there is no reasonable alternative means that will ensure delivery with greater certainty.[137] In both *Mullane* and *Dusenbery*, the Court focused on how notice was sent, rather than whether notice was actually received.[138]

Similarly, in *Mennonite Board of Missions v. Adams*,[139] the Court noted that the State is required to "make efforts to provide actual notice," but the Court stopped short of requiring actual notice.[140] The Court again focused on the attempted means of delivery and not the result.[141] In *Tulsa Professional Collection Services, Inc. v. Pope*,[142] the Court affirmed its *Mennonite* decision, holding that when the identity of a creditor is reasonably ascertainable, notice by mail or another equally reliable means is required.[143]

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133. For a detailed discussion of the lower courts' confusion, see *supra* Part II.B.

134. *Dusenbery*, 534 U.S. at 172–73.

135. *Id.* at 170.

136. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 319 (1950).

137. *Id.*

138. *Id.* at 315; *Dusenbery*, 534 U.S. at 172.

139. 462 U.S. 791 (1983).

140. *Id.* at 796 n.3.

141. *Id.* at 800.

142. 485 U.S. 478 (1988); *see supra* notes 38–39 and accompanying text.

143. *Tulsa*, 485 U.S. at 491. The *Tulsa* Court, relying on language from *Mennonite*, stated that "the Due Process Clause requires that appellant be given '[n]otice by mail or other means as certain to ensure actual notice.'" *Id.* (alteration in original) (quoting *Mennonite*, 462 U.S. at 800). This should not be misconstrued to mean that actual notice is required. The phrase "as certain to ensure" is ambiguously placed and probably qualifies the

It is widely held that personal service is unnecessary in most situations because it is unquestionably slow and expensive.[144] Therefore, most courts no longer require personal service when a feasible alternative exists.[145] The only alternative means of assuring actual notice in this context would inevitably entail changing the mail system within prisons to require that a prison employee watch the prisoner open the notice and the inmate sign a receipt to be mailed back to the agency.[146] The majority dismissed this alternative because, although it would create more evidence of receipt, it would not make the mode of delivery any more reliable.[147] If due process does not require actual notice, as the majority contended,[148] then the means of delivery, not the end receipt, should be the focus of the analysis.[149] All that due process requires is that the means of delivery be reasonably calculated to reach the intended property owner.[150] Changing the system to require a record of end receipt would increase the government's effort and expense but would not improve the method of delivery.[151]

2. Dissenting Opinion: Prisoners' Right to Due Process Protections

Dusenbery did not contest the motives of the FBI or the adequacy of certified mail.[152] Instead, Dusenbery argued that inmates are an excepted group and require actual notice because they have little control over their environment, while the gov-

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word "means," explaining that the method of delivery used must be at least as reliable as delivery by mail. *See id.* Furthermore, in *Dusenbery*, the Court clarified that the meaning of "actual" in the *Tulsa* decision was ambiguous and probably signified notice by mail and not actual receipt. *Dusenbery*, 534 U.S. at 169 n.5.

144. *Mullane*, 339 U.S. at 318–19.

145. *Id.* The *Mullane* Court determined that when notice must be served on a "large number of known resident or nonresident beneficiaries," personal service would impede proper administration of service because of unnecessary delay and expense. *Id.* Furthermore, in the *Dusenbery* dissenting opinion, Justice Ginsburg listed a number of cases where service by mail was deemed an adequate alternative to personal service. *Dusenbery*, 534 U.S. at 177 (Ginsburg, J., dissenting) ("In these cases, the Court identified mail service as a satisfactory supplement to statutory provisions for publication or posting.").

146. *Id.* at 180 (Ginsburg, J., dissenting).

147. *Id.* at 172.

148. *Id.* at 170.

149. *Id.* at 172.

150. *Id.* at 170.

151. *See id.* at 171–72.

152. *Id.* at 169.

ernment exercises a great deal of control over their location and the information inmates receive.[153] Dusenbery cited cases from various appellate courts in which similar claims of nonreceipt were asserted.[154] It should be noted, however, that none of the decisions, including *Dusenbery*, provided enough evidence to conclude that the prisoner never in fact received notice.[155] Without safeguards against frivolous claims, any inmate could file a lawsuit falsely claiming that notice was never received.[156] Then, the government would shoulder the difficult burden of proving actual receipt.

Ordinarily, a prisoner's ownership interest "stands alone" with no other "similarly situated" interests to protect it.[157] This was in fact the situation for Dusenbery.[158] Because he allegedly never received notice, Dusenbery was inevitably deprived of an opportunity to be heard.[159] The majority could find no remedy for this significant public policy concern.[160]

C. *The Limitations on Feasible Alternatives*

In order for notice to fall short of the due process threshold, the chosen means of notification must be "substantially less likely to bring home notice than other . . . feasible and customary substitutes."[161] As an alternative, Justice Ginsburg proposed the addition of new procedures requiring an inmate to sign a logbook upon delivery of notice.[162] In fact, such a system was implemented nationwide by the Bureau of Prisons during the 1990s.[163]

However, this alternative does not ensure a more reliable means of delivery. While the dissent made a good argument that these added procedures would increase the prison's incentive to

153. *Id.* at 169–70.
154. *Id.* at 172 n.6.
155. *Id.*
156. *See id.*
157. *Id.* at 178 (Ginsburg, J., dissenting).
158. *Id.* (Ginsburg, J., dissenting).
159. *Id.* (Ginsburg, J., dissenting).
160. *Id.* at 173 (Ginsburg, J., dissenting).
161. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950).
162. *Dusenbery*, 534 U.S. at 180 n.3 (Ginsburg, J., dissenting).
163. *Id.* at 180 (Ginsburg, J., dissenting).

effectively deliver its prisoners' mail,[164] the system of delivery would not change at all under these procedures.[165] Instead, nothing more than a new system of receipt would be put into place.[166] The dissent argued that a system that returned a receipt to the sender would alert such sender if notice was not received.[167] This would prompt the sender to resend notice until receipt could be confirmed.[168] Nevertheless, even this system would not change the method of delivery. None of these receipt-focused alternatives would improve the means of delivery, but rather would simply document the receipt. As previously discussed, both the *Mullane* standard and other precedent are only concerned with the method of delivery, and not the effectiveness of receipt.[169]

Even if these alternatives had changed the outcome under the *Mullane* test, their past availability could only be discussed in hindsight.[170] Despite the dissent's claims that the government "should not be 'penalized' for upgrading its policies,"[171] the dissenting opinion relied on those very upgrades to show that alternatives existed.[172] The dissent's feasible alternative was a mail system that was put into place some time after Dusenbery's notice failed.[173] The dissent argued that the improvements could have been made prior to 1988 "at minimal expense and inconvenience."[174] There was no proof, however, that prison officials were familiar with such an idea prior to 1988.[175] The dissent admitted that the government should not be "penalized" for bettering its policies,[176] yet the basis for this "feasible" alternative rested on the government's own innovative policy.[177]

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164. *Id.* at 180 n.3 (Ginsburg, J., dissenting).

165. *See id.* (Ginsburg, J., dissenting).

166. *See id.* (Ginsburg, J., dissenting).

167. *Id.* (Ginsburg, J., dissenting).

168. *Id.* (Ginsburg, J., dissenting).

169. *See supra* notes 134–43 and accompanying text.

170. *See Dusenbery*, 534 U.S. at 169–73 (referencing the transcripts from oral argument stating that the case "'is not really a mailed notice case because the procedures that are inadequate are the procedures that happened after the mailing'").

171. *Id.* at 180 (Ginsburg, J., dissenting).

172. *Id.* (Ginsburg, J., dissenting).

173. *Id.* (Ginsburg, J., dissenting).

174. *Id.* (Ginsburg, J., dissenting).

175. *See* at 169–73.

176. *Id.* at 180 (Ginsburg, J., dissenting).

177. *Id.* (Ginsburg, J., dissenting).

Basing such reasoning on hindsight is dangerous to public policy in the same way that it would be dangerous to pass a new criminal law and hold people responsible for it retroactively.[178] Without a form of "grandfathering" or prior notice that the rules have changed, the government would be placed at an unfair disadvantage.[179] Such practices could have dangerous implications. Specifically, convicted drug dealers might be able to reclaim proceeds from their illegal drug trade simply by alleging that they never received notice.[180]

D. *Impact on Persons Incarcerated by the Federal Government*

The Supreme Court's opinions on prisoners' rights have shifted dramatically over the past century.[181] During the early-to-mid 1900s, the Court embraced a "hands-off doctrine."[182] Initially the courts viewed prisoners as "slaves of the state," and, therefore, prisoners had few rights except those the state chose to extend to them.[183] By the mid-1900s, the courts had acknowledged that prisoners do retain some rights upon incarceration, but insisted that the enforcement of those rights was the responsibility of the legislative and executive branches.[184]

With the onset of the civil rights movement and the Vietnam War protests, the Supreme Court under the charge of Chief Justice Warren began extending constitutional protections to prisoners.[185] Landmark cases during this period included *Mapp v. Ohio*,[186] *Robinson v. California*,[187] *Cooper v. Pate*, [188] *Miranda v.*

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178. *See id.* at 169–73. *But see id.* at 178–79, 181 n.4 (Ginsburg, J., dissenting).

179. *See id.* at 169–73 (stating that the government is not required to go to "heroic efforts").

180. *See id.*

181. Jack E. Call, *The Supreme Court and Prisoner's Rights*, FED. PROBATION, Mar. 1995, at 36, 36.

182. LYNN S. BRANHAM, THE LAW OF SENTENCING, CORRECTIONS, AND PRISONERS' RIGHTS 140 (5th ed. 1998); *see also* Call, *supra* note 181, at 36.

183. BRANHAM, *supra* note 182, at 140 (quoting Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871)); *see also* Call, *supra* note 181, at 36.

184. BRANHAM, *supra* note 182, at 140.

185. *Id.* at 142–43.

186. 367 U.S. 643, 656–57 (1961) (extending the Fourth Amendment exclusionary rule to the states).

187. 370 U.S. 660, 667 (1962) (applying the Eighth Amendment prohibition against cruel and unusual punishment to the states).

188. 378 U.S. 546, 546 (1964) (allowing a prisoner to bring a § 1983 suit alleging viola-

Arizona, [189] and *Wolff v. McDonnell.*[190] By 1980, a more conservative Supreme Court began limiting or refusing to expand prisoners' rights, while giving more deference to corrections officials.[191] In several cases, the Court held that inmates' rights were not protected by the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution because the actions taken by corrections officials did not affect a "liberty interest."[192] Under this conservative Court, inmates lost two important search cases,[193] several First Amendment cases,[194] and three important Eighth Amendment cases.[195] Not only did inmates lose these cases, but additionally the Court's holdings made it even more difficult for prisoners to succeed in future suits.[196]

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tion of freedom of religion when prison personnel refused to let a prisoner purchase religious materials).

189. 384 U.S. 436, 478–79 (1966) (holding that statements obtained from criminal detainees, without first giving full warning of constitutional rights, were inadmissible because they violated the Fifth Amendment protection against self incrimination).

190. 418 U.S. 539, 555–56 (1974) ("There is no iron curtain drawn between the Constitution and the prisons of this country.").

191. Call, *supra* note 181, at 38–40.

192. *Id.* at 39. *See, e.g.*, Ky. Dept. of Corrs. v. Thompson, 490 U.S. 454 (1989) (concluding that inmates did not have liberty interest in receiving visitors); Jago v. Van Curen, 454 U.S. 14 (1981) (funding that inmates did not have liberty interest requiring hearing to explain recision of parole); Conn. Bd. of Pardons v. Dumschat, 452 U.S. 458 (1981) (holding that inmates had no constitutional right to commutation of sentence); Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1 (1979) (holding that inmates did not have constitutionally protected liberty interest in initial grant of parole).

193. *See* Block v. Rutherford, 468 U.S. 576, 591 (1984) (holding that "shakedown" searches are reasonable responses to security concerns and do not violate prisoners' due process rights, even if the prisoners are not allowed to observe the search); Hudson v. Palmer, 468 U.S. 517, 530 (1984) (holding that prisoners do not have a reasonable expectation of privacy and, therefore, shakedown searches of their cells are not a violation of their Fourth Amendment rights).

194. *See* O'Lone v. Estate of Shabazz, 482 U.S. 342, 353 (1987) (holding that restrictions on a prisoner's opportunity to observe certain religious ceremonies were reasonable in light of the security needs and resources of the prison); Turner v. Safley, 482 U.S. 78, 91 (1987) (holding that a rule prohibiting prisoners from corresponding with inmates in other prisons was constitutional because the regulation was clearly and reasonably related to legitimate security concerns).

195. *See* Wilson v. Seiter, 501 U.S. 294, 302 (1991) (holding that in order to prevail with a claim of cruel and unusual punishment stemming from the overcrowding of prisons, a prisoner must show deliberate indifference by the prison officials); Whitley v. Albers, 475 U.S. 312, 326 (1986) (holding that the shooting of a prisoner during a riot, even if that prisoner was not involved in the uprising, was not a violation of the Eighth Amendment in light of the prison's need to maintain security); Rhodes v. Chapman, 452 U.S. 337, 352 (1981) (holding that keeping two prisoners in one cell is not a violation of the Eighth Amendment).

196. Call, *supra* note 181, at 41.

With the addition of Justices Ginsburg and Breyer in the 1990s, the Court became less conservative regarding prisoners' rights.[197] However, Justices Scalia and Thomas tend to heavily support the corrections officers.[198] With conservatives still in control of the Court, one can speculate that the trend seen beginning in the 1980s will continue until another justice is appointed to the Court.[199]

The *Dusenbery* holding continues the Court's conservative direction. The Court made a tremendous impact on prisoners' due process rights by choosing to follow the more relaxed notice and opportunity to be heard requirements of *Mullane* rather than *Mathews*.[200] The *Dusenbery* decision exposed the possibility that persons incarcerated by the federal government may never receive notice that forfeiture proceedings are pending against their property.[201] Consequently, those incarcerated may never have the opportunity to show that their property was not connected to the crime. On its face, this seems contrary to the express language in the United States Constitution.[202] The Fifth Amendment states, "[n]o person shall be . . . deprived of life, liberty, or *property*, without due process of law."[203] However, the majority of justices interpreted the Due Process Clause as requiring law enforcement to take steps "reasonably calculated under all the circumstances" to notify all potential property owners that their property was subject to forfeiture.[204]

The majority did not want to hold law enforcement responsible in the event that notice not arrive due to factors beyond their control.[205] In reality, the chances that a guilty party will not receive notice when the delivery has been reasonably calculated to reach them are very small. Dusenbery cited several cases alleging nonreceipt of notice; however, in each of those cases there was no

197. *Id.* at 45. Prof. Call predicts that Justices Ginsburg and Breyer would support pro-inmate positions. *Id.*

198. *Id.*

199. *See id.*

200. *Dusenbery*, 534 U.S. at 167.

201. *Id.* at 181 n.4 (Ginsburg, J., dissenting).

202. *See id.*

203. U.S. CONST. amend. V (emphasis added).

204. *Dusenbery*, 534 U.S. at 168.

205. *See id.* at 170.

concrete proof of nonreceipt.[206] Had the Court taken Justice Ginsburg's position, law enforcement officers would have an absolute obligation to ensure that notice was received by an inmate before any property could undergo forfeiture proceedings.[207] These are the very "heroic efforts" that the Court was trying to avoid.[208]

Furthermore, requiring actual notice would open a Pandora's box, allowing any criminal to bring a claim that notice was never received and that due process had been violated. Because no systems existed in the past to document receipt, the government would look to prison employees to testify about the delivery of a single letter that had occurred years beforehand.[209] Cases would turn on this kind of disputed and cloudy testimony.[210] There would be no safeguards against the fraudulent testimony of inmates trying to reclaim the proceeds from illegal drug trafficking.

E. *Impact on Other Groups*

Because the *Dusenbery* Court affirmed the minimum requirement that parties send notice by certified mail,[211] in most situations notice will either reach its intended party or will be returned to the sender. However, the *Dusenbery* decision could impact any group of people whose location, travel, and mail are controlled by the government, such as members of the Armed Forces, law enforcement agents, or other government employees.[212] Government employees in a combat situation are especially at risk of not receiving notice.[213] If civil or criminal asset forfeiture proceedings were pending against property belonging to a member of such a group, according to *Mullane* and *Dusenbery,* actual notice would not be required as long as the method of delivery was "reasonably calculated."[214] Therefore, hypothetically, no-

206. *Id.* at 172 n.6.

207. *See id.* at 180 (Ginsburg, J., dissenting).

208. *Id.* at 170 (holding that personal service, as in the movie SAVING PRIVATE RYAN, was unnecessary); *see also id.* at 181 (Ginsburg, J., dissenting) (agreeing with the majority that the Due Process Clause does not require "heroic efforts" to ensure actual notice).

209. *Id.* at 171.

210. *Id.*

211. *Id.* at 169.

212. *See id.* at 170.

213. *Id.* at 182 n.5 (Ginsburg, J., dissenting)

214. *Id.* at 167–68.

tice might arrive at a foreign base, and the base post office might sign for the certified mail. However, due to an error within the internal base mail system, a soldier in a combat zone might never receive notification of the forfeiture proceedings. The dissent dismissed this hypothetical, commenting that the chances of such an event resulting in the irrevocable forfeiture of property are doubtful.[215] The majority was not willing to use this hypothetical as justification for extraordinary expectations of the government.[216]

Still, the *Dusenbery* decision may have broader implications on a far greater population. Because the Court confirmed in *Dusenbery* that actual notice is not necessary as long as notice is "reasonably calculated"[217] and sent as if "desirous of actually informing" the interested party,[218] lower courts have already begun to examine the intent of the party sending the notification to help determine the constitutional sufficiency of notice.[219] In *Greenbriar Village v. City of Mountain Brook*, [220] a landowner brought suit against the City of Mountain Brook challenging the constitutionality of three city ordinances.[221] The "heaviest burden" of one ordinance fell on one landowner, Greenbriar Village ("Greenbriar").[222] Therefore, the United States District Court for the Northern District of Alabama concluded that the city should have mailed notice to Greenbriar of the changes implemented by this new ordinance.[223] Relying on both *Mullane* and *Dusenbery*, the court determined that the sufficiency of the notice should be weighed by examining the intent of the city.[224] The court held that notice to a related party was not the "method of notification that would be used if the city were 'desirous of actually informing' Greenbriar that its permit was about to be permanently terminated."[225]

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215. *Id.* at 182 n.5 (Ginsburg, J., dissenting).

216. *Id.* at 170.

217. *Id.* at 168 (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314, 319 (1950)).

218. *Id.* (quoting *Mullane*, 339 U.S. at 315).

219. *See* Greenbriar Vill. v. City of Mountain Brook, 202 F. Supp. 2d 1279, 1302 (N.D. Ala. 2002).

220. 202 F. Supp. 2d 1279 (N.D. Ala. 2002)

221. *Id.* at 1281.

222. *Id.* at 1300.

223. *Id.*

224. *Id.*

225. *Id.* at 1302 (quoting Dusenbery v. United States, 534 U.S.161, 168 (2002)).

Furthermore, because the *Dusenbery* Court refrained from implementing an actual notice requirement,[226] other courts may likewise relax the standards that apply to private parties in civil cases. If the *Dusenbery* holding carries over into civil cases, private parties who are required to give notice may be held to the *Mullane* "reasonably calculated" standard, instead of a more rigorous actual notice standard. The "reasonably calculated" standard gives the courts much more discretion to make a determination about the adequacy of notice.[227] In contrast, if the courts were bound by an actual notice standard, courts would lack discretion, because adequacy would turn simply on whether or not notice was received—a question of fact, not of law. While this increased discretion may lead to minor inconsistencies throughout jurisdictions, it also allows courts to examine notice on a case-by-case basis. Such flexibility promotes fairness because courts can take into account unforeseen problems beyond the parties' control.

VI. CONCLUSION

Prior to the *Dusenbery* decision, appellate courts disagreed over how to determine the sufficiency of notice in criminal cases.[228] The Supreme Court granted certiorari in *Dusenbery* to clear up the disparity in the lower courts.[229] As a result, three important guidelines emerged from the majority's opinion. First, to test the sufficiency of notice, courts should apply the *Mullane* standard.[230] Second, due process does not require actual notice, as long as the method of delivery is reasonably calculated to reach the intended party.[231] Third, alternative methods of notice known only through hindsight will not render notice insufficient.[232] The party contesting notice has the burden of showing that the notifying party

226. *Dusenbery*, 534 U.S. at 172–73.

227. *See* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (holding that notice must be "reasonably calculated, *under all the circumstances,* to apprise interested parties" of the pending action (emphasis added)); United States v. One Toshiba Color Television, 213 F.3d 147, 153 (3rd Cir. 2000) ("Adequacy of notice is always evaluated by reference to the surrounding circumstances.").

228. *See supra* Part II.B.

229. *Dusenbery*, 534 U.S. at 166–67.

230. *Id.* at 167.

231. *Id.* at 172–73.

232. *Id.* at 172.

knew or should have known about the existence of a feasible alternative.[233]

The emergence of these three concepts will impact the legal community in several ways. First, the abolition of the actual notice theory will give law enforcement officials more leeway to send notice to inmates.[234] Collaterally, inmates will shoulder a greater burden when contesting notice because inmates will have to do more than merely allege that they never received notice.[235] Inmates will now have to mount a strong attack on the methods used by law enforcement to send notice. Additionally, this harsher standard will prevent inmates from abusively using the notice requirement as a loophole to retain possession of the proceeds of their illegal drug trade.[236] This movement away from actual notice marks the Court's continuing departure from the Warren Court's expansion of inmates' rights.[237]

Second, the *Dusenbery* holding gives courts the power to determine the sufficiency of notice on a case-by-case basis.[238] This increased discretion will promote fairness by extending flexibility to parties whose method of delivery was reasonably calculated but notice did not reach the intended party because of an uncontrollable outside factor, such as a postal system error. Such hypotheticals are even more realistic because of the decreased reliability of the mail following the events on September 11, 2001.

This greater latitude, however, may lead to future inconsistency among the courts. Should inconsistency become a widespread problem, the Supreme Court may have to revisit this issue in order to set specific parameters for the "reasonably calculated" standard. While the smaller details of the *Mullane* standard may need refining in the future, the *Dusenbery* decision finally has put to rest the debate over actual notice.

W. Alexander Burnett

233. *See id.* at 169–70.
234. *See supra* notes 205–08 and accompanying text.
235. *See supra* notes 155–56 and accompanying text.
236. *See supra* Part V.C.
237. *See supra* notes 185–90 and accompanying text.
238. *See Dusenbery*, 534 U.S. at 172–73.