Washington University Journal of Law & Policy

Volume 10 *Access to Justice: The Social Responsibility of Lawyers*

January 2002

Notice of Forfeiture to Incarcerated Individuals: Did the Supreme Court Get it Right in Dusenbery v. United States?

Michelle Murphy-Riveria
Washington University School of Law

Notice of Forfeiture to Incarcerated Individuals: Did the Supreme Court Get it Right in *Dusenbery v. United States*?

Michelle Murphy-Riveria*

I. INTRODUCTION: NOTICE OF FORFEITURE FROM THE GOVERNMENT TO INCARCERATED INDIVIDUALS

The U.S. Constitution requires that the government provide an individual with due process before depriving him of "life, liberty, or property."[1] A question arose as to what exactly this due process entails in the context of providing notice of forfeiture to incarcerated individuals. Was mailing such notice to the facility in which the individual is detained enough, or must the individual actually receive the notice? Or was the answer somewhere in between these two options?

Recently, the Supreme Court attempted to resolve this issue with their decision in *Dusenbery v. United States*.[2] In a 5-4 decision, the Court ruled that sending notice by certified mail to the individual's place of incarceration satisfies due process.[3]

Although the Supreme Court had never before dealt directly with this topic, it had decided several cases that were closely related to the issue. In these decisions, the Court avoided actual notice requirements,[4] but instead expanded the due process requirements for notice. The Court found that: publication is not an adequate form of notice if the individual's address is ascertainable;[5] it is insufficient if the government mails notice to the incarcerated individual's home

* J.D., Washington University School of Law, 2002.

1. U.S. CONST. amend. V.
2. 534 U.S. 161 (2002).
3. *Id*.
4. *See infra* text accompanying notes 24, 34.
5. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 319 (1950).

address but knows that the individual cannot get to that address;[6] actual notice is desirable;[7] and, there should be an emphasis on the balance between the individual's substantial need for actual notice and the government's interest in expediency.[8]

These Supreme Court decisions and their rationales lay the foundation for the circuit split that developed regarding the level and type of notice that due process mandates for incarcerated individuals. The Second and Eighth Circuits cited the Supreme Court in their holdings that the government must provide actual notice of forfeiture to incarcerated individuals or their attorneys.[9] However, the Ninth and Tenth Circuits used the same Supreme Court cases to support the position that actual notice is not required and that mailing notice to the institution in which the individual is detained is sufficient.[10] The Third Circuit took these opposing views into consideration when it made its decision in *United States v. One Toshiba Color Television*.[11] The *Toshiba* court formed a third viewpoint that leaned toward actual notice but stopped short of imposing such a requirement on the government.[12]

This recent development addresses whether or not the Due Process Clause of the Fifth Amendment[13] requires that the federal government provide actual notice of forfeiture to incarcerated individuals, and it proposes that the Supreme Court erred in its recent decision in *Dusenbery*. Although the Supreme Court did avoid

---

6. Robinson v. Hanrahan, 409 U.S. 38, 38-40 (1972).

7. Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 800 (1983). *See infra* text accompanying note 35.

8. *Tulsa Prof'l. Collection Serv., Inc. v. Pope*, 485 U.S. 478, 489 (1988). *See infra* text accompanying note 43.

9. *See infra* text accompanying notes 46-62. The Eighth Circuit has extended this further, requiring actual notice of forfeiture any time the government is detaining *or prosecuting* an individual and subsequently decides to instigate forfeiture proceedings. United States v. Woodall, 12 F.3d 791 (8th Cir. 1993). *See infra* note 62 and accompanying text.

10. *See infra* text accompanying notes 63-75.

11. 213 F.3d 147 (3d Cir. 2000).

12. *See id*.

13. U.S. CONST. amend. V. The Due Process Clause requires that an individual not ". . . be deprived of life, liberty, or property, without due process of law . . . ." *Id*.

making any absolute actual notice requirements in past decisions,[14] such a requirement for incarcerated individuals is the best logical outcome using the balancing test offered by the Court.[15] The property owner's interest is extremely high, there is no one similarly situated to protect the individual's interests in the property, and the detainee is not in a position in which he can exercise any control over the likelihood that he will actually receive any kind of correspondence.[16] On the other side of this argument is the relatively light burden on the government to go the extra step of ensuring actual notice.[17] This light burden is especially evident when considering how easy modern technology makes it to provide and document actual receipt of mail, and when recognizing that the government has complete control over the individual and his ability to receive correspondence. The individual's interest outweighs the additional burden imposed on the government, and therefore the government should provide actual notice of forfeiture to those it chooses to incarcerate.

Part II of this piece examines the history of past Supreme Court decisions concerning notice of forfeiture. It also shows how these decisions led to the circuit split regarding notice to incarcerated individuals and considers the policy arguments for each side. Part III looks at the majority opinion in *Dusenbery* and the four-justice dissent. Part IV analyzes these cases, comparing and contrasting the language of the Supreme Court in its past decisions concerning notice with the holdings and rationales of the recent circuit courts and the most recent Supreme Court. It also proposes the most logical and reasonable standards and requirements. Part V simply summarizes the discussion in a short overall conclusion.

---

14. *See infra* text accompanying notes 24, 34.

15. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950). The Court established this balancing test by noting that the adequacy of notice provided should be determined according to the particular surrounding circumstances, including the property owner's interest, the existence of others in similar situations who would protect the individual's interests, and the burden on the party seeking to give notice. *Id*. at 313-19; *see also infra* text accompanying note 21.

16. *See infra* text accompanying note 55.

17. *See infra* text accompanying note 56.

II. HISTORY: DUE PROCESS REQUIREMENTS INVOLVING NOTICE

A. Past Supreme Court Decisions

The Supreme Court's decision in *Mullane v. Central Hanover Bank & Trust Co.*[18] paved the way for the issue. In *Mullane*, the Supreme Court analyzed the constitutional sufficiency of notice provided to beneficiaries in a common trust fund.[19] The Court's holding required the mailing of notice to all parties of interest whose names and addresses were known or easily ascertainable.[20] It analyzed due process by stating that, "[a]n elementary and fundamental requirement . . . is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[21] Thus, the party giving notice must employ means, "such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."[22] In this case, the use of publication as notice to non-residents did not meet the necessary standards.[23] Although the Court did not advocate actual notice in *Mullane*,[24] it did begin to look at notice of forfeiture from the

18. 339 U.S. 306 (1950).

19. *Id*. at 307.

20. *Id*. at 318.

21. *Id*. at 314. The Court noted that the adequacy of the notice depends upon the particular surrounding circumstances, such as the level of the property owner's interest, the likelihood that others in similar situations will protect that property owner's interests, and the reasonableness of requiring more from the party seeking to give notice. *Id*. at 313-19. It rejected publication as reasonable notice to those beneficiaries whose addresses were available, noting that the publication was not "reasonably calculated" to inform them since they could easily be notified by other means—namely, the mail system, which was seen as an "[e]fficient and inexpensive means of communication." *Id*. at 319.

22. *Id*. at 315. The Court noted that the law looks to the standards of the business world to determine what is reasonable and what one who truly wants to inform would do. It pointed out that a business person who found it in his own best interest to communicate information to people whose addresses he had on file would not be satisfied with publication. Therefore, publication in these situations is not reasonable in terms of the law. *Id*. at 319-20.

23. *Id*.

24. *Id*. at 314. "Personal service has not in all circumstances been regarded as indispensable to the process due to residents, and it has more often been held unnecessary as to nonresidents. We disturb none of the established rules on these subjects." *Id*. However, the Court did find that a particular means of notice is unconstitutional if, "under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand." *Id.* at 319.

perspective of a balance of interests.[25]

In *Robinson v. Hanrahan*,[26] the Supreme Court expanded *Mullane*[27] to cover incarcerated individuals.[28] The Court relied heavily on the precedent of *Mullane*[29] in holding that the defendant was not afforded due process.[30] The Court found that the State's mailing of notice to an incarcerated individual's home address when the State knew the confined individual could not get to that address could in no way constitute notice "reasonably calculated" to inform the defendant of the pendency of the proceedings.[31]

In *Mennonite Board of Missions v. Adams*,[32] the Supreme Court again spoke for the rights of those in jeopardy of losing property to receive notice when it held that the interests of a mortgagee in real property required personal service or mailed notice *to the mortgagee* in order to fulfill due process requirements.[33] Although the Court again did not specifically advocate actual notice,[34] it did point to the balance of interests and focused on the right of the individual with interest in the property to be informed.[35] The Court thus held that the

---

25. *Id*.; *see also supra* text accompanying note 21.

26. 409 U.S. 38 (1972).

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

28. 409 U.S. at 38-39. The case involved a man who was arrested and incarcerated for armed robbery. While he was in custody awaiting trial, the state sent notice of forfeiture proceedings involving his automobile to his home address even though they were aware of the fact that he was in jail and could not get to his home. *Id*.

29. Specifically, the Court cited the requirement from *Mullane* that notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id*. at 40 (citing Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)).

30. 409 U.S. at 38, 40.

31. *Id*. Accordingly, the U.S. Supreme Court reversed and remanded the judgment of the Illinois Supreme Court because the Illinois Supreme Court granted forfeiture. *Id*.

32. 462 U.S. 791 (1983). The case dealt with an Indiana statute that required only notice by publication and mailing to an owner of property when property was to be sold for nonpayment of taxes. The issue was whether or not this provided adequate notice to the mortgagee. *Id*. at 792-93.

33. *Id*. at 798-800.

34. In fact, the Court did take the government's burden into account, saying that "[w]e do not suggest, however, that a governmental body is required to undertake extraordinary efforts to discover the identity and whereabouts of a mortgagee whose identity is not in the public record." *Id*. at 798, 799; *see also supra* text accompanying note 24.

35. 462 U.S. at 800. The Court made it clear that actual notice was desirable, saying that "[n]otice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any*

notice provided did not meet the requirements of the Due Process Clause of the Fourteenth Amendment[36] and was therefore unconstitutional.[37]

In *Tusla Professional Collection Services, Inc. v. Pope*,[38] the Court followed precedent set in *Mullane*[39] and *Mennonite*,[40] finding that due process requires notice by mail or other means as certain to ensure actual notice.[41] *Pope* is important because it emphasized the balance of interest between the property owner[42] and the government.[43] The Supreme Court concluded that giving actual notice to those whose addresses are known or reasonably ascertainable does not unduly burden the government's interest in the timely resolution of proceedings[44] and therefore found that the government could not rely on publication alone.[45]

B. Circuit Split Concerning Notice to Incarcerated Individuals

1. Actual Notice

The Second and Eighth Circuits held that the State must provide actual notice of forfeiture proceedings to incarcerated individuals. The Second Circuit dealt with the issue in *Weng v. United States*.[46] In

party." *Id*.

36. U.S. CONST. amend. XIV, § 1 (applying the Due Process Clause from the Fifth Amendment to the states). *See supra* text accompanying note 13.

37. 462 U.S. at 791, 800. Accordingly, the judgment of the Indiana Court of Appeals was reversed.

38. 485 U.S. 478 (1988). The case involved an Oklahoma probate law requiring claims against an estate to be presented to the executor/executrix within two weeks of publication of notice concerning the instigation of probate proceedings. The issue was whether or not this publication provided adequate notice to satisfy the Due Process Clause. *Id*. at 479.

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

40. Mennonite Bd. of Missions v. Adams, 462 U.S. 791 (1983).

41. 485 U.S. 478, 489-91 (1988).

42. *Id*. This includes any individual with interest in the property. *Id*.

43. *Id*. at 489-90. The "substantial practical need for actual notice" is weighed against the state's interest in resolving probates expeditiously. *Id.* at 489.

44. *Id*. at 489-90. The Court pointed out that mail service is an "inexpensive and efficient mechanism that is reasonably calculated to provide actual notice." *Id*. (citing to *Menonite*, 462 U.S. at 789, 800; Ercene v. Lindsey, 456 U.S. 444, 455 (1982); *Mullane*, 339 U.S. at 319).

45. *Id*. at 490.

46. 137 F.3d 709 (2d Cir. 1998). In this case, the claimant was arrested and convicted on narcotics charges. He was in federal custody serving his sentence for the entire time involved in

Weng, the government sent an incarcerated property owner two notices of forfeiture, "one for the currency and one for the jewelry."[47] It sent the notices by certified mail to the individual's last known home address and to a federal detention facility.[48] First, the court held that in order to satisfy the criteria in *Mullane*[49] a federal government agency should, at the very least, determine in which institution a federal detainee is incarcerated and send the notice to that particular institution.[50]

Next, the *Weng* court looked at the situation in which the notice is received by the institution at the time the individual is detained there.[51] It held that "[a]bsent special justifying circumstances," notice of forfeiture sent to the institution in which a property owner is detained is not adequate unless it is "actually" received by the detainee.[52] The court once again pointed to *Mullane*[53] as precedent for looking to the specific circumstances. In its analysis, the court balanced the types and levels of individual interest involved, taking

---

the case/appeal.

47. *Id*. at 711.

48. *Id*. No evidence was given by the government as to the reason they believed the individual was incarcerated at the particular detention center, rather they simply asserted conclusively that he was there. In fact, the individual submitted evidence showing that this assumption may have been wrong, at least in terms of the jewelry notification. The individual was transferred often and evidence showed he was not at that particular institute at the time the institute received the notice. *Id*. The government argued that "due process does not require that the claimant receive actual notice of a forfeiture proceeding, but rather, that the Government act reasonably in selecting and employing a means likely to inform the claimant of the proceeding." *Id*. at 711.

49. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950). *See supra* text accompanying notes 21-25.

50. *Weng*, 137 F.3d at 709, 714. The government should reasonably be able to locate the individual, especially when the government knows the individual is in its custody, and when it is involved in prosecuting him on the same facts upon which the forfeiture is based. If a government agency truly wanted to inform the detainee, they would surely not settle for less. Therefore, if the individual was not at the institution to which the notice was sent, the notice did not satisfy the requirements of the Due Process Clause. *Id* at 713-14.

51. *Id*. at 714-15. As for the currency notice, the detainee did not challenge the fact that the correct institution received it while he was actually detained there. However, he did allege that he never actually received it—no one ever delivered it to him. *Id*. at 714.

52. *Id*. at 714. The court disagreed with the government's claim that this was reasonably calculated to inform the detainee. The notice must be delivered not only to the detention facility, but actually to the prisoner. *Id*.

53. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314-20 (1950). *See supra* text accompanying note 21.

into account the probability of anyone similarly situated acting on behalf of the property owner's interest, against the reasonableness of requiring stricter standards for those attempting to give notice.[54] In cases where the government detains a property owner on the same grounds upon which the forfeiture action is based, the court found that the interest of the detainee was strong enough, and the burden on the government light enough, to require actual notice.[55] In support of its holding, the court noted that when the government is seeking a detainee's cooperation and testimony against another, more dangerous criminal, it seems to have no problem ensuring that the detainee *actually* receives the message.[56]

The Eighth Circuit's approach was similar to the Second Circuit's in that it required that actual notice be given to incarcerated individuals. However, the Eighth Circuit went even further. In *United States v. Woodall*,[57] notice of forfeiture was sent to the property owner's last known address and to the county jail,[58] but the property owner claimed he did not receive actual notice at the address to

54. *Weng*, 137 F.3d at 709, 714-15.

55. *Id*. The interests of the property owner are potentially immense, as they can be forced to forfeit huge amounts of currency and property. No one but the detainee is likely to protect his interest, unlike other situations in which a large class of people may have common interests or may raise the same objections. Also, the detainee is unable to take any action in order to secure his receipt of his mail, rather he is entirely dependent upon the institution. *Id*. *See also infra* text accompanying note 56 (for explanation of why burden upon the government is not unreasonably heavy).

56. 137 F.3d at 709, 714-15. The fact that the government does ensure actual notice in certain situations shows that the burden is not heavy on the government to achieve actual notice. This is true because the jailor (the Bureau of Prisons) is part of the same government as the agency seeking to give notice, so the agency should easily be able to secure the jailor's cooperation in actually delivering notice to the owner and providing a reliable record of the delivery. *Id*. The decision noted the disparity in treatment the government employs: in the situation where the inmate's receipt is beneficial to the government, the government is careful to ensure actual receipt, whereas when it initiates proceedings to forfeit large sums of an inmate's currency or property, "it is content to use the mails, with no assurance that the notice will reach the addressee." *Id*.

57. 12 F.3d 791 (8th Cir. 1993). In *Woodall*, a man was arrested on a firearms charge for which he was later convicted, and the police seized currency from him while booking him at the jail. *Id*. at 792.

58. *Id*. at 794. While the individual did not dispute the delivery of the notice to either place the government claims to have sent it, he did claim that the notice letters were mailed while his criminal trial was pending, and that the court had granted his release on bond to an alternative address of which the government was aware.

which he was released on bond.[59] The court held that if the facts were as the property owner alleged, the notice that the government provided was not adequate.[60] Although the court in *Woodall* used the reasoning set forth in *Mennonite*,[61] it also extended this decision by requiring actual notice any time the government is even *prosecuting* an individual and then initiates the forfeiture proceedings, regardless of whether or not the individual is detained.[62]

2. Constructive Notice

The Ninth and Tenth Circuits stood in opposition to the Second and Eighth Circuits with respect to notice of forfeiture cases. In *United States v. Clark*,[63] the Tenth Circuit addressed the issue of whether or not sending notice by certified mail to the property owner's resident address and to the jail in which he is detained fulfills the requirements of the Due Process Clause.[64] The court focused on the notice sent to the institution of incarceration[65] and relied heavily

59. *Id*. Notice was mailed neither to this new address, nor to his attorney. He received no actual notice of the pendency of the forfeiture. *Id*.

60. *Id*. at 795.

61. Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 800 (1983). The Court in *Woodall* simply followed the reasoning in *Mennonite* by holding that actual notice is required in any case that threatens the liberty or property interests of an individual if the name and address are known or can be reasonably determined. 12 F.3d 791, 794 (1993). *See also supra* text accompanying note 35.

62. *Woodall*, 12 F.3d at 791, 794-95. The court went so far as to say that any time the government is detaining *or prosecuting* an individual "when it elects to impose the additional burden of defending a forfeiture proceeding, fundamental fairness surely requires that either the defendant or his counsel receive actual notice of the agency's intent to forfeit in time to decide whether to compel the agency to proceed by judicial condemnation." *Id*. (internal citations omitted). It should be noted that the court did not necessarily require actual notice to the individual by the government, as providing actual notice to the individual's attorney would suffice. *Id*.

63. 84 F.3d 378 (10th Cir. 1996). *Clark* was a case involving an individual arrested on drug charges after negotiating the sale of drugs with an FBI agent. Following his arrest, the FBI seized currency from Clark and his partner. In connection with the arrest and seizure, the FBI initiated forfeiture proceedings. The issue in this case was whether the notice the FBI gave to Clark was constitutionally adequate. *Id*. at 379-80.

64. The notice sent to Clark's resident address was signed by a woman who apparently was his mother-in-law. *Id*. at 380. There was also no dispute that Clark was in fact detained in the facility to which the second notice was sent at the time when it was received and signed for by someone at the facility. However, Clark maintained that he never received actual notice, and therefore, the attempts violated the requirements of the Due Process Clause. *Id*.

65. *Id*. at 381.

upon *Mennonite*[66] in finding that the notice was constitutionally adequate.[67] The court stated that it found no precedent to view mail as an inadequate means of providing notice or to require personal service of notice in jail, whether the property owner actually received the notice or not.[68]

The Ninth Circuit reached a similar conclusion in *United States v. Real Property*,[69] which concerned parallel forfeiture actions.[70] The notice of the civil forfeiture was served by certified mail to both the county jail in which the property owner was detained and to his attorney.[71] The court found that the government's procedures satisfied the requirements in *Mullane*[72] and rejected the individual's claim that receiving actual notice was necessary.[73] The decision

66. Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 800 (1983).

67. *Clark*, 84 F.3d at 378, 381. The court cited *Mennonite* to support its finding that "notice by mail is a constitutionally [adequate way] to provide actual notice." *Id*. Thus, they found that the mailing of notice to the jail in which Clark was detained was enough. The fact that he may not have actually received it was considered irrelevant, as the FBI utilized means reasonably calculated to inform Clark of the pendency of the action. *Id*.

68. *Id*. The court held that "absent extraordinary circumstances," the government is not required to attempt to provide "notice through every means calculated to provide actual notice," and that these "extraordinary circumstances" were not met by Clark's assertions that "'[e]veryone is served in person in jail,'" and that the FBI "had reason" to know that most of the time [a certified letter is] never received by the person [who] is incarcerated." *Id*.

69. 135 F.3d 1312 (9th Cir. 1998). The facts of *Real Property* are as follows: the individual owned and operated a motel, which "was both his primary asset and his family's home." *Id*. at 1313. He was arrested and charged with several offenses arising out of selling drugs from the motel. One of these charges was criminal forfeiture. While the individual was detained pending trial, the government initiated civil forfeiture proceedings against him. The individual later plead guilty to all the criminal charges, and in exchange the government dropped the criminal forfeiture charge. However, the government retained the right to seek civil forfeiture, and proceeded to do so. The issue was whether or not the notice the government gave the individual as to the civil forfeiture proceedings was in compliance with the Due Process Clause. *Id*. at 1313-14.

70. *Id*. One of these actions was dropped in exchange for guilty pleas.

71. *Id*. The property owner conceded that he was detained in the facility that received the notice at the time that it was received, but denied that he received the notice. *Id*.

72. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950). Specifically, the court found that the government had acted to "employ such notice 'as one desirous of actually informing the absentee might reasonably adopt to accomplish it.'" *Id*. (quoted in 135 F.3d at 1312, 1315).

73. 135 F.3d at 1316. The court also cited Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 800 (1983) in deciding that notice by mail or some other means as sure to provide actual notice is required if the property owner's address can be reasonably ascertained, but that actual notice is not required by due process, even in the cases where the owner is incarcerated. 135 F.3d at 1316.

afforded weight to the facility's normal procedures in terms of delivering certified mail to detainees,[74] and these procedures supported the court's holding that the notice the government provided satisfied the Due Process Clause.[75]

3. Intermediate Approach

In *United States v. One Toshiba Color Television*,[76] the Third Circuit adopted an intermediate approach. In this case, the government sent notice of civil forfeiture by certified mail to the institution in which the property owner was detained at the time.[77] However, the individual claimed that he never received notice and that he was not aware of the proceedings.[78] The court acknowledged that this was an issue of first impression[79] and proceeded to analyze whether or not the government must "go further" and ensure actual notice to incarcerated individuals against whom it forfeiture.[80]

---

74. 135 F.3d at 1315. According to a watch commander testifying as to the procedures of getting certified mail to the detainees, the jail personnel sign for the certified mail, they open it in the presence of the inmate in order to inspect it, and they then give it directly to the inmate. The court pointed to the fact that the property owner could provide no evidence that this is not the procedure that took place with the certified mail containing the notice of civil forfeiture, other than "his own bald declaration" to the contrary. *Id*.

75. *Id*. at 1316.

76. 213 F.3d 147 (3d Cir. 2000). In *Toshiba*, police officers and Drug Enforcement Administration agents arrested an individual named McGlory for conspiracy to possess heroin with intent to distribute. He was eventually convicted of several drug trafficking, drug laundering, and firearm possession charges and received a life sentence. On the day that McGlory was arrested, the officers seized several items of property from residences used by McGlory. The government later initiated forfeiture proceedings involving this seized property. The issue was whether the attempts to provide notice that the government made were in compliance with the Due Process Clause. *Id*. at 150-52.

77. *Id*. at 151. Until his sentencing, McGlory was detained in several different facilities with which the U.S. Marshals Service contracted. The government sent the notice to the detention center in which McGlory was housed at the time, and it was signed for by a jail officer. The government also for precaution sent notice to a pre-incarceration address, which was returned, and finally to McGlory's ex-wife and an attorney. The latter mailings were in addition to the publication in a general circulation newspaper. *Id*.

78. *Id*.

79. *Id*. at 152. Although the circuit partially delved into the issue previously, they did not fully explore it. *See* United States v. McGlory, 202 F.3d 664 (3d Cir. 2000) (en banc) (holding that when a government agency is instigating forfeiture, it must send notice to the facility where the detainee is actually housed).

80. 213 F.3d at 152.

The court relied on *Mullane*[81] and *Robinson*[82] in holding that direct mail does not necessarily satisfy the due process requirements,[83] and that the government must do more to ensure actual notice to the incarcerated individuals against whom it seeks forfeiture.[84] Furthermore, the court analyzed both sides of the circuit split[85] and adopted the *Weng* standard[86] as a goal.[87] This approach maintained the rationale of *Weng*[88] but focused on the procedures in

81. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950). The court used *Mullane* to focus on the contextual nature of the standards for evaluating the adequacy of notice. 213 F.3d at 147, 152. *See supra* text accompanying notes 21-25.

82. Robinson v. Hanrahan, 409 U.S. 38 (1972). Robinson asserted that in the case of an incarcerated property owner, the notice of forfeiture must be sent to the place where he is actually detained. *See supra* text accompanying notes 28-31.

83. *Toshiba*, 213 F.3d at 152-53. The government invoked the opinion from Mennonite Bd. of Missions v. Adams, 462 U.S. 791 (1983), to support the assertion that mailing notice directly to the actual location of the property owner "suffices to establish its successful discharge of its obligations . . . under the Due Process Clause." 213 F.3d at 152-53. However, the court in *Toshiba* rejected this argument, using precedent to establish that "adequacy of notice is always evaluated by reference to the surrounding circumstances." *Id*.; *see also Mullane*, 339 U.S. at 314; *supra* text accompanying notes 21-25.

84. *Toshiba*, 213 F.3d at 153. The court rejected the government's argument even though it "carries strong surface appeal." *Id*.; *see also* Covey v. Town of Somers, 351 U.S. 141 (1956) (holding that even though notice was sent directly to an individual, the notice was inadequate because the individual was an incompetent tax payer). In reality, examples such as the *Covey* case illustrate the "imprudence of gleaning from Supreme Court precedent a per se rule that mail will always be adequate notice," as it will change according to the circumstances. 213 F.3d at 153.

85. 213 F.3d at 153-54. In *Toshiba*, the court compared the reasoning of the Tenth Circuit in Unites States v. Clark, 84 F.3d 378 (10th Cir. 1996), with the government's arguments in the case at hand. *Id*. It then looked at the reasoning that the Second and Eighth Circuits employed (*see supra* text accompanying notes 46-62), which balanced the interests of the incarcerated individual and the state, tipped the scale toward the individual and thus required actual notice. 213 F.3d at 153.

86. *See supra* text accompanying notes 50-58.

87. 213 F.3d at 154-55. The court in *Toshiba* said that the "relative burdens and benefits" of taking steps to provide actual notice show that requiring more effort from the government is correct. "In other words, there is much to commend the *Weng* approach, and as an aspiration, the *Weng* rule comports with our ideas of the sort of effort that the government should undertake when it wishes to effect notice of a forfeiture proceeding against a prisoner in federal custody." *Id*.

88. *Id* at 153. The reasoning in *Toshiba* cited and echoed the rationales from the Second and Eighth Circuits, which used the balancing of interests and pointed out that when incarcerated, a prisoner lacks the power to ensure the actual delivery of his mail, especially if he is transferred often and he does not have much recourse for the inadequacy of deliveries (unlike those in the outside world). *Id*. It also pointed out that "[w]hen an individual is incarcerated at a location of the government's choosing, the government's ability to find and directly serve him or her with papers is at or near its zenith," especially when the government's attorneys have

place to effect actual notice rather than on whether the individual actually received the notice.[89]

The *Toshiba* court disagree somewhat with mandating the actual notice standard. The court asserted that the *Weng* rule would place an undue evidentiary burden upon the government with the passage of time. The court reasoned that due to the possibility of a large gap of time separating the forfeiture notice and forfeiture proceedings from the due process challenge to such notice and proceedings, it was very likely that situations would arise where the notice was actually served, but the proper service could not be proved because documentation of the delivery of such notice was no longer available.[90] The Third Circuit also expressed concern as to lower courts overstepping their boundaries and undermining the framework of the courts.[91] Thus, the Third Circuit's holding placed greater responsibility on the government to provide actual notice of forfeiture to incarcerated individuals but stopped short of the Second and Eighth Circuit standards.[92]

---

extensive contact with the prisoner due to other criminal proceedings against him. *Id*. at 154.

89. *Id* at 155. The court thought this more appropriate because the Supreme Court never employed an actual notice standard, but had alternatively focused on the procedures that are reasonably likely to effect actual notice. Thus, the court would not adopt a strict actual notice standard, but "the concerns animating *Weng* will inform our decision as to the procedures designed to give notice." *Id*.

90. *Id*. "An overly strict notice requirement, therefore, could lead to unsettling the outcome of completed proceedings based on nothing but bare allegations of a party who had lost his property." *Id*.; *see also* United States v. Real Property, 135 F.3d 1312 (9th Cir. 1998) (dealing with a case in which the only evidence that the incarcerated individual did not receive actual notice was his own claim to the contrary). *Id*. However, the court in *Toshiba* did not give any examples of these situations in which it would be hard to prove delivery after the passage of time.

91. 213 F.3d at 155. The court thought the *Weng* approach "undermines the procedural analysis that has heretofore animated the Supreme Court's dictates on this subject." *Id*. Additionally, the court noted that an argument could be made that when a prisoner is held in a state facility, the federal government has less control over the prisoner. *Id*.; *see also* Donovan v. United States, 172 F.3d 53 (7th Cir. 1999) (holding that the *Weng* rule is less reasonable as the federal government possesses less control over the incarcerated individual). However, the court also noted that the response to this argument would be that even if the prisoners are held in state facilities on federal charges, the federal government contracted with those state facilities, and would therefore be able to request/demand procedures that would ensure the delivery of notice to the detainees. 213 F.3d at 155.

92. *Id*. Therefore, the Third Circuit held that the government does not necessarily have to prove actual notice of forfeiture to the incarcerated individual. However, if the government decides against showing actual notice, "it bears the burden of demonstrating the existence of

III. RECENT DEVELOPMENT: *DUSENBERY V. UNITED STATES*

A. Majority Opinion

Recently, the Supreme Court resolved the circuit split in *Dusenbery v. United States*.[93] In this case, the government sent forfeiture notice to the individual "in care of" his incarceration institution, to the address where the individual was arrested, "and to an address in the town where his mother lived."[94] An Inmate Systems Officer testified that he signed the certified mail receipt for the notice, and testified as to the procedures within the institution for getting certified mail to the inmates. The officer said that in accordance with procedure, he would log the mail and the inmates "Unit Team" would sign for it and then give it to the inmate.[95] The officer did not know whether Dusenbery actually received the notice. Moreover, he testified that he was not familiar with the particular practices regarding the mail once it left the mailroom.[96] He also testified that due to the Bureau of Prisons (BOP) policy of holding prison logbooks for only one year after they were closed, there was no longer a paper trail.[97]

The Court held that the government's attempts at notice satisfied due process, regardless of whether the mail actually reached the individual. The majority stressed the fact that no Supreme Court case had required actual notice,[98] and focused on the language in *Mullane*, which required only efforts "reasonably calculated" to inform the individual of the action.[99] The Court also pointed to problems with

---

procedures that are reasonably calculated to ensure that such notice will be given." *Id*.

93. 122 S. Ct. 694 (2002).

94. *Id*. at 696.

95. *Id*. at 698.

96. *Id*. at 703 (Ginsburg, J., dissenting). According to the officer, the mail after it left the mailroom would be the caseworker's responsibility. However, no caseworker testified. *Id*.

97. *Id.* at 701. In this case, the claim of improper notice was asserted almost five years after the alleged notice (thus well after the one year period). *Id*. Incidentally, the Court learned from the Solicitor General that the BOP now requires the preservation of logbooks for eleven years. *Id*. at 698 n.2.

98. *Id*.

99. *Id*. (citing *Mullane*, 339 U.S. at 315). The Court in *Dusenbery* pointed out that no heroic efforts were necessary, comparing the assurance of actual notice in these cases to the heroics in the movie "Saving Private Ryan." *Id.* at 701.

requiring actual notice involving the passage of time and the erosion of memory.[100]

Although the Court acknowledged that the BOP has since implemented a new procedure that compels the inmate to sign a logbook acknowledging receipt, it questioned whether requiring the end recipient to sign for the mail does anything to ensure reliable measures leading up to the individual's receipt.[101] The Court was also quick to point out that even if the BOP's new procedures *do* improve delivery, it does not mean that the old procedures were inadequate.[102]

B. Dissenting Opinion

In *Dusenbery*, Justice Ginsburg filed a dissent with which three other justices joined.[103] Although Justice Ginsburg conceded that prior Supreme Court cases had recognized mail service as an adequate means of notice to supplement publication or posting,[104] she also noted that the decisions analyzed the particular proceedings and facts of each situation as opposed to declaring mail adequate in all circumstances.[105] Ginsburg emphasized the ease with which the government could insure the delivery of notice to an inmate, especially since the agency charged with providing the notice is a component of the same government as the prisoner's custodian.[106]

---

100. *Id*. at 701. "What might be reasonably fresh in the minds of all parties had the question arisen contemporaneously will surely be stale five years later." *Id*. The Court asserted that "the issue would often [depend] on disputed testimony as to whether" the individual actually received the letter. *Id*. However, the Court did not address the issue of how easily the records and logbooks could be maintained for an extended period of time. *See supra* text accompanying note 97.

101. 122 S. Ct. at 702.

102. *Id*. The Court believed that it was important to avoid punishing the government for past policies "simply because" of subsequent upgrades in such policies. This may discourage further upgrades. *Id*.

103. *Id*. at 702.

104. *Id*. at 705 (Ginsburg, J., dissenting).

105. *Id*. The prior decisions "do not bless mail notice as an adequate-in-all-circumstances substitute for personal service." *Id*.

106. *Id*. Ginsburg pointed to the portion of Weng v. United States, 137 F.3d 709, 715 (2d Cir. 1998) that speaks of how easily the government delivers messages in a manner which insure receipt when the government stands to benefit from such receipt. 122 S. Ct. at 705 (Ginsburg, J., dissenting). *See supra* text accompanying note 56.

She additionally pointed out that an inmate receives his mail through the combined efforts of the postal service and the prison, neither of which he can monitor or influence.[107] The fact that the postal system may be relied upon does not suggest that the prison system may also be relied upon to deliver notice to inmates.[108]

Ginsburg said that there was no doubt that the government could "try harder" to ensure receipt of notice, "without undue inconvenience or expense."[109] This is demonstrated by the fact that the BOP has changed its policy so that inmates must now "sign a log book acknowledging delivery."[110] While Ginsburg agreed with the majority that the government should not be punished for improving its policies, she believed that the new rules show that significant procedural enhancements could have been made previously at "minimal expense and inconvenience."[111] She asserted that requiring the end recipient to sign for the mail does in fact ensure reliable measures leading up to the individual's receipt in the same way that certified mail, return receipt requested, works for other postal customers.[112] For these reasons, Justice Ginsburg felt that due process required that BOP employees "linger for the additional moments required to secure for each delivery a signature in a logbook."[113]

---

107. 122 S. Ct. at 706 (Ginsburg, J., dissenting).

108. *Id*. Ginsburg implied that the prison system "may have every incentive to delay." *Id*. She also noted that in the cases where the Supreme Court felt that notice by mail was adequate, "receipt hinged only upon the dependability of the postal service." *Id*.

109. *Id*.

110. *Id*.; *see also supra* text accompanying note 101.

111. 122 S. Ct. at 706 (Ginsburg, J., dissenting). Therefore, the previous procedures did not satisfy due process under *Mullane*, 339 U.S. 306 (1950). *See also supra* text accompanying note 102.

112. 122 S. Ct. at 706 (Ginsburg, J., dissenting). The sender has the opportunity to try again if they know the first attempt to deliver to the addressee failed. "Moreover, if forfeiture cannot be had absent a logbook signature or documentation that the addressee refused to sign, the BOP will have every incentive to make sure its internal procedures guarantee reliable delivery." *Id*. at 707 n.3. This incentive diminishes "if all that is required is a general statement by a mailroom employee that it is prison policy to deliver inmate mail." *Id*. at 707 n.3.

113. *Id*. at 707. This is nothing more than the "practicable, efficient, and inexpensive reform the BOP has already adopted." *Id*.

IV. ANALYSIS

A. Past Supreme Court Decisions

Before *Dusenbery*,[114] the Supreme Court had not dealt directly with the issue of the level of notice that the government is required to afford to incarcerated individuals against whom it is seeking forfeiture. However, the Court *had* provided language and rationale concerning notice that relates to the issue. In *Mullane v. Central Hanover Bank & Trust Co.*,[115] the Court emphasized the fundamental nature of notice requirements and the opportunity of individuals to be apprised of their situations and to respond in the manner they so choose.[116] Due to the fundamental nature of this individual right, the Court mandated that the party giving notice implement means of notice as if they truly wanted to inform the property owner.[117] In these mandates, the Supreme Court made a move in favor of individual rights and the importance of true notice.[118] The Court in *Mullane* also pointed out that the specific surrounding circumstances are determining factors in terms of the adequacy of notice,[119] and it held that a means of notice is unconstitutional if it is not reasonably designed to reach an individual who could easily be notified by another available means.[120] When applying the language of *Mullane* to an incarcerated individual, specific circumstances mandate that the government provide more than mere mailing of notice to the individual's place of incarceration. Such mailing is not reasonably

114. 122 S. Ct. 694 (2002).

115. 339 U.S. 306 (1950).

116. *Id*. at 314; *see also supra* text accompanying note 21.

117. *Id*. at 315.

118. *Id*. at 319-20. The Court shifted from the previously accepted position that publication was necessarily an adequate means of notice. In doing so, the Court looked at whether or not a reasonable business person who wished, for the purposes of his own self-interest, to communicate information to a person whose address he had on file would rely on publication. Since it is fairly obvious that he would not, the Court held that publication was not adequate in these situations. *Id*.; *see also supra* text accompanying note 22.

119. 339 U.S. at 314. The specific circumstances *Mullane* speaks of include the degree of the property owner's interest, the probability that someone else similarly situated will act in the individual's interest, and the reasonableness of requiring more from the party attempting to give notice. *Id*.; *see also supra* text accompanying note 21.

120. *Id*. at 319; *see also supra* text accompanying note 24.

calculated to reach the individual when the government could easily have the individual sign for the mail and thus ensure actual notice.

In *Robinson v. Hanrahan*,[121] the Supreme Court crept closer to an actual notice requirement[122] in holding that the government's mailing of notice to an incarcerated individual's home address was not constitutional since the government knew that the defendant lacked access to that address.[123] The means implemented here were not reasonably designed to actually inform the individual, especially since the individual could easily be informed by the available alternative of delivery to his place of incarceration.[124]

The Court stayed on the same path in *Mennonite Board of Missions v. Adams*,[125] where it advocated the desirability of actual notice.[126] The Court spoke of mail or any means as sure to guarantee actual notice as "a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party."[127] Although the Court spoke of mail as a constitutional means to send notice and did not adopt an actual notice requirement,[128] it was looking at a case in which the individual was free[129] and therefore had control of his mail. This is an entirely different situation from an incarcerated individual who does not have such control and who has no real recourse for mail that he does not actually receive.

In *Tulsa Professional Collection Services, Inc. v. Pope*[130] the Court again advocated actual notice.[131] Here, the Court again looked

121. 409 U.S. 38 (1972).

122. *Id*. It should be noted, however, that *Robinson* did not go so far as to advocate actual notice, it merely took another step in that direction.

123. *Id*. at 40. The Court stated that this form of notice could not possibly be seen as designed to inform the individual of the pendency of the forfeiture. *Id*.

124. *Id*.

125. 462 U.S. 791 (1983).

126. *Id*. at 800.

127. *Id*.; *see also supra* text accompanying note 35.

128. *Id*. at 798. The Court refused to impose the burden of going to extraordinary lengths to identify and find the location of a mortgagee. *See also supra* text accompanying note 34.

129. The issue in *Mennonite* was the means and level of notice constitutionally required to be afforded to a mortgagee when property was going to be sold because of nonpayment of taxes. *Id*. at 792-93; *see also supra* text accompanying note 32.

130. 485 U.S. 478 (1988).

131. *Id*. The Court cites *Mullane*, 339 U.S. 306 (1950), and *Mennonite*, 462 U.S. 791 (1983), in holding that due process requires notice sent by mail or any other means as sure to

at the special circumstances, and it emphasized balancing the interest of the individual with that of the government.[132] In its analysis, the Court concluded that providing actual notice to those whose addresses the government knows or could reasonably ascertain does not excessively burden its interest in expeditiously resolving the proceedings.[133] While the Court in *Tulsa* did view mail as a means reasonably designed to ensure actual notice,[134] it was again dealing with a free individual.[135] The analysis of whether or not mail is reasonably calculated to provide actual notice to an individual changes drastically when it shifts from a free individual to one who is incarcerated and who is at the mercy of the institution when it comes to receiving such mail. Thus, applying the reasoning and the balancing test forwarded in *Tulsa*, the government should do more than simply mail notice to an incarcerated individual at his institution of incarceration in order to reasonably ensure actual notice.

B. Courts Mandating Actual Notice Before Dusenbery

Prior to *Dusenbery*,[136] the court in *Weng* held that when an individual is incarcerated by the government, the government must deliver the notice not only to the correct institution of incarceration, but actually to the individual.[137] This is necessary in order to fulfill the requirement established in *Mullane* that the notice be reasonably

---

provide actual notice. 485 U.S. at 478, 489-91.

132. 485 U.S. at 489-90. In *Tulsa*, the balance was between the individual's serious and practical need for actual notice and the government's interest in expeditiously resolving probates. *Id*. at 489.

133. *Id*.

134. *Id*. The Court spoke of notice by mail as an economical and efficient means that is reasonably designed to provide actual notice. *Id*.; *see also supra* text accompanying note 44 and accompanying text.

135. *Pope* dealt with the constitutionality of a state probate law requiring claims against an estate be presented within a certain time period after notice of the instigation of probate proceedings was given by means of publication. *Id*. at 479; *see also supra* text accompanying note 38.

136. 122 S. Ct. 694 (2002).

137. Weng v. United States, 137 F.3d 709, 714 (2d Cir. 1998). The court held that the notice must be actually delivered to the individual (as opposed to merely the individual's correct institution), "absent special justifying circumstances." *Id*. However, it did not expand upon what special circumstances would justify such action. *Id*.

calculated to reach and inform the detainee.[138] This position is reasonable, because it takes into consideration the balancing test from *Mullane*.[139] Using this formula, the court showed that in cases where the government incarcerates an individual on the same grounds for which it is seeking forfeiture, the interest the individual has in actual notice outweighs the burden placed on the government to provide such actual notice.[140]

This is the logical outcome from the balancing test because the individual's interest is potentially very high and the burden on the government is quite low. The individual's interest is so high because he may be forfeiting extremely large amounts of currency and property, there is no one similarly situated who is likely to protect the individual's interest,[141] and the individual is entirely dependent upon the institution to secure the delivery of his mail.[142]

On the other hand, the burden placed on the government to ensure actual notice of forfeiture to its detainees is relatively light. The Bureau of Prisons acts as the jailor, and it is part of the same government as that which is trying to institute forfeiture claims and provide notice. Therefore, the government should easily be able to secure the cooperation of the agency in accurately delivering the notice to the detainee and in providing reliable documentation of such detainee's actual receipt.[143] This simple extra step does not seem like

---

138. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950); *see also supra* text accompanying note 21.

139. 339 U.S. at 314-19. This balancing test, established in *Mullane*, identified the specific factors in each situation to be examined as the level of interest of the individual, the probability that someone else similarly situated will represent the individual's interests, and the reasonableness of imposing more requirements on the party attempting to give notice. *Id.*; *see also supra* text accompanying note 21.

140. *Weng*, 137 F.3d at 709, 714-15.

141. This lack of anyone similarly situated to fight for the interests of the individual is true in the cases of incarcerated individuals being prosecuted on the same grounds upon which the forfeiture is based, whereas it is not true in situations where a large class of people may share common interests and the individual's interest will naturally be represented by others in the group. *See supra* text accompanying note 55.

142. This lack of control is limited to incarcerated individuals, because those who are free have ways to ensure actual delivery of mail to their correct location and have means of recourse if the mail is not delivered properly. This is not true for detainees who are at the mercy of their institution and have no real recourse against the institution if they do not actually receive mail that is delivered for them.

143. *See supra* text accompanying note 56.

an undue burden to place on the government. This is especially true since the government does employ means necessary to ensure actual notice to incarcerated individuals when it is in the government's own best interest. For example, when the government is attempting to secure a prisoner's cooperation against some other prisoner or criminal, there is never a problem with providing actual notice.[144] Therefore, since the government easily ensures actual notice when it truly is desirous of informing an incarcerated individual, it naturally flows that in order to fulfill the requirements set forth in *Mullane*,[145] the government must ensure actual notice to incarcerated individuals in forfeiture proceedings as well.

C. Dusenbery and its Predecessors in Constructive Notice

In *Dusenbery*,[146] the Supreme Court recently held that notice mailed to the institution in which the individual was detained was enough to satisfy due process.[147] This decision affirmed a number of holdings that had allowed constructive notice in the circuit courts.[148] These courts relied heavily upon the language in *Mennonite*[149] that supports mail as a constitutionally adequate means of notice in forfeiture proceedings.[150] However, the Supreme Court put forward a special circumstances approach in *Mullane*,[151] mandating means calculated "under all the circumstances" to inform the individual of the proceedings.[152] Yet, the Court in *Dusenbery* and the circuit courts all failed to consider any of the special circumstances involved in

144. *See supra* text accompanying note 56.

145. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950). Specifically, the government must act as one who is truly desirous of informing the individual. *Id*. at 315. Since we know what means the government employs when it is desirous of informing a detainee, it is only right to require that the government utilize these same means in cases of notice of forfeiture.

146. 122 S. Ct. 694 (2002).

147. *Id*.

148. *See* United States v. Clark, 84 F.3d 378 (10th Cir. 1996); United States v. Real Property, 135 F.3d 1312 (9th Cir. 1998); United States v. One Toshiba Color Television, 213 F.3d 147 (3d Cir. 2000).

149. 462 U.S. 791 (1983).

150. 84 F.3d at 381; *see also supra* text accompanying note 35.

151. 339 U.S. 306, 314 (1950).

152. *Id*.

these particular cases involving incarcerated individuals. The courts did not discuss the balance of the interest between the incarcerated individual at the mercy of his institution and the burden on the government of providing actual notice to an individual under its control.[153]

The *Dusenbery* Court also avoided the requirement from *Mullane* that the party providing notice must act as one actually desirous of informing the individual.[154] Specifically, the Court avoided taking into account the situations in which the government truly does want to inform an incarcerated individual and the means they adopt in those situations in order to ensure actual notice.[155] The Ninth Circuit[156] attempted to address this *Mullane* requirement when it found that the government, in its attempt at notice, acted as one who truly desired to inform the individual.[157] However, even in this analysis, it failed to recognize the how differently and more diligently the government attempts to ensure notice when it is in the government's interest to do so.[158]

The Supreme Court in *Dusenbery*, along with the Ninth[159] and the Third Circuits,[160] focused on the procedures the facilities implemented in order to achieve actual notice rather than on whether or not actual notice was truly achieved.[161] However, this approach fails to recognize the special circumstances involved, especially the ease with which the government can secure the location of and obtain a signature from every single incarcerated individual under its

153. *Id*.; *see also supra* text accompanying notes 21, 55-56; *see also Dusenbery*, 122 S. Ct. at 702-03 (Ginsburg, J., dissenting).

154. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950).

155. The Court in *Mullane* looked to the standards of the business world and the procedures utilized when they truly wanted to apprise an individual of something. *Id*. at 319-20. Logically, it follows that in the context of incarcerated individuals, the court should look to the procedures the government puts into place when it is attempting to inform an incarcerated individual of something that serves a government interest. *Id*.; *see also* Dusenbery v. United States, 122. S. Ct. 694, 705 (2002).

156. United States v. Real Property, 135 F.3d 1312 (9th Cir. 1998).

157. *Id*. at 1312, 1315; *see also supra* text accompanying note 72.

158. *See supra* text accompanying notes 56, 144-45 (analyzing the procedures the government employs when it is in the government's best interest to ensure actual notice to incarcerated individuals).

159. *Real Property*, 135 F.3d at 1312.

160. United States v. One Toshiba Color Television, 213 F.3d 147 (3d Cir. 2000).

161. *See supra* text accompanying notes 74-75, 89-92, 95-97.

control.[162] Therefore, due process should dictate that institutions implement procedures which ensure and document actual notice in every case.[163]

In *Dusenbery* and *Toshiba*, the Supreme Court and Third Circuit expressed their concern that an actual notice requirement would place an undue evidentiary burden on the government, especially with the passage of time.[164] However, this view does not take modern technology into account. Today, individuals' receipt of and signature for packages and certified mail are entered into computers daily where they can be instantly tracked. This information can be stored indefinitely in computers, or a copy of such receipt could be placed in an individual's file. With this in mind, the evidentiary burden upon the government does not seem to be unreasonable at all.

V. CONCLUSION

Recently, the Supreme Court held against requiring the government to provide actual notice to incarcerated individuals in order to satisfy due process.[165] However, the arguments against an actual notice requirement forwarded by *Dusenbery* and the circuits that it validated are not as strong or persuasive as the arguments in favor of such a requirement. Utilizing the balancing test offered by the Supreme Court in *Mullane*,[166] it is clear that the property owner's interest is potentially extremely high, there is no one similarly situated to act in the interest of the individual, and he does not have the opportunity to exercise any control over whether or not he actually receives any correspondence.[167] The test weighs this individual interest against the burden on the government in securing actual notice to incarcerated individuals. This burden is relatively

162. *See supra* text accompanying notes 56, 88; *see also* Dusenbery v. United States, 122 S. Ct. 694, 707 (2002) (Ginsburg, J., dissenting) (speaking of how easily an officer can "linger for the additional moments required" to obtain signatures from the incarcerated individuals).

163. It is important to note that actual notice to the incarcerated individual's attorney constitutes actual notice to the individual.

164. 213 F.3d at 155; 122 S. Ct. 701.

165. *Dusenbery*, 122 S. Ct. at 694.

166. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313-19 (1950); *see also supra* text accompanying note 21.

167. *See supra* text accompanying note 55; *see also supra* text accompanying note 16.

light when considering modern technology and the complete control the government has over the individual.[168] The individual's interest significantly outweighs the burden on the government, and therefore due process demands that the government provide actual notice of forfeiture to those it incarcerates.

The decision in *Dusenbery*, in accepting constructive notice, tolerates a procedure that does not reliably ensure that an inmate will receive notice sent to him.[169] This case "diminishes the safeguard of notice, affording an opportunity to be heard, before one is deprived of property,"[170] and it is therefore contrary to due process.

---

168. *See supra* text accompanying note 56; *see also supra* text accompanying note 17.
169. *Dusenbery*, 112 S. Ct. at 702 (Ginsburg, J., dissenting).
170. *Id*.