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The Appropriate Remedy For Failing to Comply With Constitutional Mandates in a Civil In Rem Forfeiture of Real Property

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The Appropriate Remedy For Failing to Comply With Constitutional Mandates[1] in a Civil In Rem Forfeiture of Real Property

"Individual freedom finds tangible expression in property rights."[2]

I. Introduction

The federal government's statutory right[3] to forfeit property involved in a criminal act implicates a broad range of constitutional issues.[4] In 1993, in *United States v. James Daniel Good Real Property,*[5] the Supreme Court addressed the requirements of the Due Process Clause when the government brings an action of forfeiture against real property.[6] The Court held that the owner of

1. "Constitutional Mandates" refers to an owner's right to receive notice and an opportunity to be heard in the forfeiture of real property. These mandates were codified in 2000. *See* United States v. James Daniel Good Real Property, 510 U.S. 43, 61 (1993); 18 U.S.C. § 985 (2000).

2. *Good*, 510 U.S. at 61.

3. The federal government's right to forfeit any property is necessarily founded in statutory authority. *See* United States v. Charles D. Kaier Co., 61 F.2d 160, 162 (3d Cir. 1931). As of 1998, there were over 140 civil forfeiture statutes in the United States that covered a broad range of violations. *See* ASSET FORFEITURE LAW AND PRACTICE MANUAL, 1-1 (1998). On April 25, 2000, President Clinton signed the Civil Asset Forfeiture Reform Act (hereinafter "the Reform Act") into law. *See* David B. Smith, *Feature: An Insider's View of the Civil Asset Forfeiture Reform Act of 2000*, 24 CHAMPION 28, 28 (June 2000). The Reform Act has significantly changed the landscape of civil forfeiture.

4. *See, e.g.,* Bennis v. Michigan, 516 U.S. 442 (1996) (discussing forfeiture of an automobile in the context of the Due Process Clause and the Takings Clause); Austin v. United States, 509 U.S. 602 (1993) (discussing the Eighth Amendment's excessive fines clause and its effect on drug-related forfeitures); United States v. $405,089.23 U.S. Currency, 33 F.3d 1210 (9th Cir. 1994) (discussing the double jeopardy implications of forfeiture and the concurrent prosecution against the owner for the criminal offense).

5. 510 U.S. 43 (1993).

6. *See id.* at 46. The reasoning of the majority in *Good* will be extensively discussed in Part III.

real property was entitled to notice and an opportunity to be heard before the government could legally seize the property.[7]

The decision in *Good*, and its subsequent codification in the Civil Asset Forfeiture Reform Act,[8] altered the procedure by which the government brings an action of forfeiture against the res in a civil forfeiture involving real property. Formerly, the government would acquire a warrant of arrest and seize any allegedly forfeitable property in order to assert jurisdiction.[9] This warrant was obtained in an ex parte hearing: the government official simply filed an affidavit alleging probable cause of forfeiture.[10] Upon finding such probable cause, the magistrate issued the warrant and the property was seized.[11] Secondly, an official complaint for forfeiture was filed with the district court.[12] The seizure placed the owner on notice of the forfeiture.[13]

The *Good* decision held that the government could not seize real property without affording the owner notice and an opportunity to be heard.[14] The government obtains jurisdiction and control over real property by posting the property and providing notice to the owners.[15] These changes were codified in the Reform Act.[16]

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7. *See id.* at 63.

8. *See* 18 U.S.C. § 985(b) (2000) ("[R]real property that is the subject of a civil forfeiture action shall not be seized before entry of an order of forfeiture.").

9. *See* ASSET FORFEITURE LAW AND PRACTICE MANUAL, 2-15 (1998). Before a forfeiture action may be commenced, all property must first be brought, whether actually or constructively, within the control and jurisdiction of the court. *See* Republic Nat'l Bank v. United States, 506 U.S. 80, 87 (1992). Only after jurisdiction has been obtained over the res is the forfeiture complaint filed. *See id.* The procedures used both before and after *Good*, as well as the changes implemented by the Reform Act, are discussed in Part II.

10. *See* ASSET FORFEITURE LAW AND PRACTICE MANUAL, 2-15 (1998).

11. *See id.*

12. *See id.*

13. *See id.*

14. *See* United States v. James Daniel Good Real Property, 510 U.S. 43,48-62 (1993).

15. *See id.* at 58-59 ("In the case of real property, the res may be brought within the reach of the court simply by posting notice on the property and leaving a copy of the process with the occupant."). *See also* 18 U.S.C. § 985(c)(1) (2000) (requiring the government to initiate the forfeiture action against real property by filing a complaint in forfeiture, posting notice on the property, and serving notice on the property owner).

16. 18 U.S.C. § 985(c) (2000). If the government properly follows the procedure "it shall not be necessary for the court to issue an arrest warrant in rem, or to take any other action to establish in rem jurisdiction over the property." *Id.* at 985(c)(3). Because the requirements of Section 985 are commonly associated with the Supreme Court's decision in *Good*, this comment will refer to a violation as a "*Good* violation."

Before the Reform Act, the circuits had split on the appropriate remedy if the government seized real property without providing adequate notice and opportunity to be heard. One circuit held that the cause of action should be dismissed.[17] Other circuits applied the exclusionary rule to any evidence recovered in the seizure, awarded damages to the owner, or a combination of both.[18] This comment will focus on the appropriate remedy in the event that the government seizes real property without following the proper procedures. This remedy will be addressed in terms of the case law following *Good* and the Reform Act.

Although the Supreme Court requirements in *Good,* as reflected in the Reform Act, are not particularly complex, this issue will likely continue to be the cause of litigation and controversy. In *United States v. Property Identified as Lot Numbered 718*[19] the government brought an action of forfeiture against two parcels of property believed to have been purchased with the proceeds of drug sales.[20] Prior to filing the complaint, the government posted the property, printed notice in the newspaper, and filed a lis pendens against the property.[21] One of the owners, Mrs. Honesty, contended notice of the action was not received until she was notified of the lis pendens.[22]

At the time the forfeiture complaint was filed, both properties were for sale.[23] The real estate agent listing the residence received a telephone call from someone claiming to be a federal agent who told the broker to forget the sale.[24] A release of the other property

17. The Eighth Circuit dismisses the complaint with permission to re-file if the statute of limitations has not expired. *See* United States v. One Parcel of Real Property, Located at 9638 Chicago Heights, 27 F.3d 327, 330 (8th Cir. 1994). The District Court of the District of Columbia has also taken this view. *See* United States v. Property Identified as Lot 718, 20 F. Supp.2d 27, 39 (D.D.C. 1998).

18. These jurisdictions are comprised of the Fourth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits. *See* United States v. Marsh, 105 F.3d 927, 931-32 (4th Cir. 1996); United States v. Real Property Located at 1184 Drycreek Rd., 174 F.3d 720, 727-28 (6th Cir. 1999); United States v. All Assets and Equipment of West Side Building Corp., 58 F.3d 1181, 1193 (7th Cir. 1995); United States v. Real Property Located at 20832 Big Rock Drive, 51 F.3d 1402, 1406 (9th Cir. 1995); United States v. 51 Pieces of Real Property, 17 F.3d 1306, 1315-16 (10th Cir. 1994); United States v. 408 Peyton Road, 162 F.3d 644, 652 (11th Cir. 1998).

19. 20 F. Supp.2d 27 (D.D.C. 1998).

20. The laundered drug money violates 18 U.S.C. § 1956(a)(1)(D)(i). *See id.* at 28. The property was forfeitable under 21 U.S.C. § 881(a)(6) and 18 U.S.C. § 981(a)(1)(A). *See id.*

21. *See id.* at 29.

22. *See Lot Numbered 718*, 20 F. Supp.2d at 29. She subsequently filed an answer to the complaint and a verified claim to the properties. *See id.*

23. *See id.* at 29.

24. *See id.*

was negotiated and that property was sold; the proceeds of the sale, however, were kept in escrow.[25] As a result of not receiving those funds, Mrs. Honesty fell behind on the mortgage payments on the residence and the bank indicated an intent to foreclose.[26] The government allegedly offered to remove the lis pendens, in order that the wife could avoid a disadvantageous foreclosure sale, in exchange for the escrow account.[27]

The District Court for the District of Columbia held this was an improper seizure of the residence because of the control asserted over the property, the risk of erroneous deprivation, and the lack of a compelling need for the government to move quickly.[28] After holding that a seizure had taken place, the court had to devise a remedy.[29] The proper remedy for owners such as Mrs. Honesty is a question that must be addressed in light of the history of forfeiture, the proceedings associated with a forfeiture action, and the reasoning of the *Good* decision.[30]

Therefore, in addressing the foregoing question, Part II of this comment will discuss the relevant history, procedure and theory of forfeiture. Part III will contain analysis and discussion of the *Good* decision as well as the relevant provisions of the Reform Act. Part IV will analyze the competing rationales of the circuits and conclude that the correct view is that of the majority. Finally, Part V will analyze the new scheme that was promulgated by Congress in the Reform Act.

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25. *See id.*

26. *See id.* at 29-30.

27. *See Lot Numbered 718*, 20 F. Supp.2d at 32-33.

28. *See id.* at 35-36. The court extensively discussed the type of control the government exerted over the property and concluded: "Honesty was left with two choices: capitulate to the government's settlement proposal, or face imminent eviction." *See id.* at 36. The Reform Act would seem to somewhat undermine this decision. *See* 18 U.S.C. § 985(b)(2) (2000) ("The filing of a lis pendens and the execution of a writ of entry for the purpose of conducting an inspection and inventory of the property shall not be considered a seizure under this subsection.").

29. *See Lot Numbered 718*, 20 F. Supp.2d at 38. The District Court of the District of Columbia required dismissal of the action with leave to re-file if the statute of limitations permitted. *See id.* at 40.

30. This comment's scope is limited to evaluating the rationale of the competing views and discussing which remedy is more appropriate in light of *Good*. The reasoning of the circuits is extensively discussed, while the underlying purposes of remedies and comparisons to other Due Process violations are left for another day. Moreover, although the primary focus of this comment is not a critique of the limits or benefits of the Reform Act, the major provisions that affect this topic will be discussed and the likely legislative remedy provided by the Act is addressed.

II. Background: the History, Procedure and Theory of Civil In Rem Forfeiture

A. Obtaining Perspective: a Brief History of Forfeiture

A brief history of the origins of civil in rem forfeiture is helpful in exploring the issue addressed in this comment.[31] These historical origins explain some of the legal fictions that form the foundation for the government's cause of action.[32] Distinguishing in personam forfeiture also serves to stress the underlying theory of civil in rem forfeiture: the guilt of the property as opposed to the guilt of the owner.[33]

The Supreme Court, agreeing with most historians, traces the first concepts of forfeiture to ancient Greece and Rome, as well as to Judaic law.[34] United States forfeiture can be traced to the common law of early eighteenth century England.[35] This common law provided for three types of forfeiture: deodand,[36] statutory or in rem forfeiture, and forfeiture consequent to attainder or in personam forfeiture.[37]

Underlying the deodand was the Biblical concept that a possession which facilitated an evil act became "tainted" and

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31. Although the historical perspective seems somewhat attenuated to a discussion of modern due process rights, by comparing the various methods of forfeiture, and the development of the theories, the reasoning of forfeiture decisions becomes clearer. A mass of information is available concerning the academic debate over the continued viability of forfeiture as a law enforcement tool. *See, e.g.,* Tamara R. Piety, Comment, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process,* 45 U. MIAMI L. REV. 911, 927-942, 977 (1996) (examining the traditional justifications for civil forfeiture and concluding that they have no relevancy to modern society). For a more complete discussion of the historical origins of civil forfeiture: Brad A. Chapman & Kenneth W. Pearson, Comment, *The Drug War and Real Estate Forfeiture Under 21 U.S.C. sec. 881: The "Innocent" Lienholder's Rights,* 21 TEX. TECH. L. REV. 2127 (1990).

32. *See infra* notes 72-77 (discussing the theories that underlie the modern civil in rem action).

33. *See* Various Items of Personal Property v. United States, 282 U.S. 577, 581 (1931).

34. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680-1 (1974); Bruce A. Baird and Carolyn P. Vinson, *Rico Pretrial Restraints and Due Process: The Lessons* of *Princton/Newport,* 65 NOTRE DAME L. REV. 1009, 1010 n.2 (1990).

35. *See* Baird and Vinson, *supra* note 34, at 1010 n.2.

36. *See Calero-Toledo,* 416 U.S. at 680-1. Deodand has Latin origins, *Deo dandum,* which means, "to be given to God." *See id.* at 680, n. 16.

37. *See* Baird and Vinson, *supra* note 34, at 1010 n.2.

should be destroyed.[38] The deodand, adopting this concept, provided that the instrument of a man's death should be forfeited regardless of the guilt or innocence of the owner.[39] The deodand was never specifically adopted in the United States.

Unlike the deodand, statutory forfeiture was adopted in the United States and is widely used.[40] Statutory forfeiture provides that objects used in a criminal offense are "guilty" and, therefore, forfeitable.[41] The action initiated against the property is independent of any criminal proceedings that may be brought against the criminal offender.[42] The statutory forfeiture of the English common law was limited to violations of customs, revenue, and admiralty laws.[43] The forfeiture laws of the United States, however, have a broader spectrum of violations that may be used as a basis of forfeiture.[44]

In personam forfeiture was used in the English common law upon conviction of treason or a felony.[45] Unlike statutory forfeiture, the accused's conviction of the criminal offense precipitated the forfeiture of all her personal property; her death resulted in the forfeiture of all real property.[46]

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38. *See Calero-Toledo,* 416 U.S. at 680-81 ("if an ox gore a man or a woman, and they die, he shall be stoned: and his flesh shall not be eaten" (quoting *Exodus* 21:28)). *But see* Finkelstein, *The Goring Ox: Some Historical* Perspective *on Deodands, Forfeitures, Wrongful Death and the Western Notion of* Sovereignty, 46 TEMP. L. Q. 169 (1973) (questioning the applicability of the Biblical quote to the tainting of a piece of property).

39. *See* Baird and Vinson, *supra* note 34, at 1010 n.2.

40. *See id.* Statutory forfeiture is widely known as civil in rem forfeiture in the United States.

41. *See id. See also Calero-Toledo* , 416 U.S. at 682.

42. *See Calero-Toledo,* 416 U.S. at 684 ("The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing; and this, whether the offence be *malum prohibitum,* or *malum in se*.... The practice has been, and so this Court understand [sic] the law to be, that the proceeding in rem stands independent of and wholly unaffected by any criminal proceeding in personam." (quoting The Palmyra, 12 Wheat. 1, 14-5 (1827))).

43. *See* Baird and Vinson, *supra* note 34, at 1010 n. 2.

44. *See* 21 U.S.C. § 881(a) (1999) (listing the various properties that are forfeitable).

45. *See* Baird and Vinson, *supra* note 34, at 1010 n. 2.

46. *See id.* Note that statutory forfeiture is not dependent on the conviction of the owner of the criminal offense. *See* Various Items of Personal Property v. United States, 282 U.S. 577, 581 (1931) (noting that the statutory forfeiture is no part of the punishment for the criminal offense). *Compare.* United States v. Aramony, 88 F.3d 1369 (4th Cir. 1996) (noting that in personam forfeiture requires the defendant's conviction), *with* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 684 (1974) (noting that civil in rem forfeiture does not require the defendant's conviction).

Although the Reform Act made major revisions to forfeiture proceedings, the underlying theories of forfeiture remain unchanged. Some argue that this significantly undermines the effectiveness of the Act.[47]

B. Modern Forfeiture: The Procedure and the Fictions

This section provide a background for the forfeiture actions brought against real property. Generally, two steps are necessary in a forfeiture action. First, the property is brought, whether actually or constructively, within the jurisdiction and control of the court.[48] Second, a judicial proceeding is held to determine the government's rights in the property.[49] These proceedings will be discussed briefly and only in general terms.[50]

1. Asserting Jurisdiction and Control Over the Res—All property, regardless of the type, must be brought within the control of the court.[51] Oftentimes the method by which the government

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47. *See generally* David Benjamin Ross, Comments and Notes: *Civil Forfeiture: A Fiction That Offends Due Process*, 13 REGENT U. L. REV. 259 (2001); Brant C. Hadaway, Comment: *Executive Privateers: A Discussion on Why the Civil Asset Forfeiture Reform Act Will Not Significantly Reform the Practice of Forfeiture*, 55 U. MIAMI L. REV. 81 (October 2000). *But see* Smith, *supra* note 3, at 28-29 (arguing that "the [Reform] Act is a remarkably well-crafted piece of legislation that carries through most of the reform agenda without unduly trammeling law enforcement's use of forfeiture as an effective crime control weapon").

48. *See* ASSET FORFEITURE LAW AND PRACTICE MANUAL, 2-1 (1998) (noting that seizure brings the property within the court's jurisdiction); United States v. James Daniel Good Real Property, 510 U.S. 43, 58 (1993).

49. *See* ASSET FORFEITURE LAW AND PRACTICE MANUAL, 4-1 *et seq.* (1998). Some property is subject to administrative or summary forfeiture. *See, e.g.,* 19 U.S.C. §§ 1602-21 (1999) (authorizing administrative forfeitures by a governmental agency that has seized property without judicial involvement); 21 U.S.C. § 881(f) (1999) (listing toxic or hazardous raw material or products and their containers as contraband per se subject to summary forfeiture). This eliminates the need for involvement by the courts other than appellate review. The statutory language which authorizes such seizures, however, limits the two methods. *See id.* Only property which the possession or production of, without more, is subject to summary forfeiture. *See, e.g.,* 21 U.S.C. § 881(f), (g)(1) (1999); One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 699 (1965). Administrative forfeitures are likewise limited. *See* 19 U.S.C. § 1607 (1999) (noting that property may be seized if the value does not exceed $500,000, its importation is illegal, it is a conveyance used to transport or store controlled substances, or it is a monetary instrument within the meaning of 31 U.S.C. 5312(a)(3)).

50. Such proceedings have limited significance to the issue addressed in this comment because once an adversarial hearing is held the requirements of *Good* are satisfied. *See* United States v. James Daniel Good Real Property, 510 U.S. 43, 62 (1993).

51. *See id. See also Good*, 510 U.S. at 57-58 ("And as we have noted last Term, fairly read, *The Brig Ann* simply restates the rule that the court must have

initiates a forfeiture proceeding is by seizure of the property.[52] Before the Court's decision in *Good,* the government would seize all property, whether personal or real, by a warrant procured and executed pursuant to the Fourth Amendment.[53] The seizure establishes the appropriate judicial forum, brings the property within the actual control of the court and establishes the court's jurisdiction over the property.

A Fourth Amendment warrant is obtained by submitting an application for the seizure of the particular property and a sworn affidavit setting forth the facts that provide probable cause for the forfeiture.[54] The magistrate then issues a warrant of seizure after reviewing the submitted materials and determining that the facts are sufficient to establish probable cause.[55] The government then seizes the property, pursuant to the warrant, and holds the property until the forfeiture hearing.[56]

After the *Good* decision, and its codification in the Reform Act, the government is required to have a pre-seizure hearing, as well as give notice and an opportunity to be heard to the owner of the property.[57] This is a greater burden on the government than the former procedure which required only the showing of probable cause. The court's jurisdiction and constructive control is now asserted over real property by means of posting the property and giving notice of the hearing.[58] Hence, this posting procedure replaces seizure and gives the court jurisdiction and constructive control over the property.[59] The property may only be seized after

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actual or constructive control of the res when an *in rem* suit is initiated." (quoting Republic Nat'l Bank v. United States, 506 U.S. 80, 87 (1992))).

52. *See* ASSET FORFEITURE LAW AND PRACTICE MANUAL, 2-1 (1998) (noting that the seizure brings the property within the jurisdiction of the court).

53. *See id. See also* CONST. AMEND. 4 ("The people have the right to be free of unreasonable searches and seizures and no warrant shall issue but upon probable cause."). In some situations, and absent exigent circumstances, the government is required to hold a pre-seizure hearing if there is a legitimate expectation of privacy in the area. *See, e.g.*, GM Leasing Corp. v. United States, 429 U.S. 338, 354 (1977). This is somewhat parallel to the requirements of a pre-seizure hearing after *Good* when real property is being seized. *See Good* 510 U.S. at 57-62.

54. *See In re* Application for Warrant to Seize One 1988 Chevrolet Monte Carlo, 861 F.2d 307 (1st Cir. 1988).

55. *See id.*

56. *See* ASSET FORFEITURE LAW AND PRACTICE MANUAL, 2-1 (1998).

57. *See Good*, 510 U.S. at 59. *See also* 18 U.S.C. § 985(c) (2000).

58. *See Good*, 510 U.S. at 58. *See also* 18 U.S.C. § 981(c)(1) (2000).

59. *See* 18 U.S.C. § 985(c)(3) (2000).

the government's rights have been determined at the judicial hearing.[60]

2. *The Judicial Hearing*—The formal judicial forfeiture proceedings are initiated by filing a complaint against the property.[61] The Rules provide for the contents of the complaint which include, inter alia, the basis of the court's jurisdiction, date of seizure if applicable, allegation of the forfeitability of the property, and a request for relief.[62] Assuming that the complaint is answered,[63] the government may commence civil discovery pursuant to the Federal Rules of Civil Procedure.[64]

Before the Reform Act, civil forfeiture actions required the government merely to prove probable cause that the property was forfeitable; the burden then shifted to the claimant owner to show by a preponderance of the evidence that the property should not be forfeited.[65] Judgment was entered for the government or the claimant and the property was either forfeited or promptly returned to the claimant.[66]

The Reform Act has instituted a multitude of changes in this procedure and most significantly in the area of burden of proof.[67] The government is now required to prove by a preponderance of

60. *See Good*, 510 U.S. at 58 (1993). This, however, does not eliminate the need for the government to obtain jurisdiction and control over the res. *See id.*

61. *See* Supplemental Rules for Certain Admiralty and Maritime Claims, Rule C(2).

62. *See id.* at C(2), E(2)(a).

63. *See* FED. R. CIV. P. 55 (noting that default judgment may be sought in a civil proceeding if a cognizable response is not filed within 30 days).

64. *See* ASSET FORFEITURE LAW AND PRACTICE MANUAL, 4-43 – 4-74 (1998) (noting that the full gamut of civil discovery is available in civil forfeiture proceedings including, inter alia, requests for documents, admissions, and motions to compel discovery). This is a practical allowance because it permits the government to decide whether to move for summary judgment, proceed to trial, or settle the case. *See id.* at 4-43. This has the effect of conserving judicial resources and holds with the judicial fiction that the property is considered the offender and that the action is civil, rather than criminal, in nature.

65. *See, e.g.*, 19 U.S.C. § 1615 (1999). The Supreme Court upheld this procedure under Constitutional attack. *See* Boyd v. United States, 116 U.S. 616, 634-5 (1886). This is so because the statutes are only quasi-criminal. *See* United States v. One Parcel . . . 194 Quaker Farms Road, 85 F.3d 985 (2d Cir. 1996) (noting that the forfeiture statutes are "not criminal enough to prevent Congress from imposing the burden of proof on the claimant").

66. *See* ASSET FORFEITURE LAW AND PRACTICE MANUAL, 4-111 - 4-113 (1998).

67. *See* 18 U.S.C. § 983 (2000). Many of the reforms, such as the innocent owner defense, the allowance of damages for damages to seized property, and a new statute of limitations, are beyond the scope of this comment. For a good overview of the reforms see Smith, *supra* note 3.

the evidence that the property is subject to forfeiture.[68] Moreover, if the theory underlying the forfeiture is that the property "was used to facilitate the commission of a criminal offense, or was involved in the commission of a criminal offense, the Government shall establish that there was a substantial connection between the property and the offence."[69]

The Reform Act provides for legal counsel in certain situations.[70] In the case of a forfeiture of real property that is used as the primary residence of the claimant, "the court, at the request of the person, shall insure that the person is represented by an attorney for Legal Services Corporation with respect to the claim."[71]

3. The Fictional "Guilty Property" and the Theory That Underlies a Forfeiture Action—The government's interests in forfeitable property arise at the time a crime is committed that involves the property.[72] This doctrine, commonly known as the "relation back doctrine," is important to the govern-ment's claim.[73] The forfeiture proceedings merely perfect the government's rights that arose at the time of the commission of the criminal act.[74] The timing of the seizure, therefore, had no effect on the substantive right of the government to forfeit the property.[75]

Before the Reform Act, this doctrine protected the government's rights to forfeit the property from intermediate sales and transfers, even to bona fide purchasers for value.[76] Now, however, because of a unified innocent owner defense enacted in the Reform Act, various innocent property owners are protected

68. *See id.* § 983(c)(1). The government is free to meet this burden with evidence gathered after the filing of the complaint. *See id.* § 983(c)(2).

69. *See id.* § 983(c)(3).

70. *See* 18 U.S.C. § 983(b) (2000).

71. *See id.* § 983(b)(2)(A).

72. *See* 18 U.S.C. § 981(f) (2000); 21 U.S.C. § 881(h) (2000). *See also* United States v. Stowell, 133 U.S. 1, 1617 (1890) (noting that "the forfeiture takes effect immediately upon the commission of the act; the right to the property then vests in the United States, although their title is not perfected until judicial condemnation . . . the condemnation . . . relates back to that time, and avoids all intermediate sales and alienations, even to purchasers in good faith").

73. *See Stowell*, 133 U.S. at 16-17 (noting that the relation back doctrine effectively avoids all intermediate sales and alienations). As noted below, this doctrine has lost some of its teeth with the enactment of the Reform Act.

74. *See id. See also* United States v. One 1978 Mercedes Benz, Four-Door Sedan, 711 F.2d 1297, 1302 (5th Cir. 1983).

75. *See id.* The conviction of the perpetrator of the underlying offence has no bearing on whether the property may be forfeited. *See* Various Items of Personal Property v. United States, 282 U.S. 577, 581 (1931) ("It is the property which is proceeded against . . . The forfeiture is no part of the punishment for the criminal offense.").

76. *See Stowell,* 133 U.S. at 16-17.

from forfeiture.[77] Even in the light of this reform, the underlying theory remains that the government's interests arise at the time of the commission of the offence."

III. The Watershed Decision: *United States v. James Daniel Good Real Property* [78]

A. Factual Background: The Drug Offense

In *Good* the Court addressed whether the "Due Process Clause of the Fifth Amendment prohibits the Government in a civil forfeiture case from seizing real property without first affording the owner notice and an opportunity to be heard."[79] The offending property had been seized[80] because a search warrant of the property had revealed marijuana and other drug-related materials and paraphernalia.[81] The government obtained a warrant based on an affidavit, which warrant was executed against the property three days later.[82] The hearing was ex parte and the owner of the home was not given an opportunity to present evidence as to why the property should not be seized.[83] The government allowed the tenants, who were renting the property, to remain; future rent payments, however, were to be directed to the government.[84]

B. Procedural History: Seizure Before the Adversarial Hearing

Good, the owner of the property, claimed that the seizure pursuant to a warrant obtained in an ex parte hearing had violated his

77. *See* 18 U.S.C. § 983(d)(1) (2000) ("An innocent owner's interest shall not be forfeited under any civil forfeiture statute."). The claimant must prove he is an innocent owner by a preponderance of the evidence. *See id.* The statute provides a very detailed list of criteria for meeting the innocent owner standard. *See generally* 18 U.S.C. § 981(d).

78. 510 U.S. 43 (1993).

79. *See id.* at 46.

80. The property was seized under 21 U.S.C. § 881(a)(7). This statute permits the forfeiture of real property for a violation of Title 21. *See* 21 U.S.C. § 881(a)(7) (1999).

81. *See Good*, 510 U.S. at 46.

82. *See id.* at 47.

83. *See id.*

84. *See id.* The redirection of rent payments demonstrates the importance of the seizure and how pervasive its effects are on the rights of the owners. *See id.* ("It [the seizure] gives the Government not only the right to prohibit sale, but also the right to evict occupants, to modify the property, to condition occupancy, to receive rents, and to supersede the owner in all rights pertaining [to the property] . . . .").

Due Process rights.[85] The District Court held that the seizure did not violate such rights and granted summary judgment to the government; the Court of Appeals, however, overruled and held in Good's favor.[86] Thus, the issue before the Supreme Court was whether the Court of Appeals was correct in holding that the Respondent's Due Process rights had been violated.[87]

C. *Reasoning of the Majority: Seizure Before Notice and Opportunity Violates Due Process Rights*

The majority opinion,[88] written by Justice Kennedy, responded to two primary arguments asserted by the government as justification for the prehearing seizure of real property in forfeiture cases.[89] First, the government argued that compliance with the Fourth Amendment, by obtaining a warrant based on probable cause, was satisfactory for all Constitutional purposes.[90] Second, the government asserted that the drug forfeiture laws justified an exception to the Due Process Clause.[91] The majority concluded that without a showing of exigent circumstances real property could not

85. *See Good*, 510 U.S. at 47. Good also claimed that the forfeiture action was invalid because it had not been commenced in a timely matter. *See id.*

86. *See id.*

87. *See id.* at 47-8.

88. Part I of the decision was the factual background and was joined by all Justices of the Court. *See id.* at 46-48. In Part II, Justice Kennedy addressed the Due Process claims. *See id. at* 48-62. In this part of the decision Justice Kennedy was joined by Justices Blackmun, Stevens, Souter, and Ginsburg. *See Good*, 510 U.S. at 46. The dissenters as to Part II were Chief Justice Rehnquist, Justice Scalia, Justice O'Connor and Justice Thomas. *See id.* The Court was unanimous on the timeliness issue noted above which was Part III of the decision. *See id.* at 46, 63-65. Although Chief Justice Rehnquist, Justice O'Connor and Justice Thomas turned in vehement dissents to the Due Process decision in Part II, with arguments that strike hard at the majority's reasoning, they are generally beyond the scope of the analysis of this comment. Thus, they will be noted when appropriate as tangential issues in order to provide perspective and critique of the majority opinion.

89. *See id.* at 48-62. The government conceded that the prehearing seizure of the property deprived the owner of interests protected by the Fifth Amendment. *See id.* at 49.

90. *See Good*, 510 U.S. at 49. The Fourth Amendment provides that "no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend.IV.

95. *See Good*, 510 U.S. at 49. The Due Process Clause of the Fifth Amendment provides that "no person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend V.

be seized without fully satisfying the requirements of the Due Process Clause.[92]

The majority first held that Fourth Amendment requirements were not satisfactory for all purposes. Instead the "proper question" was whether either the Fourth or the Fifth Amendment had been violated exclusive of the other.[93] The Court rejected the government's comparison to Fourth Amendment cases dealing with the arrest and detention of criminal suspects because those cases included procedural safeguards that are inapplicable to forfeiture cases.[94] Moreover, the majority noted that previous cases demonstrated a rejection by the Court of the notion that one Constitutional guarantee necessarily pre-empts the requirements of another.[95] The Court concluded that the Fourth Amendment "does not provide the sole measure of constitutional protection that must be afforded property owners in forfeiture proceedings."[96]

The Court continued its analysis of the government's seizure, and whether it could be considered an exception to the Due Process Clause requirements, in light of the previous decision in *Calero-Toledo*.[97] The decision had permitted the seizure of a yacht without predeprivation notice or hearing.[98] The *Good* majority noted that real property could not be forfeited under the laws in effect at the time of *Calero-Toledo* decision.[99] Also important to the *Calero-Toledo* Court's reasoning was the inherent mobility of a yacht.[100]

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92. *See Good*, 510 U.S. at 62.

93. *See id.* at 50.

94. *See id.* at 50-51

95. *See id.* at 49-52. The Court did, however, note that the provisions of one guarantee could settle the issue. *See id.* at 51. *Calero-Toledo* was cited by the majority because it examined an ex parte forfeiture proceeding in light of the Due Process Clause; thus, past jurisprudence demonstrates the Court's tendency to analyze forfeiture decisions in this light. *See Good*, 510 U.S. at 51 (citing Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974)).

96. *See Good*, 510 U.S. at 52. Chief Justice Rehnquist's dissent would have found the Fourth Amendment as the benchmark in civil forfeiture proceedings. *See id.* at 67 (Rehnquist, C.J. dissenting) ("Compliance with the standards and procedures prescribed by the Fourth Amendment constitutes all the 'Process' that is 'due' to respondent Good under the Fifth Amendment in the forfeiture context.").

97. United States v. Calero-Toledo, 416 U.S. 663 (1974).

98. *See id.* at 679-680.

99. *See Good*, 510 U.S. at 53. Real property was not permitted to be forfeited until ten years later. *See id.*

100. *See id.* at 52. Chief Justice Rehnquist argues that the Court in *Calero-Toledo* considered two other factors besides inherent mobility: public interest and initiation of the seizure by disinterested public officials. *See id.* at 71-72 (Rehnquist, C.J. dissenting).

Real property, conversely, is stationary and cannot easily be transported to another jurisdiction.[101]

The majority applied a three-part test, gleaned from *Matthews v. Eldridge*,[102] in determining whether an exception to the Due Process requirements was appropriate in these cases.[103] First, private interests affected by the official action are considered.[104] Second, the risk of erroneous deprivation of those interests, and the corresponding probable value of additional safeguards, are analyzed.[105] Finally, the Government's interest, including the administrative burdens imposed, must be weighed.[106]

The Court characterized an owner's interest in the home as "a private interest of historic and continuing importance."[107] A seizure leaves the owner without recourse until a future unspecified hearing.[108] The Court considered Good's rental of the home to tenants of little importance and concluded that "the private interests at stake in the seizure of real property weigh heavily in the *Matthews* balance."[109]

The ex parte proceeding was found to create an "unacceptable risk of error" by its very nature.[110] As the state stands to benefit financially if the property is found forfeitable, an adversarial hearing is all the more important to achieving a just outcome.[111]

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101. *See id.* at 52. The majority noted that the decision would "apply to real property in general, not simply to residences." *See id.* at 61. Both Justice O'Connor and Chief Justice Rehnquist query the majority's reliance on the immobility of real property. *See id.* at 72 (Rehnquist, C.J. dissenting) ("And while not being capable of being moved or concealed, the real property at issue here could be destroyed or damaged . . . to prevent them [buildings and the like] from falling into the hands of the Government if prior notice were required."); *see also Good*, 510 U.S. at 76 (O'Connor, J. dissenting).

102. 424 U.S. 319 (1976).

103. *See Good*, 510 U.S. at 53. Chief Justice Rehnquist noted in his dissent his rejection of this test as the benchmark. *See id.* at 66-67 (Rehnquist, C.J. dissenting) (noting that the Court has explicitly rejected that this is a universal test for all Due Process cases and that the court's precedent in the civil forfeiture context should control).

104. *See id.* at 53.

105. *See id.*

106. *See id.* at 53.

107. *See Good*, 510 U.S. at 53-54. Chief Justice Rehnquist's dissent questioned this characterization the Government may deny a person their rights personal to liberty through an ex parte proceeding when officials are procuring a warrant to arrest an individual based on probable cause, but property rights could not be denied by the same procedure. *See id.* at 46 (Rehnquist, C.J. dissenting).

108. *See id.* at 54.

109. *See id.* at 54-55.

110. *See id.* at 55.

111. *See id.* at 55-56.

Finally, the Court found that the very nature of real property made arguments of exigency fallacious.[112] Although the rule traditionally had been that seizure was necessary to establish jurisdiction and control, with real property the appropriate forum could be found without actual seizure."[113] A simple posting of the real property brings the property within the constructive control of the court and ensures that the property is not sold, destroyed, or otherwise used for illegal purposes before a determination of the government's interests.[114]

Therefore, the majority concluded that the government must provide pre-seizure notice and opportunity to be heard before any seizure of real property.[115]

D. The Reform Act: The Legislative Version of Good

The Reform Act codified the *Good* decision in Section 985.[116] All civil forfeitures of real property or interests in real property are required to proceed as judicial forfeitures under the Act.[117] The section explicitly provides that "real property that is the subject of a civil forfeiture action shall not be seized before entry of an order of

112. *See id.* at 56-57. The Court here revisited the *Calero-Toledo* arguments of inherent mobility. *See id.* Early cases permitting the seizure of real property without prior notice and opportunity to be heard were distinguished on the basis of "executive urgency." *See id.* at 60-1 (noting the rationale behind permitting seizures during wartime and collecting taxes). These cases form a strong argument in Chief Justice Rehnquist's dissent that the government has long permitted the seizure of property by ex parte proceedings. *See Good*, 510 U.S. at 69 (Rehnquist, C.J. dissenting). Similarly, Justice O'Connor found incredible the majority's distinctions of real and personal property as the foundation for the decision. *See id.* at 74-75 (O'Connor, J. dissenting) ("But that distinction [between real and personal] has never been considered constitutionally relevant in our forfeiture cases.").

113. *See id.* at 57.

114. *See id.* at 58. The government can file a lis pendens, in order to protect the title and prevent transfer, and can file for a restraining order if the situation requires. *See id.* This comment differentiates between judicial forum and control because the Court in *Good* seemed to take the same approach. *See id.* at 57-58. The Court first held that seizure was unnecessary to establish the appropriate forum, and then held that constructive control through posting was appropriate. *See id.*

115. *See Good*, 510 U.S. at 62. The Court premised its holding on the lack of the showing of exigent circumstances by the government. *See id.*

116. *See* 18 U.S.C. § 985 (2000).

117. *Id.* § 985(a).

forfeiture."[118] Moreover, the provisions of *Good* were enacted as follows:

> The Government shall initiate a civil forfeiture action against real property by –
>
> (A) filing a complaint for forfeiture;
> (B) posting a notice of the complaint on the property; and
> (C) serving notice on the property owner, along with a copy of the complaint.[119]

The section also provides for constructive service if the owner of the property is a fugitive, resides outside the United States and cannot be served, or "cannot be located in the exercise of due diligence."[120] If these appropriate steps for constructive service are taken, jurisdiction is established over the res.[121]

The section also provides for an exigent circumstances exception: if the government is able to show that a warrant and seizure are needed to protect the property, then the warrant may be issued ex parte.[122] Also, an umbrella provision states that real property may seized after notice is provided to the court before trial and the court "issues a notice of application for warrant, causes the notice to be served on the property owner and posted on the property, and conducts a hearing in which the property owner has a meaningful opportunity to be heard."[123]

IV. A *Good* Violation: What was the Appropriate Remedy Before the Reform Act?

The Court in *Good* did not pass on the appropriate remedy if the government failed to provide notice and opportunity before

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118. 18 U.S.C. § 985(b)(1)(A) (2000). Furthermore, the statute provides that "the owners or occupants of the real property shall not be evicted from, or otherwise deprived of the use an enjoyment of, real property that is the subject of a pending forfeiture action." *Id.* § 985(b)(1)(B).

119. *Id.* § 985(c)(1).

120. *See id.* § 985 (c)(2). Constructive service is made under the rules of the "laws of the State in which the property is located." *Id.*

121. *See id.* § 985(c)(3).

122. *See id.* § 985(d)(1)(ii). The definition of "exigent circumstances" is provided. *See id.* § 985(d)(2)(providing that seizure must be necessary to prevent "the sale, destruction, or continued unlawful use of the real property"). Presumably, this provision relies on the language of the *Good* Court which seemed to allow for an exigent circumstances exception. *See* United States v. James Daniel Good Real Property, 510 U.S. 43, 58-59 (1993).

123. *See* 18 U.S.C. § 985(d)(1)(i) (2000).

seizure,[124] and the circuits split on the appropriate remedy. The background on civil in rem forfeiture including the enactment of the Reform Act, the procedure of a forfeiture case, and the Court's reasoning in *Good*, provide a solid foundation from which to analyze the competing interpretations.

Four possible remedies could address a governmental failure to comply with *Good's* requirements. The first alternative is to give the owner of the property damages in the form of lost use, rent revenue, and other pecuniary loss.[125] As was noted above, the government seizure of real property has a pervasive effect on the property rights of the owner.[126] Moreover, it is worth re-emphasizing that the owner of the seized property may be prevented from retaking control of that property.[127]

A second alternative is to suppress evidence discovered as a direct result of the wrongful seizure.[128] On the surface this justification would seem founded on the theory of a Fourth Amendment violation and the exclusionary rule.[129] Several courts combine this remedy with damages.[130]

The third alternative is dismissal of the complaint with leave to re-file if the applicable statute of limitations has not expired.[131] In

124. Instead, the case was simply "remanded for further proceedings consistent with this opinion." *See Good*, 510 U.S. at 65.

125. *See, e.g.*, United States v. Real Property Located at 20832 Big Rock Drive, 51 F.3d 1402, 1406 (9th Cir. 1995) ("The Government is held responsible for any rents accrued during the illegal seizure." (internal quotations omitted)). The term "wrongfully deprived" speaks not to the "innocence" or "guilt" of the property, and the related issue of forfeitability, but only to the issue of the Due Process violation.

126. *See Good*, 510 U.S. at 47 ("The Government permitted the tenants to remain on the premises subject to an occupancy agreement, but directed the payment of future rents to the United States Marshall.").

127. *See, e.g.*, United States v. 2751 Peyton Woods Trail, 66 F.3d 1164, 1165 (11th Cir. 1995) ("The government then [after receiving warrants for arrest,] executed process on the properties and changed the locks on an uninhabited home situated on the one developed property.").

128. *See, e.g.*, United States v. 51 Pieces of Real Property, Roswell, New Mexico, 17 F.3d 1306, 1315-16 (11th Cir. 1994) ("The illegality of the seizure, however, does not necessarily invalidate the forfeiture. The judgment of forfeiture may still stand, so long as impermissibly obtained evidence is not used in the forfeiture proceeding." (quoting United States v. 4492 S. Livonia Rd., 889 F.2d 1258, 1265 (2d Cir. 1989)) (citations omitted)).

129. *See generally* Mapp v. Ohio, 367 U.S. 643, 646-50 (1961).

130. *See, e.g., 51 Pieces of Real Property*, 17 F.3d at 1316.

131. *See, e.g.*, United States of America v. 2751 Peyton Woods Trail, 66 F.3d 1164, 1167 (11th Cir. 1995).

the period before the Reform Act, the statute of limitations was five years from the time the alleged offense was "discovered."[132]

The fourth alternative, and one not approved by any court, is dismissal of the government's complaint without leave to re-file. Each of these alternatives will be discussed.

A. Minority View: Dismissal with Leave to Re-file

A minority of circuits addressing the issue adopted the third alternative listed above: the case is dismissed with leave to re-file if the statute of limitations has not expired.[133] In *United States* v. *One Parcel of Real Property, Located at* 9638 *Chicago Heights*[134] the government failed to provide Long, the owner of property that was alleged to have facilitated his sale of cocaine, with notice and opportunity to be heard before seizing his property.[135] The reasoning of the Eighth Circuit Court of Appeal in deciding the appropriate remedy was surprisingly short: "The lack of notice and a hearing prior to the issuance of an arrest warrant for the seizure of the Long residence renders that warrant invalid and unconstitutional. Because the seizure was conducted pursuant to an invalid warrant, we must dismiss this forfeiture action."[136]

If the government never had a right to seize the property, and therefore assert actual control over that property, then that cause of action is invalid because it is premised on an unlawful and invalid action. These courts agree that the action may be re-filed if the statutory time constraints permit.[137]

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132. *See* 19 U.S.C. § 1621 (1999). The Reform Act has modified the statute to run two years after the time the involvement of the property in the offense is discovered, or five years after the time the alleged offense is discovered, whichever is later. *See* 19 U.S.C. § 1621 (2000).

133. The Eighth Circuit is the only Court of Appeals that accepts this reasoning. *See* United States v. One Parcel of Real Property, Located at 9638 Chicago Heights, St. Louis, Missouri, 27 F.3d 327, 330 (8th Cir. 1994). The District Court for the District of Columbia has also adopted this minority view. *See* United States v. Property Identified as Lot Numbered 718, 20 F. Supp.2d 27, 39 (D.D.C. 1998).

134. 27 F.3d 327 (8th Cir. 1994).

135. *See id.* at 328. This decision was pending appeal when the Supreme Court decided *Good*. *See id.* at 329.

136. *See 9638 Chicago Heights*, 27 F.3d at 330. The Courts adhering to the minority view expend much more analysis explaining the inadequacies of the majority view. *See, e.g., Property Identified as Lot Numbered 718*, 20 F. Supp. 2d. at 39-41. These arguments will be discussed in Part IV-C.

137. *See 9638 Chicago Heights*, 27 F.3d. at 330; *accord Property Identified as Lot Numbered 718*, 20 F. Supp.2d. at 40 (noting that the provision for re-filing "harmonizes with the rationale other circuits have used to reject the dismissal remedy").

B. Majority View: Suppression Plus Damages

A majority of circuits addressing the issue have decided that the government must pay damages for the wrongful seizure, have any evidence seized during the wrongful seizure suppressed, or a combination of the two.[138]

In reasoning to this result, these courts first look to the following foundation: "The illegality of the seizure . . . does not necessarily invalidate the forfeiture."[139] This proposition is extracted from the Second Circuit decision of *United States v. The Premises and Real Property at 4492 South Livonia Rd.*[140] In this pre-*Good* decision, the Second Circuit Court of Appeals had held that the government's seizure of the real property at issue was a violation of the owner's Due Process rights.[141]

Although the *4492 South Livonia Rd.* decision predicted the outcome of the *Good* majority, the citations supporting the proposition that an illegal seizure does not invalidate the forfeiture are less than satisfactory.[142] All the cases cited are pre-*Good* decisions that deal with moveable personal property.[143] Despite this paltry foundation, this proposition forms the basis of many majority

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138. These jurisdictions are comprised of the Fourth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits. *See* United States v. Marsh, 105 F.3d 927, 931-32 (4th Cir. 1996); United States v. Real Property Located at 1184 Drycreek Rd., 43023, 174 F.3d 720, 727-28 (6th Cir. 1999); United States v. All Assets and Equipment of West Side Building Corp, 58 F.3d 1181, 1193 (7th Cir. 1995); United States v. Real Property Located at 20832 Big Rock Drive, 51 F.3d 1402, 1406 (9th Cir. 1995); United States v. 51 Pieces of Real Property, 17 F.3d 1306, 1315-16 (10th Cir. 1994); United States v. 408 Peyton Road, 162 F.3d 644, 652 (11th Cir. 1998).

139. *See* United States v. 51 Pieces of Real Property, 17 F.3d 1306, 1315 (10th Cir. 1994).

140. 889 F.2d 1258 (2d Cir. 1989).

141. *See id.* at 1262-66. This reasoning was talismanic of the Supreme Court's later decision Good. *See id.*

142. *See id.* at 1265-66. The Court cites the following cases: United States v. One 1978 Mercedes Benz, Four-Door Sedan, 711 F.2d 1297, 1303 (5th Cir. 1983) (holding that the warrantless seizure of an automobile did not "jeopardize the government's right to secure forfeiture if the probable cause to seize the vehicle can be supported with untainted evidence"); United States v. One 1975 Pontiac Lemans, 621 F.2d 444, 450-51 (1st Cir. 1980) (holding that an automobile used in connection with gambling, thus violating the internal revenue laws, was forfeitable even though the government seized the automobile without a warrant: "a prior unauthorized seizure of the object did not preclude a valid forfeiture"); United States v. One (1) 1971 Harley-Davidson Motorcycle, 508 F.2d 351 (9th Cir. 1974) (holding that warrantless seizure of a motorcycle did not invalidate the seizure so long as requirements proven without evidence untainted by the seizure). *See id.*

143. *See, supra,* footnote 143 (indicating the personal property and dates of the cases cited in 4492 *Livonia Road*).

decisions.[144] These opinions fail to cite to any more concrete basis for their holding than that alluded to in the *4492 South Livonia Road* opinion.

After holding the forfeiture action viable, the courts then state that the government is precluded from using any evidence resulting from the illegal seizure.[145] As above, the courts often cite *4492 South Livonia Road* and its progeny for this proposition. Also, many add the "additional twist" that the government be held liable for any rents or profits that may have accrued during the illegal seizure.[146] The addition of damages is reasoned "an effective, but measured, remedy for the violation of the claimant's rights."[147]

The time period for which the damages are to be paid is the time between the illegal seizure and when the claimant is afforded Due Process rights at an adversarial hearing.[148] Thus, in *United States v. Marsh,*[149] when a summary judgment motion was heard by the magistrate, there was no doubt that this hearing satisfied the requirements established by *Good.*[150]

C. A Fourth Option: Dismissal with Prejudice?

It is necessary to discuss, for the sake of completeness, a fourth option that has not been subscribed to by any court: that the complaint be dismissed without opportunity to re-file. An argument for this view is found in another context and in a dissenting opinion. In *One 1975 Pontiac Lemans,*[151] the government

144. *See, e.g., Marsh*, 105 F.3d at 931 ("[A] Good-violative seizure does not immunize the property from forfeiture."); *All Assets and Equipment of West Side Building Corp.*, 58 F.3d at 1193 ("[T]he illegal seizure does not, standing alone, require that the property be immune from forfeiture."); *51 Pieces of Real Property*, 17 F.3d at 1315 ("The illegality of the seizure, however, does not necessarily invalidate the forfeiture.").

145. *See, e.g., 51 Pieces of Real Property*, 17 F.3d at 1316; United States v. The Premises and Real Property at 4492 South Livona Road, 889 F.2d 1258, 1266 (5th Cir. 1983).

146. *See, e.g.*, Real Property Located at 20832 Big Rock Drive, 51 F.3d 1402, 1406 (9th Cir. 1995).

147. *See* United States v. All Assets and Equipment of West Side Building Corp., 58 F.3d 1181, 1194 (7th Cir. 1995). *See also Marsh*, 105 F.3d at 931 ("The circuits not dismissing the action have tailored the remedy in a fashion commensurate with the violation of the rights of the claimant [by granting damages] . . . .").

148. *See Marsh*, 105 F.3d at 932 (noting that when the claimant "received an adversarial hearing on the forfeiture, she had received all the process that was due . . .").

149. 105 F.3d 927 (4th Cir. 1997).

150. *See id.*

151. 621 F.2d 444 (1st Cir. 1980).

seized an automobile believed to have been used for illegal gambling in violation of tax laws.[152] The automobile was "seized . . . without a warrant from a public street."[153] The majority opinion held that the government's seizure of the car without a warrant did not invalidate the forfeiture.[154]

The dissent, by Chief Judge Coffin, argued that the not only should the evidence found pursuant to the illegal seizure be excluded, but that the government should lose its cause of action against that piece of property.[155] The reasoning is founded on the exclusionary rule. The exclusionary rule is a judge-made remedy, the primary purpose of which is to deter unconstitutional police conduct.[156] The exclusionary rule mandates that "property obtained as a result of an illegal search and seizure should be returned to a person entitled to lawful possession and may not be used in any subsequent criminal proceeding."[157]

Chief Judge Coffin reasoned by analogy that the government should be barred in the case of an illegal seizure in the forfeiture context.[158] The "exclusion" of the property from any further proceedings because of the illegality of the actions of the government strikes an appropriate balance between societal and governmental needs.[159] Only by insulating the property from further action can the Constitutional rights of the citizenry be protected.[160] Thus, this

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152. *See id.* at 446-47.

153. *See id.* at 447.

154. *See id.* at 450-51. As noted above, this case was cited in support of the majority view as found in *4492 South Livonia Road. See* United States v. Premises and Real Property at 4492 South Livonia Road, 889 F.2d 1258, 1265-66 (2d Cir. 1989).

155. *See One 1975 Pontiac Lemans*, 621 F.2d at 458-59 (Coffin, C.J., dissenting). Although this dissent is written in the case of a warrantless seizure of an automobile, its reasoning is even more applicable in the context of a seizure of real property and in light of *Good*.

156. *See id.* at 458 (citing the Supreme Court decision of Stone v. Powell, 428 U.S. 465, 486 (1976) for the primary purpose of the exclusionary rule).

157. *See id.* at 459.

158. *See id.* at 459 ("It appears to me, therefore, both permissible and reasonable to treat forfeiture cases as what they are sui generis and . . . [apply the exclusionary rule the same way].").

159. *See id.*

160. *See id.* The majority had this to say about the dissent's reasoning:

> Our colleague's [Coffin's] rule would deprive the government of a vehicle whose forfeit character is fully proven by untainted evidence simply, it appears, to punish the government for failing to get the warrant to which, as the outcome of the forfeiture case shows, it would have been entitled all along.

See id. at 451.

"social cost" is a small price to pay to ensure that the government complies with the Due Process requirements.[161]

D. Analysis of the Competing Rationales

Each of the three major solutions will be examined in turn. This comment will conclude that although the majority decisions are not particularly well-reasoned, the proper remedy for a *Good* violation is the imposition of damages and the suppression of any evidence recovered. This stems from the fact that the minority reasoning suffers from a fatal flaw: it wrongly premises the government's cause of action on the seizure of the property.

1. Right for the Wrong Reasons: The Majority's Underlying Proposition That the Forfeiture Action is Not Destroyed by the Good *Violation*—It seems appropriate to begin a comparison of the rationales with a consideration of the majority's underlying proposition.[162] The majority's proposition that the forfeiture right of action is not destroyed by an inappropriate seizure is founded upon the wrong law.[163] The cases cited by *4492 Livonia Road* dealt with personal property that was readily movable.[164] Those cases, without going too much beyond the scope of this comment, were wrongly decided. The theory of forfeiture is that the government's cause of action must be based upon the bringing movable property within the control and jurisdiction of the court.[165] Seizure of the property establishes actual control over the property of the court, as well as establishes the proper judicial forum. If the property was not brought within the court's jurisdiction and control, the action should have been dismissed sua sponte.[166]

What changes with the opinion in *Good* is that real property need not be seized in order to establish control over the property.[167]

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161. *See id.* at 459 (Coffin, C.J. dissenting).

162. *See, supra* notes 139-144 for a discussion of this underlying presumption.

163. *See* United States v. The Premises and Real Property at 4492 South Livonia Road, 889 F.2d 1258, 1265-66 (5th Cir. 1983).

164. *See id.*

165. *See* United States v. James Daniel Good Real Property, 510 U.S. 43, 57 (1993) (noting that "seizure of the res has long been considered a prerequisite to the initiation of in rem forfeiture proceedings . . ."); ASSET FORFEITURE LAW AND PRACTICE MANUAL, 2-1 (1998).

166. The response of the *One 1975 Pontiac Lemans* majority, noted *supra* in footnote 160, is clearly inadequate. *See* United States v. One 1975 Pontiac Lemans, 621 F.2d 444, 451(1st Cir. 1980). The jurisdiction and control of the court is the appropriate question; without that prerequisite the court has no authority to pass on the guilt of the property.

167. *See Good*, 510 U.S. at 57-58.

The Court explained, quoting Justice Story, the reasoning for requiring seizure for movable personal property: "Before judicial cognizance can attach upon a forfeiture *in rem*, . . . there must be a seizure; for until a seizure it is impossible to ascertain what is the competent forum."[168] When the property is real, this reasoning loses its potency: "the appropriate judicial forum may be determined without actual seizure."[169] Moreover, constructive control is established by posting the property and providing notice to the owners.

Thus, the difference between real and personal property makes valid the majority's proposition that the action is not lost by the government's failure to comply with *Good.* However, the reasoning and caselaw depended upon by the courts are unavailing. This is so because the forum is easily ascertainable and control is necessarily established.

2. *Dismissal of the Cause of Action: A Misunderstanding of the Reason for the Warrant*—The minority decisions requiring the dismissal of the cause of action are invalid for the reasons cited immediately above.[170] The government's cause of action against real property is simply no longer premised on the seizure of that property.[171] As long as the property has otherwise been brought within the court's constructive control, through the posting and notice as outlined in *Good,*[172] then the reviewing court should fashion a remedy as indicated below. Therefore, it is irrelevant that the warrant is "invalid and unconstitutional"[173] because the real property is obviously within the court's judicial reach and the posting establishes the necessary control.

On a practical level, the minority conclusion provides little effective relief to the harmed property owner. The statute of limitations was then five years;[174] by permitting the re-filing of the action the courts vitiate any real consequences of the government's unconstitutional action. The wronged owner could simply petition the district court to dismiss the cause of action. Afterwards the

168. *See id.* at 57 (quoting The Brig Ann, 13 U.S. 289 (1815)).

169. *See id.* at 57.

170. This discussion is equally applicable to the remedy that would dismiss the cause of action without permission to re-file: it is simply premised on the wrong reasons.

171. *See Good*, 510 U.S. at 57-58.

172. *See id.*

173. *See* United States v. One Parcel of Real Property, Located at 9638 Chicago Heights, 27 F.3d 327, 330 (8th Cir. 1994).

174. *See* 19 U.S.C. § 1621 (1999). *See supra*, note 132, for the current statute of limitations.

government could promptly and properly post the property and re-file the action. The legal resources of the government far surpass even the most extraordinary citizen, making the extra petition much more of a burden on the property owner.[175]

More difficult is the question of the inadequacy of the other remedies. The District of Columbia District Court noted: "Given the substantial powers that civil forfeiture laws vest in the government . . . the remedy of dismissal is commensurate with the offense [of a Due Process violation]."[176] Given the broad powers of the courts to fashion remedies, this may be a difficult reason with which to quibble. But, as noted above, the dismissal remedy really affords only temporary relief if the government is given leave to re-file.

3. Suppression of Evidence: The Most Effective Deterrent for Law Enforcement—The suppression of any evidence that may be found in a warrantless seizure will provide some relief to an owner.[177] This is not an ordinary application of the exclusionary rule because the Fourth Amendment can be satisfied by a probable cause hearing before a local magistrate. However, if the government indeed found evidence that tended to prove the forfeitability of the property by the illegal seizure, the exclusion of such evidence could strike a meaningful blow. It is rational in the sense that if the government did not have a right to be in possession of the property, it should not be permitted to use its ill-gotten evidence at trial.[178]

The problem with this remedy is that it offers limited consolation in certain contexts. For example, in *Property Identified as Lot 17*, the government's cause of action was based on the belief that the property had been purchased with illegal funds.[179] The illegal seizure of such property is unlikely to result in the confiscation of other evidence that would support the forfeiture cause of action.[180] Suppression is effective, however, in many cases.

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175. This problem, of course, could be alleviated by imposing costs on the government.

176. United States v. Property Identified as Lot Numbered 718, 20 F. Supp. 2d 27, 40 (D.D.C. 1998). This comment is on the heels of a discussion as to why the majority remedy is inadequate. *See id.* These reasons will be discussed post haste in the following sections.

177. The majority requires the forfeitability of the property to be proven without reference to any evidence that was procured by the illegal seizure. *See, e.g.*, United States v. 51 Pieces of Real Property, 17 F.3d 1306, 1316 (10th Cir. 1994).

178. *See generally* Mapp v. Ohio, 367 U.S. 643 (1961) (discussing the exclusionary rule and the Fourth Amendment).

179. *See* United States v. Property Identified as Lot Numbered 718, 20 F. Supp. 2d 27, 40-41 (D.D.C. 1998); *see also* 21 U.S.C. §881(a)(1)(A) (1999).

180. *See Property Identified as Lot 718*, 20 F. Supp. 2d at 40.

Moreover, it is noted that the seizure in the forfeiture context is meant to assert a possessory interest over the property and is not usually accomplished to find evidence.[181] Thus, it is argued, the Fourth Amendment exclusionary remedy cannot provide effective relief.[182] Admittedly, the government's action goes beyond that normally thought of as a Fourth Amendment violation. However, the exclusionary remedy may in fact be the most devastating remedy currently used by any jurisdiction. Damages and dismissal with permission to re-file simply do not strike at the offending official's consciousness as his pocketbook is unlikely affected. Knowing that evidence of wrongdoing could be suppressed, however, would seemingly make even the most ambitious officer pause.

Therefore, although not effective in all forfeiture cases, the suppression of evidence provides a valid and effective means to control law enforcement's violation of *Good*.

4. Damages for Lost Use: Placing the Owner in His Former Position—The purpose of the damages remedy is to place the claimant in the position she would have occupied without the unconstitutional seizure.[183] Although unlikely to really pull at the purse strings of the government, the damages remedy does afford a wronged owner some relief for an unconstitutional seizure. At the very least, the claimant will not be worse off than she was before the seizure.

A criticism of this remedy is that the return of rents has no validity if the property in question is owner-occupied.[184] Moreover, to broadly formulate lost enjoyment in these situations presents serious problems of how to quantify such a loss.[185] But, if the government has not dispossessed the owner, perhaps no remedy is in order as this is likely no more invasive than posting. In *Good*, the rents from the property had been redirected toward the government.[186] Thus, the owner had suffered a loss. A technical violation of the requirements that leads to no real injury, or the claimant

181. *See* United States v. James Daniel Good Real Property, 510 U.S. 43, 52 (1993) ("The purpose and effect of the Government's action in the present case go beyond the traditional meaning of search and seizure. Here the Government seized property not to preserve evidence of wrongdoing, but to assert ownership and control over the property itself.").

182. *See Property Identified as Lot 17*, 20 F. Supp. 2d at 40.

183. *See* United States v. Real Property Located at Incline Village, 976 F. Supp. 1327, 1348 (D. Nev. 1997).

184. *See Property Identified as Lot 17*, 20 F. Supp. 2d at 40.

185. *See id.*

186. *See Good*, 510 U.S. at 47.

being worse off, provides no cause of action to entitle the owner to any recourse.

An example illustrates this idea. Suppose that the government obtained a warrant to seize a particular piece of property that was believed to have been purchased with illegal funds. The government executes this warrant and "seizes" the property, but the owner is permitted to remain. Four months later, during which time the owner was permitted to remain and the government exerted no control over the owner's rights, an adversarial hearing is held. The owner has suffered no legally recognizable harm because she is no worse off than if the government had simply filed a lis pendens and posted the property. Certainly this situation changes when the owner is dispossessed, or otherwise harmed by a pecuniary loss.

Thus, damages strikes a balance that readily compensates any harm that might have befallen the owner of an illegally dispossessed property.

V. The Reform Act's Position . . . or Nonposition

The Reform Act has several provisions that will have some impact on the appropriate *Good* violation remedy. First, the Federal Tort Claims Act ("FTCA") was amended to waive sovereign immunity for property seized under any forfeiture law, when the interest was not forfeited, and the claimant was not convicted of any crime.[187] Second, another provision entitles a claimant who "substantially prevails" in a civil forfeiture proceeding to recover reasonable attorney fees, reasonable litigation costs, and post-judgment interest.[188]

Thus, it would seem clear that if the government seized real property without proper notice and opportunity, the owner would be entitled to sue for compensation under the FTCA for damages. However, it would be more difficult to demonstrate that the owner "substantially prevail[ed]" on those facts alone. This language, though undefined, seems to be directed toward frivolous proceedings, rather than faulty procedure.

It is slightly more difficult to predict what effect the Reform Act will have if an illegal seizure took place. Section 983(a)(1)(A) provides for written notice to any interested parties after a seizure in a nonjudicial forfeiture "as soon as practicable, and in no case

187. 28 U.S.C. § 2680(c) (2000).
188. 28 U.S.C. § 2465(b)(1)(A)-(B) (2000).

more than 60 days *after the date of the seizure.*"[189] A separate provision states that if this notice is not provided to the interested parties "the Government shall return the property to that person without prejudice to the right of the Government to commence a forfeiture proceeding at a later time."[190]

Although this seems to accept the minority position, it is probably inapplicable. First, it addresses only nonjudicial forfeitures; all real property interests are forfeited by judicial forfeiture.[191] Moreover, it assumes a proper seizure because the first provision provides for notice of seizure to interested parties, and the latter a return of the property to the person from whom it was seized.[192] The violation lies in the government's failure to give notice rather than an improper seizure. Thus, this section does not address the appropriate remedy for a *Good* violation.

This section does present an interesting outlook, however, on how the reforms may impact the reasoning of the courts. If the legislature has deemed the failure to provide notice of a proper seizure of property within a reasonable period of time cause to dismiss the forfeiture,[193] the statute likely would have provided the same remedy for the more egregious breach of its specific provisions that real property not be seized before the proper steps have been taken.[194] Thus, the statute provides elements of both the majority position and the minority position without seeming to completely endorse either in the context of real property.

The provision relating specifically to the civil forfeiture of real property does not provide any cognizable remedy.[195] Another provision, however, applies a uniform standard for a motion to set aside a declaration of forfeiture in which a person entitled to

189. *See id.* § 983(a)(1)(A)(i) (emphasis added). This section addresses "any nonjudicial civil forfeiture proceeding under a civil forfeiture statute." *See id.*

190. *See id.* § 983(a)(1)(F). However, the government is not "required to return contraband or other property that the person from whom the property was seized may not legally possess." *See id.* This part of the provision will obviously have no relevance to real property which could not be contrand per se. Note that this provision works in conjunction with the new, and more lenient, statute of limitations. *See id.* § 1621 (linking the statute of limitations to the discovery of the connection of the property or the discovery of the offense).

191. *See id.* § 985(a).

192. *See id.* § 983(a)(1)(A)(i). *See also id.* § 983(a)(1)(F) ("If the Government does not send notice of a seizure of property in accordance with [§ 983(a)(1)(A)] to the person from whom the property was seized [the Government must return the property].").

193. *See id.* § 983(a)(1)(F). Of course, like the minority position delineated above, the Government may re-file its claim. *See id.*

194. *See id.* § 985(b)-(c).

195. *See generally id.* § 985.

written notice does not receive such notice.[196] This section, however, only addresses improper notice and presumes a valid seizure and proper procedure.[197] Thus, this also addresses only the improper notice to the aggrieved party and not an invalid seizure of real property.

Thus, the Reform Act seems to provide minimal guidance to a person aggrieved by the seizure of real property without proper notice and opportunity to be heard. Although the addition to the FTCA provides an alternate damage provision, and the remedy provisions provide a new layer of argument to such owners, the Act does not specifically provide the remedy for an invalid forfeiture.

VI. Conclusion

The Supreme Court's decision in *Good* has created considerable controversy over the proper remedy that will fully protect the government's interest in forfeiting a "guilty" piece of property, while compensating the owner aggrieved by the Due Process violation. Although dismissal of the suit seems at first blush to strike an appropriate balance at first blush, the underlying rationale of the remedy falls short. The invalidity of the seizure simply is unimportant to the analysis after *Good* because appropriate judicial forum is easily ascertainable and it will be fairly easy to establish constructive control over the property. However, the provisions of the Reform Act, coupled with the remedy provisions addressing a failure to give notice, do add a new argument for an analogous remedy were the government to breach the provisions of the Act.

Although damages may not fully compensate every technical violation of *Good,* damages place the property owner into the position occupied before the seizure. Moreover, when combined with the effective deterrent of suppression of any evidence recovered, the majority jurisdictions' remedy is effective to assure the owner's Due Process rights will be protected. These circuits should continue to apply these appropriate and well-reasoned remedies even in the light of the Reform Act.

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196. *See id.* § 983(e) ("Motion to set aside forfeiture").

197. The statute only addresses the interests of the moving party and does not set aside the validity of the forfeiture. *See id.* § 983(e)(1).