

ASSET FORFEITURE: HOME AND ABROAD

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Good intention will always be pleaded for every assumption of power. . . . [T]he Constitution was made to guard the people against the dangers of good intentions. There are men in all ages who mean to govern well, but they mean to govern. They promise to be good masters, but they mean to be masters.

-Daniel Webster

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There are more than two hundred different forfeiture statutes, covering literally everything from soup to nuts. Each state has at least two forfeiture provisions, *i.e.*, one civil and one criminal, with some states having more. New York, for example, boasts no fewer than fifteen

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separate forfeiture statutes, fifteen different ways for the government to seize and forfeit your property.

The civil forfeiture statutes have been the most controversial and have caused most of the stir during the last several years. In general, they provide to law enforcement agencies or assistant United States Attorneys the authority to file a civil lawsuit against the offending property in civil term.

I. HISTORY OF CIVIL FORFEITURE

Civil forfeiture laws are actually an anomaly in American law. They empower law enforcement agencies to seize money or other property they believe has been used in, is intended to be used in, or is proceeds of criminal activity. There is no need for a conviction before seizure or forfeiture. In fact, the property owner does not have to be charged with a crime. Civil forfeiture prosecutions are brought *in rem* against the culpable or guilty property. Since the property is guilty of the criminal activity, the legal fiction goes, the property is being seized and punished. No *individual* is being prosecuted. Therefore, fundamental constitutional protections such as the presumption of innocence, having the *government* convict *you* of the charge instead of you proving your innocence, and the right to be free from unjust private property *takings* by the government quite simply do not apply. Compounding this is that the procedures claimants must follow to contest a forfeiture are remarkably complicated, even for seasoned attorneys, and therefore give the government every advantage.

Unlike *criminal* forfeiture statutes, which require a conviction before property can be taken from an individual, civil forfeiture laws require only a showing that agents have probable cause to believe that the property was used or intended to be used to facilitate a crime, or that it represents the proceeds of a crime. It is difficult to conceive of a lower standard relating to criminal law. Civil forfeitures, after all, are criminal proceedings, no matter what the Supreme Court has held, with the government as plaintiff, a crime forming the basis of the action, and the property being guilty of involvement in a crime. This is especially troubling when you realize that, by and large, seizures are premised upon the essentially unchecked discretion of a cop.

Where did these laws come from? Despite being relatively new to us, the concept of civil forfeiture was acknowledged even before the Greeks. Some cite to the Bible. In Exodus, chapter 21, verse 28, it is written: "If an ox gore a man or a woman that they die, then the ox shall be surely stoned, and his flesh shall not be eaten. But the owner of the ox

shall be quit." The perfect civil forfeiture? Not really. Unlike in a true civil forfeiture, the Biblical sovereign did not acquire the offending property or its value. Nor did society benefit by eating the ox. Rather, this was social justice, meted out to discourage revenge from the deceased's family.¹

As our predecessors traveled through the generations, they adopted many of the Biblical practices. Revenge was the common thread.² Rome had its Twelve Tables.³ The Greeks followed closely behind.⁴ And Britain had its common law. Indeed, at common law, civil forfeitures were in the nature of a deodand, the *spiritual predecessors of forfeiture statutes*.⁵ Derived from the Latin phrase *Deo Dandum*, meaning, "to be given to God,"⁶ the deodand itself originated in pre-Judeo-Christian practices.⁷ These practices, similar to the Talmud's interpretation of the *goring ox* passage, reflect the view that the instrument of death is the accused and that religious atonement is required. Property or its value was given to the

1. Jacob J. Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeiture, Wrongful Death and the Western Notion of Sovereignty*, 46 TEMP. L. Q. 169, 180-181 (1973). Of course, were the owner aware of the dangerous propensity of the ox, the result would be different, both today and in Biblical times.

But if the ox were wont to push with his horn in time past, and it hath been testified to his owner, and he hath not kept him in, but he hath killed a man or a woman, the ox shall be stoned, and his owner also shall be put to death.

Exodus 21:29.

According to the Talmud, the use of the phrase "and its flesh shall not be eaten" is intended as a prohibition against receiving benefit from the animal. This prohibition becomes effective from the moment the offending animal is convicted, even prior to its stoning. See TALMUD, TRACTATE BABA KAMMA 41a. Thus, the Biblical source for the notion of forfeiture does not contemplate a scheme under which a governing body or agency benefits from the use of the guilty property. See Steven L. Schwarcz & Alan E. Rothman, "Civil Forfeiture: A Higher Form of Commercial Law?", 62 FORD. L. REV. 287, 290 (Nov. 1993).

2. OLIVER W. HOLMES, THE COMMON LAW 34 (1881).

3. 1 SCOTT, THE CIVIL LAW 69 (1932). See also W. DURANT, STORY OF CIVILIZATION, (1972). "If a quadruped causes injury to anyone, let the owner tender him the estimated amount of the damage; and if he is unwilling to accept it, the owner shall . . . surrender the animal that caused the injury." 7 TWELVE TABLES 1, translated in 1 SCOTT, THE CIVIL LAW 69 (1932).

4. "We banished beyond our borders sticks and stones and steal, voiceless and mindless things, if they chance to kill a man; and if a man commits suicide, bury the hand that struck the blow afar from the body." Aeschines the Greek (389-314 B.C.E.) as quoted in the DRUG AGENTS' GUIDE TO FORFEITURE 2. See also OLIVER W. HOLMES, THE COMMON LAW (1881); *Ex Parte Lange*, 85 U.S. 163, 168 (1873).

5. OLIVER W. HOLMES, THE COMMON LAW (1881); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 681 (1974). See, Note, *Bane of American Forfeiture Law — Banished at Last?*, 62 CORNELL L. REV. 768, 770 (1977).

6. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 681 n.16 (1974).

7. OLIVER W. HOLMES, THE COMMON LAW 1-38 (1881).

Crown "with the belief that the king would provide money for masses to be said for the good of the dead man's soul, or insure that the deodand was put to charitable uses."⁸ For the kings, however, the motivation was hardly spiritual. It was pure, unadulterated greed. Sound familiar?

In medieval times, the scope of forfeiture was absolute. Known as "forfeiture of estate," it deprived the offender of all personal and real property.⁹ Subsequently, under the guise of redressing a loss caused by criminal activity, civil forfeiture became a premium source of revenue for the Crown in common law England.¹⁰ Centuries later, long after the religious purpose of the deodand had ended, the practice remained a source of revenue for the Crown and was further supported as a deterrent to negligence.¹¹ The final justification, however, remained revenue, and lots of it. It was fundraising at its best. Things were so frustrating for the commoner, and lord alike, in merry old England that, bowing to their pressure, one of the concessions granted in the Magna Carta was the creation of what was called the "year and the day" rule: The king held real property for non-treasonous offenses of one year and a day, after which time the property would revert to a tenant's lord.¹² Personality, however, would escheat to the Crown.

When the British left home and settled a New World called America, they brought with them many of their old, indeed despised, customs. Remarkably, too, when a custom, formerly distrusted, was seen from the opposite side of the fence for the first time, it looked much better. This was true with forfeiture. The first Congress of the United States abolished forfeiture of estate for federal offenses in 1790,¹³ and the Federal Constitution protected property through both the Due Process Clause¹⁴ and a specific limitation on the scope of forfeiture in the context of treason.¹⁵ Nevertheless, the forfeiture tradition was maintained in the colonies

8. *Pearson Yacht*, 416 U.S. at 681. Deodand was abolished by Parliament in 1846, and remedies for wrongful death developed in its place, with damages paid to those harmed by a person's death rather than to the State through the forfeiture of the offending property.

9. *United States v. Grande*, 620 F.2d 1026, 1038-1039 (4th Cir.), *cert. denied*, 449 U.S. 919 (1980).

10. Finkelstein, *supra* note 1, at 169.

11. Torrance G. Reed & Joseph P. Gill, *RICO Forfeitures, Forfeitable Interests and Procedural Due Process*, 62 N. C. L. REV. 57 (1983).

12. MAGNA CARTA, cl. 32.

13. Act of Apr. 30, 1790, § 24, 1 Stat. 117. This provision is currently codified at 18 U.S.C. § 3563.

14. U.S. CONST. amend. V.

15. U.S. CONST. art. III, § 3, cl. 2 ("prohibiting [f]orfeiture except during the life of the person attained").

through the maritime and customs laws, the reason why some of today's more powerful federal forfeiture laws are codified in the admiralty laws.¹⁶ The founding of a new nation did little to change these ancient traditions. Almost immediately following the adoption of the Constitution, ships and cargo were made subject to forfeiture under federal law.¹⁷ The concept made sense then. Our fledgling Republic depended on customs duties for almost all of its revenue, and the ship owners who failed to pay the import duties on the cargo were the same people from whom we had just declared our independence! They were our enemies, not our citizens, and most of them were half a world away. In that context, there could be little to debate regarding the propriety of seizing and forfeiting their property.

Forfeiture quietly remained on the books until, one day, President Reagan's staff figured out that these laws could be used and abused as high powered weapons by law enforcement in the *War on Drugs*. The rest, as they say, is history.

II. THE DRIVING FORCE BEHIND TODAY'S FORFEITURE: MONEY

One of the most alarming aspects of our current forfeiture scheme is that it permits law enforcement agencies to keep the proceeds of their forfeitures. This creates an overwhelming financial incentive for abuse, one that would tempt even the most honest cop. Probably the most remarkable example comes from Arizona. In one county, a statute provides that a police officer will receive a salary as long as there are enough funds in the forfeiture account to pay his salary. The local media coined this *collars for dollars*. Enough said.

Among the many courts that have expressed grave concern about these and other forfeiture practices is the Second Circuit Court of Appeals. In 1992, the Court, traditionally very conservative, said it was "enormously troubled by the governments' increasingly and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes."¹⁸

Other federal and state courts have echoed similar concerns. In *United States v. One Parcel of Property*,¹⁹ the Eighth Circuit stated: "We

16. The English Navigation Acts in the 1600s required that all commodities shipped to the colonies be transported on British vessels. A violation of these laws resulted in the forfeiture of the illegally carried goods as well as the ships that transported them, a dear price to pay for an upstart industry in the colonies.

17. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 683 (1979).

18. *United States v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896, 905 (2nd Cir. 1992).

19. *United States v. One Parcel of Property*, 964 F.2d 814, 818 (8th Cir. 1992).

are troubled by the government's view that any property, whether it be a hobos hovel or the Empire State Building, can be seized by the government because the owner, regardless of his or her past criminal record, engages in a single drug transaction." Abuse also was a concern in *Jones v. United States Drug Enforcement Administration*,²⁰ where the district court held that "the statutory scheme as well as its administrative implementation provides substantial opportunity for abuse and potentiality for corruption." The court continued with a pointed, and telling, observation: "The law enforcement agency has a direct financial interest in the enforcement of these laws. . . . The obviously dangerous potentiality for abuse extant in the forfeiture scheme should trigger, at the very least, heightened scrutiny by the courts when a seizure is contested."²¹

On the state level, at least one high court, familiar with forfeiture matters, has noted its concern. In *Wohlstrom v. Buchanan*,²² the Arizona Supreme Court recounted the threat of forfeiture statutes upon an individuals due process rights.²³

Yet, it has remained for two other courts to put the facts of the instant case in perspective. The Fourth Circuit observed:

One of the most potent weapons in the government's war on drugs is its ability to obtain the civil forfeiture of property that aids violations of the drug laws. . . . Congress has given this weapon increased power, expanding the war to every piece of real property involved in the narcotics trade. Yet even warfare is conducted by rules. It is the judiciary's responsibility to ensure that the civil forfeiture penalty falls only those property interests which spring rightly and justly into its reach. While we do not doubt that the anomalous circumstances of this case

20. *Jones v. United States Drug Enforcement Administration*, 819 F.Supp. 698, 724 (M.D. Tenn. 1993).

21. *Id.*; see also *United States v. \$191,910 in United States Currency*, 16 F.3d 1051, 1069 (9th Cir. 1994) (disparity between government's and claimant's burdens in forfeiture proceedings "involves a serious risk that an innocent person will be deprived of his property"); *United States v. That Certain Real Property*, 798 F. Supp. 1540, 1553 (N.D. Ala. 1992) (discussing inherent problematic due process issues relating to civil forfeiture and government's *unchecked use* of civil forfeiture statutes).

22. *Wohlstrom v. Buchanan*, 884 P.2d 687 (Ariz. 1994).

23. See also *In re 1986 Chevrolet Corvette, Ariz.* Lexis 78, 169 Ariz. Adv. Rep. 30 (Ariz. 1994) (expressing concern over the government's increasing power in the area of forfeiture).

render it something of a *rara avis*, even the rarest of species deserve shelter under the law's aegis²⁴

Most notably, the United States Supreme Court recognized the government's direct pecuniary interest in the outcome of forfeiture proceedings. In *United States v. James Daniel Good Real Property*,²⁵ Associate Justice Clarence Thomas, one of the Supreme Courts most ardent conservatives and the government's strongest supporters, wrote of his "distrust of the Government's aggressive use of broad civil forfeiture statutes." "I am disturbed," he continued, "by the breadth of the new civil forfeiture statutes . . . which subjects to forfeiture all real property that is used, or intended to be used, in the commission, or even the facilitation, of a federal drug offense."²⁶ Notably, the Justice went on, "ambitious modern [forfeiture] statutes and prosecutorial practices have all but detached themselves from the ancient notion of civil forfeiture."²⁷ Hence, "it may be necessary . . . to reevaluate our generally deferential approach to legislative judgments in this area of civil forfeiture."²⁸

Sadly, there is good reason for the distrust. Under the guise of attempting to recoup the *costs* of crime and crime prevention, from 1985 to 1996, the federal government has secured more than \$5 billion in forfeited proceeds, with another \$1.5 billion in the pipeline.²⁹ The United States Attorney's office in the Southern District of New York collected more than \$420 million between 1985 and 1994. Indeed, in 1994 alone, they brought in close to \$50 million, \$17 million *more than their annual budget*. The Eastern District of New York, during the same period, collected more than \$31 million, plus another \$70 million in civil judgments, settlements, criminal fines and assessments. Their operating budget is \$26 million. Even our deficit-oriented government has figured out that when your \$26 million investment shows a \$100 million return, you are doing something right. In short, the forfeiture laws have permitted the government to become a "full financial partner and participant in what is unquestionably the largest *business* in the country."³⁰

24. *United States v. Two Tracts of Real Property*, 998 F.2d 204, 213-214 (4th Cir. 1993) (emphasis supplied).

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

26. *Id.*

27. *Id.*

28. *Id.*

29. Susan Adams, *Forfeiting Rights*, FORBES MAGAZINE, May 20, 1996, at 96.

30. STEVEN L. KESSLER, CIVIL AND CRIMINAL FORFEITURE: FEDERAL AND STATE PRACTICE § 1.01, 1-2 (Clark 1993 and Supp. 1998), quoting Sinoway, et al., *Current Trends in Asset Forfeiture* (California Attorneys for Criminal Justice, 1992).

The extent of the government's financial stake through the use of the forfeiture statutes came to light through released Department of Justice memoranda. In 1989, the Acting Deputy General, Edward S. G. Dennis, Jr. sent a memorandum indicating the need to meet the department's forfeiture budget: "If inadequate forfeiture resources are available to achieve the above goal, you will be expected to divert personnel from other activities or to seek assistance from other United States Attorneys offices, the criminal division and the executive office for United States Attorneys."³¹

In 1990, Attorney General Dick Thornburgh warned all federal prosecutors that the department was far short of its projection of \$470 million in forfeiture deposits with only 3 months remaining in fiscal 1990, and that they must increase the volume of forfeiture actions:

We must significantly increase production in order to reach our budget target. . . . Failure to achieve the \$470 million projection would expose the Departments forfeiture program to criticism and undermine confidence in our budget projections. Every effort must be made to increase forfeiture income during the remaining three months of [fiscal year] 1990.

Federal prosecutors realized the conflict of interest and skewing of priorities created by the forfeiture statutes. In 1993, after a new administration was installed at the Department of Justice (DOJ), the former director of the DOJ Asset Forfeiture Office, Michael Zeldin, remarked:

The intelligent thing to have done would have been to pick our cases more carefully and not overreach. We had a situation in which the desire to deposit money into the asset forfeiture fund became the reason for being of forfeiture, eclipsing in certain measure the desire to effect fair enforcement of the laws as a matter of pure law-enforcement objectives.³²

In addition, the Department of Justice gives positive recognition and incentives to United States Attorneys offices on the basis of the amount of assets they seize. As Myles Malman, a former federal prosecutor from Florida, said: "There is nothing inherently wrong with rewarding people for the assets they seize. But there has to be clear communication that they

31. Stephen Labaton, *Seize Property in Crime Cases Causes Concern*, N.Y. TIMES, May 31, 1993, at A1.

32. *Id.*

shouldn't sacrifice good judgment and conscionability for statistics. The system is subject to abuse."³³

This aggressive forfeiture policy has caused and continues to cause abusive results. The Pittsburgh Press published a series of articles in August 1991. Following a ten-month investigation, the paper uncovered more than 400 instances of innocent people who had to forfeit money or property to federal authorities. More recently, the Arizona Tribune and the Orlando Sentinel have uncovered similar abuses.³⁴ Representative Henry Hyde, R-Ill., recently estimated that about eighty percent of the people losing property under federal civil asset forfeiture laws *are never even charged with a crime*.³⁵ Despite a potential claimant's lack of a nexus to illegal activity, the forfeiture process goes on simply because many claimants do not have the resources to challenge federal authorities. Economist Sam Staley, President of the Urban Policy Research Institute, noted that "[m]any [claimants] lack the resources and sophistication to fight a prolonged court battle"³⁶ This comes as no surprise to federal authorities, since, statistically, if they seize and hold the property, the forfeiture process itself will force the claimant to abandon his or her claim more than *eighty percent* of the time.

This government-sanctioned policy directing an agency, whenever possible, to seize property to meet budget projections is reflected in the Department of Justice's incentives for using this process and the statistical knowledge that at least eighty percent of the claimants run out of the financial resources and energy to fight the government and go away. This has resulted in all seizing agencies retaining seized property even if an investigation reveals that the property involved is not associated with illicit activity or the property owner is an innocent owner. Not only is this policy *de facto* outright theft, but it also amounts to a clear violation of the Fifth Amendments Due Process Clause.

The broad campaign of the Justice Department to abuse the forfeiture statutes indicates a systematic conspiracy to indiscriminately deny the due process, equal protection and First and Fourth Amendment rights of citizens. This is possible because the forfeiture statutes do not put the initial burden on the government to institute proceedings promptly, upon notice, with an opportunity to be heard, and show not only probable cause, but lack of innocent ownership or other defense *by proof beyond a*

33. *Id.*

34. See KESSLER, *supra* note 30.

35. HENRY HYDE, FORFEITING OUR PROPERTY RIGHTS: IS YOUR PROPERTY SAFE FROM SEIZURE? (The Cato Institute, 1995).

36. Carl Horowitz, INVESTORS BUSINESS DAILY, Dec. 9, 1993, at 1.

reasonable doubt. Given the cumulative abuses, the statutes are unconstitutional as applied.

III. PROPOSED LEGISLATIVE FORFEITURE REFORM

After the Supreme Court last term made a mockery of our Constitution in *Bennis v. Michigan*³⁷ and *United States v. Ursery*,³⁸ House Judiciary Chairman Henry Hyde, a Reagan Republican from Illinois, introduced the Civil Asset Forfeiture Reform Act (H.R. 1835).³⁹ He and Representative John Conyers, a Carter Democrat from Michigan and the ranking Democrat on the Committee, have joined hands on this one, in an attempt to remedy some of the worst problems affecting federal civil forfeiture laws.

Some of the important changes in the new bill are:

- 1) Place the burden of proof on the government to prove that, by clear and convincing evidence, the property is subject to forfeiture.
- 2) Provide for the appointment of counsel for property owners who cannot afford lawyers to challenge forfeitures, paid for from the Federal Asset Forfeiture Fund.
- 3) Clarify the innocent ownership defense, most specifically to state that an owner who takes reasonable steps to prevent others from using the property for criminal activity can get his property back.
- 4) Eliminate the requirement that owners post a bond before being allowed to challenge the action. What a concept! Your house has been seized, your business has been shut down, all of your money has been seized or frozen, and, before you are permitted to challenge the seizure, you have to post a bond of \$5,000 or ten percent of the property's value, whichever is less.
- 5) Extend from 10 to 30 days the time for property owners to file a claim for the return of their property.

37. *Bennis v. Michigan*, 116 S.Ct. 994 (1996).

38. *United States v. Ursery*, 116 S.Ct. 2135 (1996).

39. This is the successor to H.R. 1916.

- 6) Require the government to institute judicial forfeiture proceedings within ninety days after the filing of a claim
- 7) Permit property owners to sue the government for negligence in handling or storage of their property, if the property is not ultimately forfeited.
- 8) Provide federal courts with the ability to grant possession of the contested property to the owner during the pendency of the forfeiture proceeding, *if* possession by the government during the action would cause the owner to suffer substantial hardship (such as preventing the functioning of a business or leaving an owner homeless).

As originally enacted, this bill goes a long way toward correcting the abuses experienced under the current structure. Not surprisingly, the Department of Justice has fought Congress, and fought hard, to change the bill, introducing its own version of a reform measure. No hearings have been conducted regarding the DOJ-drafted H.R. 1965, nor has the bill been subjected to public scrutiny or intensive committee review. At sixty-nine pages, it is fifty-four pages longer than H.R. 1835. Quite simply, it mocks the reform effort of H.R. 1835.

It is noteworthy that H.R. 1965 is supported by no organizations other than the Department of Justice and its client agencies, all of whom have a direct interest in expanding their forfeiture powers. As illustrated above, forfeited assets serve as supplemental budget funds which go directly into the agencies coffers.

A review of the following passages in H.R. 1965 reveals that its passage is worse than no reform at all.

- 1) It permits the government to seize and hold private property even *without* probable cause, while it uses depositions, interrogatories and other discovery mechanisms to justify its seizure and after-the-fact filing of a complaint. This also imposes costly pre-trial discovery burdens on the innocent private property owner.
- 2) It defines proceeds so broadly as to include gross receipts of an offense, without any allowance for the cost of legitimate goods and services provided by the offender, *e.g.*, the otherwise innocent merchant. The only relief provided is in unduly limited number of fraud cases. But this does not apply to wire and mail fraud, where RICO or money laundering activity is involved

Congress charges that are prevalent in a large number of regulatory and other white collar crime indictments.

3) It permits the *pre-trial restraint of substitute assets*. This restraint has never before been authorized by statute and has been specifically rejected under numerous theories by every circuit court addressing the issue since 1991. Among other things, this would prevent the charged individual from retaining counsel and paying for the defense with his or her own assets before being found to have committed the crime with which he or she has been charged.

4) It limits the definition of innocent owner or third party to purchasers of goods and services, thereby expressly seeking to overturn Supreme Court precedent including donees, banks and other innocent, bona fide *sellers* of goods and services.

5) It restricts the appointment of counsel for indigent claimants to cases meeting Star Chamber procedural requirements, an anathema to American law. The claimant requesting court-appointed counsel must submit to wide open cross-examination by the federal prosecutor, on *any* issue, including the merits of the case, before an appointment can take place.

The DOJ proposal is abusive and unfair. If reform is indeed desired, H.R. 1965 should be rejected in Congress, and the bi-partisan supported H.R. 1835 should be adopted.

IV. FORFEITING ASSETS OUTSIDE THE UNITED STATES

So how *do* these expansive laws affect assets outside the United States? The major case in this area is *United States v. All Funds on Deposit in Any Accounts*.⁴⁰

In *All Funds*, the government sought funds on deposit in the claimant's name in bank accounts in England. The District Court found that it had *in rem* jurisdiction over foreign accounts, and granted summary judgment for the government. Claimant appealed. The Second Circuit affirmed, holding that: actual or constructive control of property was required for *in rem* jurisdiction, and the district court had constructive control and therefore properly asserted *in rem* jurisdiction over funds in the United Kingdom.

What was the basis of the courts decision? Indeed, *in rem*

40. *United States v. All Funds on Deposit in Any Accounts*, 63 F.3d 148 (2d Cir. 1995).

jurisdiction over property that isn't even in your *country* that's absurd! Not according to the Second Circuit.

The court began with the statute. In response to the inability of a district court to effect service outside its state's borders, Congress enacted 28 U.S.C § 1355(d), which provides that a district court "with jurisdiction over a forfeiture action pursuant to subsection (b) may issue and cause to be served in any other district such process as may be required to bring before the court the property that is the subject of the forfeiture action." This national service of process provision clearly conferred *in rem* jurisdiction on district courts in forfeiture proceedings with respect to property located within another judicial district in the United States.⁴¹ But no published opinion had applied § 1355 to property located in a foreign country.

The government argued that § 1355 obviated the need for a district court to exercise any degree of control over property to sustain a forfeiture proceeding. According to the government, the only relevant inquiry under § 1355 is whether any of the conduct giving rise to the forfeiture proceeding occurred in the district in which the action was commenced, even if the property is located in a foreign country.

The Second Circuit rejected this argument. Although Congress certainly intended to streamline civil forfeiture proceedings by amending § 1355, even with respect to property located in foreign countries, the court did not believe that Congress intended to fundamentally alter well-settled law regarding *in rem* jurisdiction. The circuit cited the Supreme Court decision in *United States v. James Daniel Good Real Property*,⁴² where the Court said that "to institute and perfect proceedings *in rem*, . . . the thing should be actually or constructively within the reach of the Court."⁴³ This control is required in addition to the requirements of subject matter jurisdiction and venue. Therefore, the issue for the Second Circuit was *control*: whether the property was within the actual or constructive control of the district court in which the action is commenced.

So where was the court's control? Brooklyn to Buckingham Palace? The claimant argued that the District Court lacked any degree of control because England was not obliged to remit the seized funds to the United States. There was no legal entitlement of the United States to the

41. See *United States v. \$633,021.67*, 842 F. Supp. 528, 531-32 (N.D. Ga. 1993); *United States v. Contents of Account No. 2033301*, 831 F. Supp. 337, 340 (S.D.N.Y. 1993).

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

43. See also *Republic Nat'l Bank of Miami v. United States*, 506 U.S. 80, (1992) ("the court must have actual or constructive control of the res when an *in rem* forfeiture suit is initiated").

funds, either under British law or a bilateral treaty, which might require the British authorities to turn over the confiscated funds to the United States. Since neither existed, claimant argued, there is no constructive control.

But the Second Circuit disagreed. Notwithstanding the absence of a binding obligation on the part of England to relinquish the funds, the Court concluded that the district court had constructive control of the funds by virtue of the demonstrated cooperation of the British government pursuant to the 1988 Treaty and the Drug Trafficking Offenses Act. In 1990, the British High Court issued a restraining order freezing the funds based solely on a request by the United States. In September 1993, at the request of the United States Marshals Service, British law enforcement officials served copies of the forfeiture complaint and warrant on the British banks holding the funds. And in 1994, the 1990 restraining order was continued by the High Court.

Therefore, the British courts and law enforcement acted essentially as agents of the United States for purposes of this forfeiture action. Every action of the British law enforcement officials was in direct response to requests from American authorities. Although the Second Circuit refused to delineate the precise scope of what will constitute constructive control in future cases — *and probably why this case has not been followed* — the court was satisfied that at least under *these* facts, the government met its burden of demonstrating that the British government would turn over at least a portion of the seized funds to the United States, thereby vesting the district court with the requisite constructive control over the funds.

Noteworthy of review is *In re F*,⁴⁴ a situation reversing the facts of *All Funds*. In *In re F*, the British High Court enforced a forfeiture order from an American court against British assets. The court ruled that enforcing the American order would not be contrary to the interests of justice pursuant to section 26(A)(1)(c) of the Drug Trafficking Offenses Act of 1986. The court noted the importance to recognize the seriousness and scale of drug trafficking, the underlying criminality in the forfeiture proceeding, and the sophistication of asset concealment and money laundering. The Vienna Drug Convention and the United States-United Kingdom bilateral agreement of assisting in proceedings for the freezing, seizure and forfeiture of the proceeds of drug trafficking require international cooperation while simultaneously ensuring the maintenance of

44. This decision, dated November 29, 1996, is discussed extensively in *British Court Enforces U.S. Civil Forfeiture Order*, 13 INTERNATIONAL ENFORCEMENT LAW REPORTER, 362 (Sep. 1997), and in *US Civil Forfeitures Now Enforced in England, British Dependent Territories*, 1 ASSET PROTECTION INT'L 9 (Aug. 1997).

the basic concepts of English justice.

The British court had no problem upholding the reversal of the burden of proof in the American proceeding regarding standing or the underlying issue of whether the funds were the proceeds of drug trafficking. The court did not find these procedures so contrary to the English concepts of justice as to prevent the court from reaching a conclusion that enforcement of the forfeiture order is not contrary to the interests of justice.

The bottom line regarding the law in this country on the forfeiture of foreign assets in domestic litigation is that there appears to be no legislative or judicial gloss or guidance other than the cases discussed. Prosecutors cite *All Funds* as gospel, permitting the seizure and forfeiture of foreign assets. Defense attorneys distinguish *All Funds* quite properly, I think, on the facts, as, in fact, the Second Circuit did. What the courts will do in the future is anyone's guess. What is interesting, however, is the absence of any other published decision since August 1995. It appears that neither side is willing to take the chance on this one just yet, preferring instead to work out some compromise.

This area promises to be an exciting one to watch. Given the questions relating to the constitutionality of civil forfeiture in normal, run-of-the-mill situations in the United States, including the burden of proof, admissibility of hearsay, Eighth Amendment concerns, questions of standing, and protections more in line with criminal prosecutions, expanding the results of these already questionable procedures could have a chilling effect upon the Constitution as we know it. It remains to be seen how far the courts are willing to bend to support the Executive Branch's seemingly insatiable appetite in the name of the War on Drugs.