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FEAR AND LOATHING AND THE FORFEITURE LAWS

The trunk of the car looked like a mobile police narcotics lab. We had two bags of grass, seventy-five pellets of mescaline, five sheets of high-powered blotter acid, a salt shaker half full of cocaine, and a whole galaxy of multi-colored uppers, downers, screamers, laughers . . . and also a quart of tequila, a quart of rum, a case of Budweiser, a pint of raw ether and two dozen amyls.¹

But this was before the Reagan Administration's war on drugs.

In 1988 the Reagan Administration began a new phase in its war on drugs. The administration undertook a concerted demand-side attack on the drug trade with the establishment of the zero tolerance policy.² Reinterpretation³ of the drug forfeiture statute⁴ to penalize personal users was one of the weapons in this demand-side attack.⁵ This Note examines Section 881 of the statute on two levels.

This Note first reviews the statute's application in terms of the level of due process it affords. Generally, the level of due process afforded a defendant or a claimant depends upon the nature of the complaint. The courts have held that the forfeiture statute is quasi-criminal. As a result, forfeiture claimants are entitled to a mixed bag of criminal procedural protections.

This Note rejects as unprincipled the courts' characterization of the statute as a quasi-criminal law. Instead this Note argues that the statute is a criminal statute and concludes that claimants are entitled to the same due process protections as criminal defendants.

The Note then considers the fairness of Section 881. The fairness evaluation includes a discussion of the statute's disproportionate effect, the courts' inability to mitigate harsh results, and the unavailability of the laches defense. Ultimately the Note addresses

¹ HUNTER S. THOMPSON, *FEAR AND LOATHING IN LAS VEGAS* 4 (1971).

² Charles Rangel, *Reagan's 'Zero Tolerance' Is a Zero Drug Policy*, *NEWSDAY*, June 28, 1988, at 66 (editorial). The Bush Administration has pursued the attack with equal vigor. See David Johnston, *119 Seized in Drive to Halt Marijuana Growing*, *N.Y. Times*, Oct. 27, 1989, at A12, col. 1; Sally Johnson, *Vermont Ponders Spirit of Law on Drugs*, *N.Y. Times*, Oct. 24, 1989, at A18, col. 5.

³ For a discussion of Congress's original intent and an outline of the statutory forfeiture mechanism, see *infra* notes 33-47 and accompanying text.

⁴ Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 511, 94 Stat. 1236, 1276 (1970) (codified as amended at 21 U.S.C. § 881 (1982 & Supp. V 1987)). All references hereinafter are made to the codified statute. As the official supplement only dates to 1987, citation to an unofficial codification is made when necessary to assure accuracy.

⁵ Rangel, *supra* note 2.

the fundamental unfairness of the statute and concludes that Congress should amend it to allow the courts more flexibility and to prevent the prosecution of grossly disproportionate forfeitures.

I

BACKGROUND

A. The History of the Zero Tolerance Policy

In early 1988, the Reagan Administration expanded its war on drugs with the implementation of the so-called "zero tolerance" policy, which targets the drug user as well as the dealer.⁶ Prior to the implementation of the zero tolerance policy, the government primarily engaged in a supply-side attack on drugs, attempting to interdict drugs before they reached the streets. Under zero tolerance, the Cabinet-level National Drug Policy Board made many proposals to discourage drug use. Among the proposals were suspensions of the driver's licenses of convicted users, reduction of federal college and housing subsidies to these users, and the forfeiture of any car or boat found to contain trace amounts of illegal drugs.⁷ Former Attorney General Meese implemented the zero tolerance proposal for forfeitures in March of 1988.⁸

Zero tolerance encourages government agents to seize an individual's property for violations of the drug laws. The statutory basis for this policy is Section 881, which Congress passed in 1970. Section 881 permits forfeiture regardless of the quantity of drugs found.⁹ In the first month and a half of the Reagan Administration's program the government seized over twelve million dollars worth of cars.¹⁰ Additionally, the value of some of the seizures was grossly disproportionate to the amount of drugs found: a 2.5 million dollar yacht seized for less than one-tenth of an ounce of marijuana,¹¹ a car impounded when the air within it smelled of marijuana smoke, and a car impounded for one-tenth of a gram of marijuana removed with tweezers from the bottom of the driver's purse are just a few examples.¹²

⁶ *Id.*

⁷ *Id.*

⁸ Memorandum from Attorney General Edwin Meese, III, to all United States Attorneys 2 (March 30, 1988) (Combined Zero Tolerance/User) (on file at the Cornell Law Review).

⁹ 21 U.S.C. § 881 (1982); *United States v. One 1976 Porsche 911S*, 670 F.2d 810 (9th Cir. 1979); *see United States v. One Clipper Bow Ketch Nisku*, 548 F.2d 8 (1st Cir. 1977).

¹⁰ Jon Nordheimer, *Tighter Federal Drug Dragnet Yields Cars, Boats and Protests*, N.Y. Times, May 22, 1988, at 1, col. 2.

¹¹ *Luxury Yacht is Seized with bit of Marijuana*, N.Y. Times, May 8, 1988, at 16, col. 6.

¹² Nordheimer, *supra* note 10.

To understand the zero tolerance policy, it is first necessary to understand the drug forfeiture statute.

B. Forfeiture Laws

1. *Origins of Forfeitures*

Oliver Wendell Holmes, Jr., argued in *The Common Law* that modern forfeiture law is the last vestige of the common law deodand.¹³ The deodand, a payment to the Crown by the owner of an object that accidentally caused the death of another, represented the assignment of liability without reference to culpability.¹⁴ After examining several parallels, Holmes concluded that forfeitures were an outgrowth of deodands. As deodands assign liability regardless of guilt or innocence, an owner forfeits his ship in admiralty for customs violations, regardless of guilt.¹⁵ Holmes noted that deodands are usually imposed when the object (such as a falling tree or a runaway carriage)¹⁶ strikes and kills the victim, and concluded that the object's "motion" creates the liability. With motion as a basis for liability, Holmes attributed admiralty forfeiture to the motion of ships through the water.¹⁷ A few courts have wholeheartedly adopted Holmes's armchair history.¹⁸

As will be shown below, however, this reading of Holmes's argument¹⁹ is inaccurate; forfeiture laws arose independent of deodands. Finkelstein salvages Holmes's history of forfeitures by arguing that forfeitures and deodands share several characteristics²⁰ and in retrospect represent similar responses to the significant problems of their two different time periods. Finkelstein argues that with the close of the medieval period, as the Crown became increas-

¹³ OLIVER W. HOLMES, JR., *THE COMMON LAW* 25-30 (1923).

¹⁴ Jacob Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 *TEMP. L.Q.* 169, 185, 249-50 (1973).

¹⁵ O.W. HOLMES, *supra* note 13, at 27-30. It should be noted that the modern forfeiture statute allows the government to condemn property without having to demonstrate that the owner was culpable. Lack of culpability does enter the picture, however, as a possible defense. See *infra* text accompanying note 204.

¹⁶ O.W. HOLMES, *supra* note 13, at 25-26.

¹⁷ *Id.* at 26.

¹⁸ *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-81 (1974); *United States v. United States Coin and Currency*, 401 U.S. 715, 719-21 (1971); *United States v. Sandini*, 816 F.2d 869, 872 n.3 (3d Cir. 1987); *United States v. One 1974 Cadillac El Dorado Sedan*, 548 F.2d 421, 424 n.2 (2d Cir. 1977); *United States v. Schmalfeldt*, 657 F. Supp. 385, 387-88 (W.D. Mich. 1987).

¹⁹ The thesis of *The Common Law* is that some modern statutes are living fossils of older laws. Holmes argues that the form of the law stays the same through time, while the rationale for the law changes. O.W. HOLMES, *supra* note 13, at 5.

²⁰ Both deodands and forfeitures are the exclusive prerogative of the state, both are actions in rem, and both are imposed regardless of the owner's state of mind. Finkelstein, *supra* note 14, at 251.

ingly secular, modern forfeiture replaced deodands.²¹ While the violent death of a human was considered an offense against God in the earlier period, the non-payment of a customs duty can be seen as an offense against the state in the later period. Both offenses required forfeiture of something of value.

Modern forfeiture law originated, independent of deodands, during England's seventeenth-century maritime expansion.²² In this period, the admiralty courts and the common law courts fought pitched jurisdictional battles because a wider jurisdiction resulted in more potential clients.²³ Admiralty had one advantage over the common law. Based on the same civil law code as the rest of the European trading partners, it was the court of choice for international merchants.²⁴ Thus, admiralty had a vested interest in developing its procedures to curry the business of the merchant class.²⁵ The *in rem* proceeding, developed in the seventeenth century, ranked high on the list of admiralty's procedural offerings.²⁶ The merchant class liked the *in rem* proceeding because the "libelant could proceed against property itself—the ship and its tackle—with greater hope of compensation than in a suit at common law against some impecunious master or partowner of the ship."²⁷ This *in rem* proceeding developed to allow the forfeiture of ships as a penalty when the owner tried to avoid paying customs duties.

This tradition of forfeiture in admiralty carried over to the New World,²⁸ though not smoothly. When the Crown was unable to extract desired tariff payments through criminal sanctions via jury trials, it threatened the colonies with the use of forfeitures and juryless admiralty proceedings.²⁹ Although the Continental Congress complained about England's abuses of admiralty proceedings in the Declaration of Independence,³⁰ the United States Congress had

²¹ *Id.*

²² *Cf.* THOMAS SHOEMBAUM, *ADMIRALTY AND MARITIME LAW* 11-16 (1987) (describing the rise of admiralty, and its procedures, during the rise of England to a great maritime power).

²³ *See* *United States v. One 1976 Mercedes Benz 280S*, 618 F.2d 453, 457 (7th Cir. 1980) (the court provides an excellent history of the forfeiture laws); Daniel Coquillette, *Legal Ideology and Incorporation I: The English Civilian Writers, 1523 - 1607*, 61 B.U.L. REV. 1, 21-22 (1981).

²⁴ George Steckley, *Merchants and the Admiralty Court During the English Revolution*, 22 AM. J. LEGAL HIST. 137, 143, 151 (1978).

²⁵ *Id.* at 171.

²⁶ *Id.*

²⁷ *Id.* At common law it was necessary to bring in personam suits against each of the twenty or thirty part-owners of any ship. *Id.* at 151.

²⁸ *See, e.g.*, Sugar Act, 1764, 4 Geo. 3, ch. 15.

²⁹ *United States v. One 1976 Mercedes Benz 280S*, 618 F.2d 453, 457 (7th Cir. 1980); BARBARA W. TUCHMAN, *THE MARCH OF FOLLY* 146 (1984).

³⁰ The Declaration of Independence para. 5 (U.S. 1776).

fewer qualms about its own use of the procedure. Indeed, the fifth statute passed by the first session of the United States Congress provided for forfeitures of ships when the owners did not pay customs duties.³¹ Today's forfeiture laws provide for the confiscation of vessels used in violation of the drug laws; they are the direct descendants of this early customs statute and they share many of the same procedures.³²

2. *The Present Drug Forfeiture Act*

In 1970, Congress passed the Comprehensive Drug Abuse and Control Act, which provides for civil forfeiture for violations of the drug laws.³³ Because the forfeiture provision is only one small section in a much larger statute, the legislative history of this section is not entirely clear. It is possible, however, to draw a few conclusions. By placing forfeiture in the administrative penalties title rather than in the criminal penalties title, one can infer that Congress intended to assess a civil penalty through forfeiture.³⁴

Further, the legislative history illustrates that Congress intended this penalty to attach to drug dealers and not to drug users. The legislative history states that the goal of the statute is to increase research, to penalize drug dealers, and to encourage drug users to seek treatment.³⁵ Because no direct connection exists between seizure of users' cars and encouragement of drug rehabilitation, or between seizure of property and promotion of research, one can conclude that the forfeiture section is intended as a penalty. The statute's historical context supports this conclusion. The same Congress enacted both the Comprehensive Drug Abuse and Control Act and the RICO statute, and both have similar forfeiture mechanisms.³⁶ RICO allows the government to seize property purchased with money from organized crime.³⁷ The goal of RICO

³¹ See *United States v. One 1976 Mercedes Benz 280S*, 618 F.2d 453, 461 (7th Cir. 1980); An Act to Regulate the Collection of Duties, ch. V, § 36, 1 Stat. 29, 47 (1789).

³² See *One 1976 Mercedes Benz 280S*, 618 F.2d at 461. Compare An Act to Regulate the Collection of Duties, ch. V, § 36, 1 Stat. 29, 47 (1789) (note the method of publication, the burden of proof, the bond requirement, and the method of evaluating the value of the forfeited items) with 21 U.S.C.A. § 881 (West 1981 & Supp. 1989) and 19 U.S.C. §§ 1602-1618 (1982).

³³ Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 511, 84 Stat. 1236, 1276 (1970) (codified as amended at 21 U.S.C. § 881 (1982 & Supp. V 1987)). See *supra* note 4.

³⁴ H.R. REP. NO. 1444, 91st Cong., 2d Sess. 5, reprinted in 1970 U.S. CODE CONG. & ADMIN. NEWS 4566, 4570-71.

³⁵ H.R. REP. NO. 1444, 91st Cong., 2d Sess. 1, reprinted in 1970 U.S. CODE CONG. & ADMIN. NEWS 4566.

³⁶ See Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1963, 84 Stat. 922, 943 (1970) (current version at 18 U.S.C. § 1961-1968 (1982)).

³⁷ 18 U.S.C. §§ 1962(a), 1963(a) (1982).

is to hamper organized crime by taking away the tools of the trade.³⁸ Drug forfeiture laws parallel RICO to the extent that they take away property purchased with drug money³⁹ and property that aids drug smuggling.⁴⁰ Thus, the statute assesses forfeiture as a civil penalty operating to deter drug dealing.

Section 881 codifies the drug forfeiture statute. The section specifically subjects illegal drugs, their containers, the conveyances that transported the drugs, money used in drug transactions, and real property purchased with drug money to forfeiture.⁴¹

The current statute creates an elaborate mechanism for forfeiture. First, the government may effect seizure through either an admiralty or statutory route.⁴² Once a government agent has seized property through either of the two routes, the agent must follow the forfeiture process delineated in the customs laws.⁴³ The customs laws provide for both summary and judicial forfeiture.⁴⁴ In a summary forfeiture proceeding, the owner can either buy his or her

³⁸ See S. REP. NO. 617, 91st Cong., 1st Sess. 79 (1969). The committee justified the forfeiture as among much needed "new approaches that will deal not only with individuals, but also with the economic well being of the nation. In short, an attack must be made on [the mob's] source of economic power itself, and the attack must take place on all available fronts." *Id.*

³⁹ 21 U.S.C.A. § 881(a)(6)-(7) (West 1981 & Supp. 1989) (property connected to drugs).

⁴⁰ *Id.* § 881(a)(3)-(4); see also S. REP. NO. 225, 98th Cong., 2d Sess. 191 (1984) ("More than ten years ago, the Congress recognized . . . [that] if law enforcement efforts to combat racketeering and drug trafficking are to be successful, they must include an attack on the economic aspects of these crimes. Forfeiture is the mechanism through which such an attack may be made.").

⁴¹ 21 U.S.C.A. § 881(a)(1)-(7) (West 1981 & Supp. 1989). The forfeited item's title vests in the United States Government upon the item's use in violation of the drug laws. *Id.* § 881(h) (West Supp. 1989). The government, however, is not required to immediately take possession of the item. See *United States v. Kemp*, 690 F.2d 397 (4th Cir. 1982); *United States v. One 1977 Mark V. Coupe*, 643 F.2d 154 (3rd Cir. 1981).

⁴² 21 U.S.C.A. § 881(b) (West 1981 & Supp. 1989). For a discussion of seizure through the admiralty laws, see *infra* notes 115-17 and accompanying text. For a discussion of seizure through the statutory mechanism, see *infra* notes 118-21 and accompanying text.

⁴³ 21 U.S.C.A. § 881(d) (West Supp. 1989). The customs laws first require the agent to assess the domestic value of the item. 19 U.S.C.A. § 1606 (West Supp. 1989). If the value of the property is less than one hundred thousand dollars, if the property is contraband and *per se* illegal, or if the seized property is a conveyance, then the government can proceed by summary forfeiture, but the claimant may request judicial forfeiture. *Id.* § 1607. Summary forfeiture requires the government to publish a notice of forfeiture, and to mail a notice if the owner is known. *Id.* Within twenty days of publication of the first notice, the owner must file a claim and post a bond for a portion of the value. *Id.* § 1608. The owner can then pay for the property or begin a judicial forfeiture proceeding. *Id.* §§ 1608, 1614. If no bond is posted, then the property is sold at a public auction. *Id.* § 1608. If the forfeited item is not a conveyance and it is worth more than one hundred thousand dollars, then the government must initiate judicial forfeiture. *Id.* § 1610.

⁴⁴ *Id.* §§ 1607, 1608; see *supra* note 43.

property back from the government, or demand a judicial forfeiture proceeding.⁴⁵ In a judicial forfeiture proceeding, the government must first prove that probable cause justified the forfeiture. Upon such proof, the burden shifts to the claimant to prove his or her innocence.⁴⁶ Regardless of whether the property undergoes summary or judicial forfeiture, the individual can seek remission or mitigation from the Attorney General.⁴⁷

II

IS SECTION 881 CONSTITUTIONAL?

The constitutional due process implications of Section 881 depend on the statute's characterization as either a civil or a criminal law. Procedural protections afforded claimants hinge on this characterization. This section first discusses whether 21 U.S.C. § 881 is civil or criminal and then examines the constitutional safeguards that should attach to the statute. Finally, it analyzes the protections that courts have given to forfeiture claimants.

A. Is Section 881 Civil or Criminal?

1. *The Civil/Criminal Test in the Abstract*

In *Helvering v. Mitchell*,⁴⁸ the Supreme Court first developed the theoretical groundwork for evaluating whether a statute is civil or criminal. The government charged the defendant in *Mitchell* with tax fraud and attempted to penalize him through a civil fine.⁴⁹ The Court stated that to determine whether a statute is criminal or civil, courts should strive to determine whether the congress meant to create a criminal or a civil penalty.⁵⁰ This holding expressed enormous deference to Congress and could have resulted in a complete abdication of the courts' role as the guardian of the Constitution.⁵¹ Indeed, the Court proclaimed this seemingly limitless deference to Congress in *Mitchell* despite noting that the statute under consideration resulted in a "comparative[ly] sever[e]" penalty.⁵² Congress

⁴⁵ See *supra* note 43.

⁴⁶ 19 U.S.C.A. § 1615 (West 1981 & Supp. 1989).

⁴⁷ *Id.* § 1618. Traditionally, depending on the legal framework of the forfeiture, the claimant sought remission or mitigation through the Secretary of the Treasury (if under the customs law) or the Secretary of Commerce (if under the navigation laws). Congress modified this, and now remission or mitigation is generally sought through the Attorney General. 21 U.S.C. § 881(d) (1982).

⁴⁸ 303 U.S. 391 (1938).

⁴⁹ *Id.* at 395-96.

⁵⁰ *Id.* at 399.

⁵¹ Under this limitless test, Congress conceivably could have enacted any statute and characterized it as civil in order to bypass all of the due process protections that the Constitution requires in criminal cases.

⁵² *Mitchell*, 303 U.S. at 400.

never tested the limits of *Mitchell*, however, and the Court revised the test in two subsequent decisions.

The Court trimmed the broad holding of *Mitchell* in *Kennedy v. Mendoza-Martinez*.⁵³ At issue in *Mendoza-Martinez* was the defendant's due process protection when the government sought to deprive him of his United States citizenship after he left the country to escape the draft during World War II. To resolve this question, the Court created a two-part test for determining whether a statute is civil or criminal. The first prong requires the court to examine whether Congress intended to enact a civil statute.⁵⁴

If the court concludes that Congress intended to enact a civil statute, the court then determines whether Congress could constitutionally characterize the statute as civil. According to *Mendoza-Martinez*, this examination involves weighing seven factors: first, whether the statute creates an affirmative disability or restraint; second, whether the underlying behavior has been historically punished as a crime; third, whether the statute requires scienter; fourth, whether the statute promotes retribution and/or deterrence; fifth, whether the underlying behavior is currently a crime; sixth, whether there is an alternative, non-penal purpose behind the law; and seventh, whether the law is well-tailored to its non-penal purpose.⁵⁵

Instead of directly applying the *Mendoza-Martinez* test when an opportunity presented itself seventeen years later, the Court reformulated the *Mitchell* test in *United States v. Ward*.⁵⁶ The defendant in *Ward* challenged the constitutionality of a statute that assessed a civil penalty for polluting navigable waters. The *Ward* Court retained the first part of the *Mendoza-Martinez* test, which examined the congressional intent, but it created a variation of the second prong of the test.⁵⁷

The second part of the *Ward* test replaced the seven *Mendoza-Martinez* factors and instead examined whether the statutory penalty is so punitive that the law should be considered criminal. If the penalty is so punitive, the court should negate Congress's intention to enact a civil statute. However, "only the clearest proof" that the penalty is too harsh is sufficient to override this Congressional intent.⁵⁸ Therefore, the second part of the *Ward* test is much more deferential to Congressional will than the *Mendoza-Martinez* seven-

⁵³ 372 U.S. 144 (1963).

⁵⁴ *Id.* at 169.

⁵⁵ *Id.* at 168-69.

⁵⁶ 448 U.S. 242 (1980).

⁵⁷ *Id.* at 248-49.

⁵⁸ *Id.*

factor test. Yet *Ward* has not totally supplanted *Mendoza-Martinez*,⁵⁹ and courts seem to treat the two tests as alternatives, notwithstanding the possibility that they may yield different results.⁶⁰

2. Courts Have Not Properly Applied the Civil/Criminal Tests to Forfeiture Laws

The Court has not been consistent in its application of either the *Mendoza-Martinez* or the *Ward* test to the forfeiture laws. Instead, the Court has held several times that forfeiture laws are quasi-criminal—criminal for certain constitutional provisions, and civil for others.⁶¹ It is difficult to justify this quasi-criminal characterization in any principled fashion.⁶²

The Court has not explained how it can distinguish among the different criminal due process provisions, preserving some while discarding others.⁶³ Instead of striving for consistency by coherently applying either the *Mendoza-Martinez* test or the *Ward* test, the Court has adjudicated forfeiture cases in an ad hoc fashion. With each case the Court must decide whether the quasi-criminal statute is sufficiently similar to a criminal statute to justify awarding the claimant the constitutional protection he or she seeks.

This analysis is problematic because the Constitution does not create a hierarchy among the various rights provided to a criminal defendant. The American constitutional scheme does not place the right to avoid self-incrimination, for example, above the right to avoid double jeopardy. Rather, all criminal defendants are entitled

⁵⁹ See *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 362-66 (1984) (applying the *Mendoza-Martinez* seven factor test to the second prong of the *Ward* test).

⁶⁰ Compare *infra* text in Section II(A)(3)(a) with *infra* text in Section II(A)(3)(b). This lack of preference for either test can be seen in the failure of *Ward* to recognize that the new test might yield different results than the *Mendoza-Martinez* test. The Court indicated that it was merely restating the *Mendoza-Martinez* factors, implying that the *Ward* test is the same as the older test. *Ward*, 448 U.S. at 249.

⁶¹ See, e.g., *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965); *Boyd v. United States*, 116 U.S. 616 (1886).

⁶² Additionally, there is no constitutional textual support for quasi-criminal actions. The Constitution speaks of criminal actions and common law actions, but does not speak of hybrid actions. Although I have few reservations with an expansive interpretation of the Constitution, the Court is on its firmest footing when it reasonably interprets the language of the Constitution to update it in light of contemporary mores and to further personal liberties. Here, the Court has avoided the constitutional interpretation; there is no evidence that contemporary mores cry out for a quasi-criminal action, and this Note argues that the quasi-criminal status of forfeitures harms personal liberties.

⁶³ The Court has examined each facet of due process on a piecemeal basis. See *United States v. United States Coin and Currency*, 401 U.S. 715 (1971); *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965); *Helvering v. Mitchell*, 303 U.S. 391 (1938); *Various Items of Personal Property v. United States*, 282 U.S. 577 (1931); *Boyd v. United States*, 116 U.S. 616 (1886). Consequently, it has begged the bigger question of why some due process provisions are applicable to a given law while other provisions are not.

to fundamental criminal procedures "necessary to an Anglo-American regime of ordered liberty."⁶⁴ If a court determines that a particular forfeiture statute is criminal in nature, the defendant should be awarded the entire bundle of constitutional rights due a criminal defendant.

On the other hand, if the court determines that the forfeiture statute is civil, then the claimant is not entitled to the same due process rights as a criminal defendant, and the court is engaging in unjustifiable activism by awarding such rights to the civil claimant. This activism is less justifiable than the court rulings that expanded criminal procedure in the 1960s and 1970s since here there is no textual grounding for the rights;⁶⁵ civil parties are traditionally entitled to little more than a fair hearing.⁶⁶

Quasi-criminal statutes, therefore, either unconstitutionally deprive criminal defendants of their due process rights or unjustifiably afford civil claimants too many rights. A principled analysis of the forfeiture laws would apply the *Mendoza-Martinez* test or the *Ward* test to the specific statute and then characterize the statute as either criminal or civil in its applications.

3. Courts Should Characterize Section 881 as Criminal

The first part of both the *Mendoza-Martinez* and the *Ward* tests requires the examination of Congressional intent.⁶⁷ The legislative history of Section 881 indicates that Congress intended to enact a civil statute.⁶⁸ Therefore, the analysis of whether Section 881 is criminal turns on the second part of both tests, where the courts must weigh the criminal aspects of the statute. By balancing the seven factors of the *Mendoza-Martinez* test, courts should negate Congress's intent and characterize Section 881 as criminal. Furthermore, even the *Ward* test suggests that the court should nullify Congress's intention to create a civil statute in some individual cases.⁶⁹

a. *The Application of the Mendoza-Martinez Test to Section 881.*

The second part of the *Mendoza-Martinez* test requires evaluation of the given statute in light of seven factors.⁷⁰ The court may

⁶⁴ *Duncan v. Louisiana*, 391 U.S. 145, 150 n.14 (1968).

⁶⁵ *See supra* note 62.

⁶⁶ *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); JACK H. FRIEDENTHAL, MARY KAY KANE, ARTHUR MILLER, CIVIL PROCEDURE § 3.21, at 172 (1985).

⁶⁷ *See supra* text accompanying notes 54 & 57.

⁶⁸ *See supra* text accompanying note 34.

⁶⁹ The *Ward* test does not provide a uniform standard because it essentially requires an ad hoc analysis. *See infra* note 79 and accompanying text.

⁷⁰ *See infra* notes 71-78 and accompanying text.

overrule Congress's intent to create a civil statute if after balancing the seven factors it finds the statute to be sufficiently criminal in nature.

A court would first ask whether 21 U.S.C. § 881 creates an affirmative disability. *Mendoza-Martinez* does not clearly define what constitutes an affirmative disability.⁷¹ Is it the mere prohibition of a specific legal act? Or is it the imposition of an economic, social, or physical harm? The forfeiture statute prohibits a legal act when the government prohibits owners from claiming title to forfeited property. Alternatively, the government's seizure of forfeited property directly imposes harm on property owners by depriving them of their property rights. Thus, under either definition, Section 881 creates an affirmative disability.

The second factor of the *Mendoza-Martinez* test, whether the underlying behavior has historically been punished as a crime, is clearly met. Drug possession has been a crime since the late nineteenth century.⁷²

The third factor examines whether the statute has a mental state requirement.⁷³ Although 21 U.S.C. § 881 does not require the government to prove mens rea, mental state is a vital component in proving lack of negligence, a possible defense that vessel owners can assert.⁷⁴ Thus, forfeiture is conditioned on the claimant's inability to prove an innocent mens rea.

The fourth factor asks whether the law promotes retribution or deterrence, which would make the offence more criminal than civil.

⁷¹ A disability is usually defined as a restraint that prevents an individual from enjoying "ordinary legal rights." BLACK'S LAW DICTIONARY 415 (5th ed. 1979). The Court, however, seems to use the term in a much narrower sense, perhaps equating it to what *Black's* refers to as a special disability that "debars [the individual] from [performing] one specific act." *Id.* The *Mendoza-Martinez* Court cites two cases to help define affirmative disability; both of the cases involve a special disability. See *United States v. Lovett*, 328 U.S. 303, 316 (1945) (World War II era statute ordering the firing of several members of the executive branch suspected of being communists was struck down as a criminal statute that did not incorporate the necessary due process protections); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 377 (1866) (a post civil war statute preventing members of the confederacy who had yet to take a loyalty oath from being hired by the federal government was struck down for being a criminal statute and violating the prohibition on bills of attainder).

⁷² One of the earliest statutes dealt with Chinese Opium. See Act of Feb. 23, 1887, ch. 210, 24 Stat. 409, *repealed by* Pub. L. No. 91-513, Title III, § 1101(a)(1), 84 Stat. 1291 (1970).

⁷³ The model penal code lists four levels of scienter: purposely, knowingly, recklessly, and negligently. MODEL PENAL CODE § 2.02 (2) (1962).

⁷⁴ See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689 (1974) ("[I]t would be difficult to reject the constitutional claim of an owner . . . who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property.").

At the very least, Congress intended Section 881 to deter drug smuggling by taking away a tool of the smugglers.⁷⁵ Likewise, some retribitional goals are met when the government takes the property of the smugglers.

The fifth factor examines whether the underlying behavior is currently a crime. This factor also argues for overriding Congress's intent to create a civil statute, since the underlying behavior of drug possession can be prosecuted as a crime.

Although the first five factors of the *Mendoza-Martinez* test suggest that the courts should override Congress's intent, the last two factors may suggest otherwise. The sixth factor asks whether an alternative, non-penal purpose to the law exists. The purpose of the forfeiture law is not merely to inflict damages upon the drug runners. The long-term goal is to stymie drug smuggling by taking smugglers' vessels and money.⁷⁶ The existence of a non-penal purpose in Section 881, however, should not control the outcome of the analysis. Because nearly every criminal statute has an alternative non-penal purpose,⁷⁷ this factor does not effectively discriminate between those statutes which should be considered civil and those which should be considered criminal.

The seventh factor asks whether the law creates a penalty that is well-tailored to the alternative non-penal goals. If the penalty is poorly-tailored to the alternative non-penal goals, then perhaps these goals are not the real aim of the statute. The question of fit can be analyzed on two levels. First, examined on a societal level, one would likely conclude that Section 881 is well-tailored to the non-penal goal expressed above. This conclusion depends, however, upon the assumptions that fighting drugs is among America's highest national priorities, and that forfeitures have some deterrent effect on drug smuggling. Thus analyzed, the law is well-tailored because the resulting marginal gain in such an important struggle validates Section 881.

The means-end fit can also be analyzed on an individual level. When the government executes its aggressive zero tolerance policy, small scale users forfeit property in amounts disproportionate to the severity of their actions.⁷⁸ For example, two individuals caught with the same amount of marijuana would be penalized to vastly different degrees if one individual was found on board his million dollar

⁷⁵ See *supra* notes 35-40 and accompanying text.

⁷⁶ See *id.*

⁷⁷ Murder statutes can be said to promote the alternative non-penal purpose of peacefulness by dissuading would-be murderers. And yet, no one would argue that the statute is civil.

⁷⁸ See *supra* text accompanying note 11-12.

yacht and the other was driving his 1973 Ford Pinto. Even if the forfeitures accomplish the non-penal purpose of encouraging the claimants to stop using drugs, the statute is not well-tailored on an individual level because the benefit to society of convincing the yacht owner to give up using marijuana does not justify the million dollar penalty. Section 881 can only be well-tailored to its non-penal purpose when the government uses it to implement Congress's original policy of attacking drug suppliers. These suppliers are more likely to be caught with large amounts of drugs and they pose a greater threat to society.

Although the last two factors may suggest that the courts should respect Congress's intent, the factors must be examined within the context of the entire seven factor equation. *Mendoza-Martinez* does not require courts to use the seven factors as a checklist. Instead, it encourages them to weigh the factors and thereby determine whether the statute in question is really criminal despite its civil label. Unlike the *Ward* test, the *Mendoza-Martinez* test does not require a court to show great deference to congressional intent. Viewing the *Mendoza-Martinez* factors, the courts should treat Section 881 as a criminal statute.

b. *Application of the Ward Test to Section 881.*

Even the *Ward* test, which is more deferential to Congress, suggests that the courts should sometimes nullify Congress's intention to create a civil statute. The *Ward* test asks whether the penalty is so punitive as to negate Congress's intention to enact a civil statute. The analysis in *Ward* hinges upon the penalty's severity. Penalties in forfeiture cases are case-specific because the forfeiture's severity depends upon the value of the forfeited property. Thus, in those cases where the value of the forfeited property is greatly disproportionate to the underlying behavior, a court could negate Congress's intent.

The *Ward* test, however, may be inadequate for forfeitures. Particularly problematic is the impossibility of drawing a bright line rule delineating when any given forfeiture is disproportionate. Under *Ward*, before each trial on the merits, a court must adjudicate the proportionality question to determine the applicable due process standard.⁷⁹ The *Mendoza-Martinez* test, on the other hand, needs to be litigated only once to determine the standard for every case brought under the statute. And therefore, at least in the case of

⁷⁹ This problem is unique to forfeiture since there are two variables: the value of the forfeited property and the amount of drugs. This problem is not present in most other cases where the penalty is statutorily imposed and the only variable is the degree of harm. See, e.g., *United States v. Ward*, 448 U.S. 242 (1980).

forfeiture, courts should apply only the *Mendoza-Martinez* test and not the *Ward* test.

B. Quasi-Criminal Laws and Due Process

Civil parties are afforded much less due process than criminal defendants. If a civil plaintiff brings a non-frivolous suit to a court of proper jurisdiction, the court can resolve the case on the merits using the applicable rules of civil procedure and evidence. Each party is entitled to a fair hearing and little more.⁸⁰

For criminal defendants, on the other hand, the parameters of due process are much broader. Criminal defendants are entitled to many constitutional safeguards: the state must give prior notice of the crime via a properly enacted and published statute;⁸¹ the state cannot shift certain elements of the state's case onto the defendant;⁸² the statute must normally contain a mens rea requirement;⁸³ the prosecutor cannot force the defendant to testify against himself;⁸⁴ and the prosecutor cannot use evidence against the defendant if the state obtains it in violation of the defendant's fourth amendment rights.⁸⁵

Because courts presently view claimants in forfeiture actions as neither purely civil nor purely criminal parties but as parties to a quasi-criminal action, the courts have awarded the claimants a hodgepodge of rights.⁸⁶ For example, in *Boyd v. United States*,⁸⁷ the Supreme Court created an exception to the usual rule that the fifth amendment is inapplicable to civil actions.⁸⁸ The Court recognized that although Congress characterized forfeitures as civil actions,

⁸⁰ See *supra* note 66 and accompanying text.

⁸¹ See U.S. CONST. art. I, § 9, cl. 3 (Congress shall pass no ex post facto laws); U.S. CONST. art. I, § 10, cl. 1 (the states shall pass no ex post facto laws).

⁸² See, e.g., *In re Winship*, 397 U.S. 358 (1970).

⁸³ See, e.g., *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978).

⁸⁴ U.S. CONST. amend. V (self-incrimination clause).

⁸⁵ See, e.g., *Weeks v. United States*, 232 U.S. 383 (1914).

⁸⁶ See *United States v. D.K.G. Appaloosas, Inc.*, 829 F.2d 532, 540 (5th Cir. 1987) ("It is true that forfeiture statutes like Section 881 have been considered criminal for certain purposes However, for other purposes, the civil nature of forfeiture procedures has been held to bar the application of important constitutional protections.") (citation omitted), *cert. denied*, 108 S. Ct. 1270 (1988).

⁸⁷ 116 U.S. 616 (1886).

⁸⁸ As a general rule, civil parties can always be called by their opponent to testify. The major exception to this general rule is evidentiary privileges. See J. FRIEDENTHAL, M. KANE, A. MILLER, *supra* note 66, § 7.4. Parties to civil actions are not entitled to invoke the protections of the fifth amendment merely to avoid civil damages. The fifth amendment is specifically designed to avoid criminal liability and can only be invoked in a civil trial if the line of questioning concerns a subject involving potential criminal penalties. Any civil party who refuses to answer the queries of an opponent without invoking a privilege in good faith is ordinarily subject to contempt and other penalties. See *Carlson v. United States*, 209 F.2d 209, 216 (1st Cir. 1954).

these actions had distinct criminal characteristics.⁸⁹ Therefore, forfeiture claimants can invoke the fifth amendment not only to protect against any future criminal actions, but also to protect their property from forfeiture. For purposes of the self-incrimination clause, forfeitures are criminal actions.

With *Boyd* as a comparison we turn to other procedural rights. It is difficult to draw a principled distinction between *Boyd's* outright grant of fifth amendment protection and the Court's less generous treatment of several other criminal procedure rights.

1. *Due Process Rights That the Courts Do Not Award the Claimant in a Quasi-Criminal Forfeiture Action*

The Supreme Court, in *In re Winship*,⁹⁰ read the due process clause to require the prosecution to prove "beyond a reasonable doubt . . . every fact necessary to constitute the crime with which he is charged."⁹¹ At a forfeiture hearing, however, the government need only make a showing of probable cause that the claimant's property is subject to forfeiture.⁹² Once the prosecution proves its case by a preponderance of the evidence,⁹³ claimants then have the burden to establish their innocence by proving that they actually were not carrying drugs or that they lacked the necessary *mens rea*.⁹⁴

If Section 881 were a criminal statute, these burdens of proof in a forfeiture action would be unconstitutional for three reasons. First, the prosecution must only meet a preponderance of the evidence standard,⁹⁵ which clearly violates the *Winship* requirement of proof beyond a reasonable doubt.

Second, even though the legislative history of Section 881 indicates that the prosecution should prove a connection between the forfeited item and a violation of the drug laws,⁹⁶ two circuits have

⁸⁹ *Boyd*, 116 U.S. at 634.

⁹⁰ 397 U.S. 358 (1970).

⁹¹ *Id.* at 364.

⁹² See *supra* text accompanying note 46.

⁹³ The courts have uniformly held that the government must show probable cause by the preponderance of the evidence standard. See, e.g., *United States v. One 1977 Lincoln Mark V*, 453 F. Supp. 1388 (S.D.N.Y. 1978).

⁹⁴ 19 U.S.C.A. § 1615 (West 1981 & Supp. 1989) ("the burden of proof shall be upon the defendant"). Claimants can successfully contest the forfeiture by establishing that they acted non-negligently. See *infra* text accompanying note 204.

⁹⁵ 19 U.S.C.A. § 1615 (West 1981 & Supp. 1989).

⁹⁶ The legislative history states that "due to the penal nature of forfeiture statutes, it is the intent of these provisions that property would be forfeited only if there is a substantial connection between the property and the underlying criminal activity which the statute seeks to prevent." 124 CONG. REC. 34,671 (1978) (joint House-Senate explanation of Senate amendment).

held that the government is not required to make such a showing.⁹⁷ These rulings allow the prosecution to avoid proving every element of its case as required by the second half of the *Winship* holding.

Third, the statute unconstitutionally shifts an essential element of the prosecution's case onto the claimant by making the lack of negligence, one of the levels of mens rea, an affirmative defense. The Supreme Court affirmed, in *Mullaney v. Wilbur*,⁹⁸ that the state cannot shift the burden of proof of any essential element of a crime to the criminal defendant. Since *United States v. United States Gypsum Co.* held that mens rea is an essential element of most crimes,⁹⁹ one might conclude that the respective burdens of proof are unconstitutional. Yet every court of appeals that has ruled upon this shifting of the elements of proof in forfeiture actions has concluded that this shift is acceptable because the action is quasi-criminal.¹⁰⁰

The state's ability to shift the burden of proof in a forfeiture action is only one limit on forfeiture claimants' due process rights. For example, although the state cannot usually bring a second criminal action for the same incident against the same defendant after the first action fails, the Supreme Court has held that the bringing of a forfeiture action after a failed criminal prosecution is not double jeopardy.¹⁰¹ Additionally, two circuits have held that property can be forfeited under Section 881 for illegal behavior that occurred prior to the passage of the law because the ex post facto clause does not apply to quasi-criminal actions.¹⁰²

2. *Due Process Rights That the Forfeiture Claimants Receive to a Lesser Extent Than Criminal Defendants*

Although forfeiture claimants are denied many basic due process rights, the courts, recognizing that the forfeiture action shares many of the indicia of a criminal proceeding, have given claimants

⁹⁷ *United States v. \$5,644,540.00 in United States Currency*, 799 F.2d 1357 (9th Cir. 1986); *United States v. Four Million, Two Hundred Fifty-five Thousand Dollars*, 762 F.2d 895 (11th Cir. 1985), *cert. denied*, 474 U.S. 1056 (1986).

⁹⁸ 421 U.S. 684 (1975).

⁹⁹ With a few narrowly circumscribed exceptions, "mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 (1978) (quoting *Dennis v. United States*, 341 U.S. 494, 500 (1951)).

¹⁰⁰ *United States v. \$250,000 in United States Currency*, 808 F.2d 895 (1st Cir. 1987); *United States v. \$2,500 in United States Currency*, 689 F.2d 10, 12 (2d Cir. 1982), *cert. denied*, 466 U.S. 1099 (1984); *United States v. One 1970 Pontiac GTO*, 529 F.2d 65, 66 (9th Cir. 1976); *Bramble v. Richardson*, 498 F.2d 968, 973 (10th Cir.), *cert. denied*, 419 U.S. 1069 (1974).

¹⁰¹ See *Various Items of Personal Property v. United States*, 282 U.S. 577 (1931).

¹⁰² *United States v. D.K.G. Appaloosas, Inc.*, 829 F.2d 532 (5th Cir. 1987), *cert. denied*, 485 U.S. 976 (1988); *United States v. 5,644,540.00 in United States Currency*, 799 F.2d 1357 (9th Cir. 1986).

many due process rights reserved for criminal defendants. But the courts have failed to expand these very rights to keep them symmetrical with the rights of criminal defendants.

a. *The Right to a Jury Trial.*

Two constitutional amendments guarantee the right to a jury trial. The sixth amendment guarantees all criminal defendants the "right to a speedy and public trial, by an impartial jury."¹⁰³ The seventh amendment guarantees all civil claimants in suits at common law the right to a jury trial if the amount in controversy exceeds twenty dollars.¹⁰⁴ In some cases, forfeiture proceedings can sidestep these two amendments. Since courts characterize the proceedings as quasi-criminal, and because the actions can be brought in admiralty, the proceedings are neither clearly criminal and governed by the sixth amendment, nor actions at common law governed by the seventh amendment.

The government may commence a forfeiture action either by seizing the property through the Federal Rules of Civil Procedure Supplemental Rules for Admiralty Rule C or by seizing it through one of the statutory mechanisms enumerated in Section 881.¹⁰⁵ If the government elects to bring the action through Rule C, the court is sitting in admiralty;¹⁰⁶ if the government chooses the latter mechanisms, the court is sitting at common law.¹⁰⁷ The seventh amendment not only fails to guarantee the right of a jury trial to parties to an admiralty suit, but Federal Rule of Civil Procedure 38(e) specifically denies admiralty claimants the right to a jury trial.

The denial of a jury trial in admiralty suits borders on injustice when we consider that the government need not be consistent in its decisions to commence actions in admiralty or at common law. Only the owner who is fortunate to have his or her property seized through the statutory mechanisms is entitled to a jury trial.

To remedy some of the inequities caused by denial of a jury trial, the seventh circuit has held that if the government uses the rules of admiralty to bring a seizure on land, the court will treat the case as having been brought to a common-law court and will grant a jury trial.¹⁰⁸ This holding, however, does not address the right of a

¹⁰³ U.S. CONST. amend. VI.

¹⁰⁴ U.S. CONST. amend. VII.

¹⁰⁵ 21 U.S.C.A. § 881(b)(1)-(4) (West 1981 & Supp. 1989).

¹⁰⁶ FED. R. CIV. P. 9(h).

¹⁰⁷ When the government seizes the property through the statutory mechanism, the claimant is entitled to a jury trial. It is unclear, however, whether the jury trial is available because the action is at common law or because forfeitures are criminal.

¹⁰⁸ *United States v. One 1976 Mercedes Benz 280S*, 618 F.2d 453 (7th Cir. 1980).

claimant to request a jury trial when the claimant's ship or boat was forfeited at sea and the court is sitting in admiralty.

Another dimension of the right to a jury trial that the courts have not addressed is the constitutionality of granting the government a directed verdict. In a criminal trial, the jury must decide every question of fact; the prosecution cannot move for a directed verdict.¹⁰⁹ The forfeiture statutes imply that the government can move for a directed verdict.¹¹⁰ No federal court, however, has ruled on the right of a forfeiture claimant to have all of the facts tried by a jury.

b. *Fourth Amendment Protections.*

The Supreme Court has held that forfeiture seizures must comply with the fourth amendment's restrictions on unreasonable searches and seizures.¹¹¹ However, the courts have not applied the fourth amendment to forfeiture cases as broadly as they have applied the amendment to criminal cases.

(i) Mechanisms for Seizures within the Forfeiture Laws

As discussed above,¹¹² Section 881 allows the government to choose between two basic mechanisms for seizing property: the general rules of admiralty¹¹³ and the specific statutory provisions of the forfeiture laws.¹¹⁴

If the government elects to seize the property under the general rules of admiralty, it may resort to a seizure in rem.¹¹⁵ The government initiates the seizure by filing a complaint, which must state at a minimum: where the property is to be seized; whether the property is on land or on the sea; and any other allegations required by the forfeiture statute.¹¹⁶ If the complaint is duly made out and sworn to, then "the clerk . . . shall forthwith issue a summons and warrant . . . without requiring a certificate of exigent circumstances."¹¹⁷

¹⁰⁹ *United Bhd. of Carpenters and Joiners of Am. v. United States*, 330 U.S. 395, 408 (1947).

¹¹⁰ The customs laws place the burden of proof on the claimant, 19 U.S.C.A. § 1615 (West 1981 & Supp. 1989), which implies that should the claimant not meet the burden of persuasion, the government would win by default. The customs laws also allow for summary forfeiture, *id.* § 1607, which allows the government to win without a hearing in certain cases. *See supra* note 43.

¹¹¹ *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965) (state forfeiture laws); *Boyd v. United States*, 116 U.S. 616 (1886) (federal forfeiture laws).

¹¹² *See supra* notes 105-07 and accompanying text.

¹¹³ 21 U.S.C.A. § 881(b) (West 1981 & Supp. 1989).

¹¹⁴ *Id.* § 881(b)(1)-(4).

¹¹⁵ FED. R. CIV. P. SUPP. R. ADMIR. & MAR. CLAIMS C(1).

¹¹⁶ *Id.* at C(2). 21 U.S.C.A. § 881 (West 1981 & Supp. 1989), does not require any other allegations.

¹¹⁷ FED. R. CIV. P. SUPP. R. ADMIR. & MAR. CLAIMS C(3).

On the other hand, to follow the statutory seizure mechanisms under Section 881, the government must meet one of four conditions: the seizure must be incident to a search warrant, arrest warrant or an arrest;¹¹⁸ the seizure must be justified by a lien imposed because of a prior judgment in favor of the government;¹¹⁹ the Attorney General must have probable cause to believe that the item to be forfeited is dangerous to the public's health or welfare;¹²⁰ or the Attorney General must have probable cause to believe that the forfeited item is subject to civil forfeiture.¹²¹

(ii) The Admiralty Mechanism Circumvents the Fourth Amendment Warrant Requirement

The Supreme Court has interpreted the fourth amendment to require that a neutral and detached magistrate examine all warrant applications.¹²² However, Supplemental Rule C allows a clerk to issue the warrant.¹²³ Rule C is constitutional only if a clerk qualifies as a magistrate.

The Supreme Court held in *Shadwick v. City of Tampa*¹²⁴ that, in order to be constitutionally qualified as a magistrate, the issuer of a warrant must meet two requirements: the magistrate must be neutral and independent of the officers who request the warrant, and the magistrate must be capable of determining whether probable cause exists for the particular search or arrest warrant.¹²⁵ Although clerks in admiralty proceedings may fulfill the first requirement, they cannot conform to the second requirement because the statute structurally prevents clerks from making a probable cause determination.¹²⁶ Clerks are also practically incapable of making a probable cause determination because they usually lack the training of a judge.¹²⁷

The courts which have examined the admiralty rules in light of the magistrate requirement have disagreed on the rules' constitutionality. The Supreme Court has yet to rule on the issue, but

118 21 U.S.C. § 881(b)(1) (1982).

119 *Id.* § 881(b)(2).

120 *Id.* § 881(b)(3).

121 21 U.S.C.A. § 881(b)(4) (West 1981 & Supp. 1989).

122 See *United States v. Leon*, 468 U.S. 897, 917 (1984); *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 326 (1979); *Shadwick v. City of Tampa*, 407 U.S. 345, 350 (1972).

123 FED. R. CIV. P. SUPP. R. ADMIR. & MAR. CLAIMS C(3).

124 407 U.S. 345 (1972).

125 *Id.* at 350.

126 FED. R. CIV. P. SUPP. R. ADMIR. & MAR. CLAIMS C(3).

127 *United States v. One 1977 Lincoln Mark V Coupe*, 643 F.2d 154 (3d Cir.), *cert. denied*, 454 U.S. 818 (1981) (the court stated that the admiralty procedure was minimal, citing with approval *United States v. Pappas*, 613 F.2d 324 (1979) (Campbell, J., concurring) (discussing the inability of clerks to conduct proximate cause determinations)).

several district courts and the Court of Appeals for the Eleventh Circuit have addressed it.¹²⁸ The district courts have concluded that the clerk is not a detached and neutral magistrate for a variety of reasons: the clerk is not a judicial officer; the clerk can only rubber-stamp the complaint and issue a warrant; and the complaint contains only conclusory allegations and not the information necessary for a probable cause hearing.¹²⁹ The Eleventh Circuit, on the other hand, held that review by a magistrate was unnecessary.¹³⁰ The court reasoned that because the Supreme Court held in *Calero-Toledo v. Pearson Yacht Leasing Co.*¹³¹ that the Constitution does not require a pre-seizure hearing in a forfeiture action, the inadequacies of the admiralty warrant process are irrelevant. Any process is more process than the minimum constitutional requirements. As analyzed below,¹³² this reading of *Calero-Toledo* is erroneous. Pre-seizure hearings should be required in some cases and in those cases the magistrate requirement of the fourth amendment should be met.

Additionally, the admiralty mechanism does not provide a pre-seizure hearing. Both the due process clause and the warrant clause mandate a pre-seizure hearing.¹³³ The analysis of the two clauses is similar in several critical respects. Both clauses strive to minimize the chance of a wrongful deprivation of property by requiring some form of judicial supervision.¹³⁴

The landmark case of *Fuentes v. Shevin*¹³⁵ established that the due process clause requires a judicial pre-seizure hearing before a creditor can invoke the state apparatus for attaching a debtor's property.¹³⁶ The Court reasoned that, regardless of the administra-

¹²⁸ *United States v. A Single Family Residence*, 803 F.2d 625 (11th Cir. 1986); *United States v. Real Property Located at 25231 Mammoth Circle*, 659 F. Supp. 925 (C.D. Cal. 1987); *United States v. Life Ins. Co. of Va.*, 647 F. Supp. 732 (W.D.N.C. 1986); *Application of Kingsley*, 614 F. Supp. 219 (D. Mass. 1985); *United States v. Certain Real Estate Property*, 612 F. Supp. 1492 (S.D. Fla. 1985).

¹²⁹ *25231 Mammoth Circle*, 659 F. Supp. at 927; *Life Ins. Co. of Va.*, 647 F. Supp. at 741; *Application of Kingsley*, 614 F. Supp. at 222-23; *Certain Real Estate Property*, 612 F. Supp. at 1495.

¹³⁰ *A Single Family Residence*, 803 F.2d at 631.

¹³¹ 416 U.S. 663 (1974).

¹³² See *infra* notes 140-50 and accompanying text.

¹³³ See *Fuentes v. Shevin*, 407 U.S. 67, 96 (1972) (due process clause); *United States v. Leon*, 468 U.S. 897, 917 (1984) (fourth amendment warrant clause).

¹³⁴ Compare LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 10.7, at 666-67 (2d ed. 1988) (the due process clause is designed to minimize wrongful takings) with *Johnson v. United States*, 333 U.S. 10, 13-15 (1948) (neutral and detached magistrate reviewing warrant requests reduces the chances that a policeman will unjustifiably invade someone's privacy).

¹³⁵ 407 U.S. 67 (1972).

¹³⁶ The Court later modified *Fuentes* in *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974), permitting ex parte hearings in place of pre-seizure hearings if the creditor can prove that the ex parte hearings conform with constitutional due process requirements.

tive cost,¹³⁷ due process requires a hearing in order to decrease the risk of an arbitrary taking.¹³⁸ *Fuentes*, however, recognized an exception to the hearing requirement when three conditions are met: the state controls the force being used, a very important government interest is at stake, and there is a need for "very prompt action."¹³⁹

It was the *Fuentes* construction of the due process clause, rather than the fourth amendment warrant requirement, that the Court addressed when it first confronted the pre-seizure hearings problem in a forfeiture case. The Court concluded in *Calero-Toledo v. Pearson Yacht Leasing Co.*¹⁴⁰ that the Puerto Rican government met the three *Fuentes* conditions when it seized a yacht under its drug laws without a pre-seizure hearing. The forfeiture was acceptable: the Commonwealth had control over the force used; the desire to stop the continued illicit use of property represented a significant government purpose; and the Commonwealth needed to act quickly to prevent the owner from taking the yacht to another jurisdiction.¹⁴¹ The Court also noted that the Commonwealth officials performed the same function that a judge would perform since the statute required the Commonwealth officials to determine whether the seizure was appropriate before taking possession of the property.¹⁴²

Lower courts have construed the *Calero-Toledo* holding to be a per se rule validating forfeitures whenever the property is relatively mobile.¹⁴³ The Court's heavy-handed treatment of the facts of the case may have caused this construction.¹⁴⁴ The lower courts' per se rule, however, is unwise because its broad sweep could subvert the fourth amendment and the due process clause by allowing the *Fuentes* exception to swallow the general rule requiring pre-seizure hearings. The fourth amendment turns on reasonableness, which should be analyzed on a case-by-case basis¹⁴⁵ and not with bright

¹³⁷ *Fuentes*, 407 U.S. at 90.

¹³⁸ *Id.* at 83.

¹³⁹ *Id.* at 91. The third *Fuentes* exception may be identical to the exigent circumstances requirement for warrantless searches. See *infra* note 148.

¹⁴⁰ 416 U.S. 663 (1974).

¹⁴¹ *Id.* at 679.

¹⁴² *Id.*

¹⁴³ See, e.g., *United States v. Certain Real Estate Property*, 612 F. Supp. 1492, 1496 (S.D. Fla. 1985). Some courts have even broadened the law to validate all forfeiture seizures regardless of how immovable the property is. See, e.g., *United States v. A Single Family Residence*, 803 F.2d 625, 632 (11th Cir. 1986).

¹⁴⁴ The dissent in *Calero-Toledo* criticized the Court for basing its holding on facts which were more germane to forfeiture actions and yachts in general than to the facts before the Court. For instance the yacht was seized over two months after the marijuana was spotted on board, so there was no need for very prompt action. *Calero-Toledo*, 416 U.S. at 691 (1973) (Douglas, J., dissenting).

¹⁴⁵ See *Terry v. Ohio*, 392 U.S. 1, 13, 16-20 (1968) (the variety of types of street encounters between the police and citizens has led the Court to conclude that case-by-case review is best).

line rules. Although most yacht seizures will be reasonable,¹⁴⁶ it is not difficult to imagine one that is unreasonable and thus violates the fourth amendment.¹⁴⁷ The constitutional need to avoid these unreasonable seizures should require an adequate pre-seizure hearing through the warrant process in every case where no exigent circumstances exist.¹⁴⁸ In these hearings a judge should require the government to demonstrate probable cause before it can seize a vessel.

The lower courts' interpretation of *Calero-Toledo's* holding does not resolve the constitutionality of the admiralty rules. The Supplemental Rules for Certain Admiralty and Maritime Claims are not limited to ships and boats. In fact, the rules recognize that the seizure can occur on land.¹⁴⁹ Thus, a government officer can file the complaint with a clerk, the clerk must issue a warrant, and then the government can seize any property under the admiralty rules, including realty.¹⁵⁰ The government, however, would have a difficult time meeting the third *Fuentes* condition—the need for “very prompt action”—when the government seizes realty or other non-mobile property. If the seizure fails to meet the three *Fuentes* conditions then the seizure is constitutional only if there is a pre-seizure hearing.

In a recent opinion, the Court of Appeals for the Second Circuit held that claimants are entitled to pre-seizure hearings when the government attempts to seize stationary items such as realty.¹⁵¹ The court held that as a general rule, it is “unlikely” that the government

¹⁴⁶ If there is probable cause, most seizures will be reasonable and a warrant will be unnecessary. Because yachts are very mobile and can easily move to avoid seizure, most seizures will fit within the exigent circumstances exception. See *infra* note 148.

¹⁴⁷ One instance where the government would have a very difficult time proving exigent circumstances would be a situation similar to that in *Calero-Toledo*. Evidently the illegal incident which caused the forfeiture occurred two months prior to the seizure. *Calero-Toledo*, 416 U.S. at 691 (Douglas, J., dissenting). Because there was a two month delay between the illegal incident and the seizure, the Commonwealth officials had plenty of time to seek a warrant, making it difficult for the Commonwealth to allege the existence of exigent circumstances. If the government has sufficient time in which to obtain a warrant, a delay creates an inference that there are no exigent circumstances. See *Steagald v. United States*, 451 U.S. 204, 215 (1981); *Coolidge v. New Hampshire*, 403 U.S. 443, 470 (1971); *Chimel v. California*, 395 U.S. 752, 773 (1969); *United States v. Morgan*, 743 F.2d 1158, 1161 (6th Cir. 1984), *cert. denied*, 471 U.S. 1061 (1985).

¹⁴⁸ The Court in *United States v. Chadwick*, 433 U.S. 1 (1977), indicated that exigent circumstances fall into three categories: where there is danger to the police officers which justifies the search, where the evidence may lose its evidentiary value if it is not obtained immediately, and where there is some threat of escape. *Id.* at 4.

¹⁴⁹ FED. R. CIV. P. SUPP. R. ADMIR. & MAR. CLAIMS C(2) (“the complaint shall state the place of seizure and whether it was on land”).

¹⁵⁰ See, e.g., *United States v. Certain Real Estate Property*, 612 F. Supp. 1492 (S.D. Fla. 1985).

¹⁵¹ *United States v. Premises and Real Property at 4492 S. Livonia Rd.*, 889 F.2d 1258 (2d Cir. 1989).

could show exigent circumstances when realty is involved because realty is not “readily moved or dissipated.”¹⁵² Furthermore, the government’s interest in avoiding a pre-seizure hearing is weak. The only interest is the reduced administrative burden of avoiding a hearing before seizing the home. “[T]he broad interest of enforcing the drug laws is not applicable, because that interest is equally served by forfeiture after an adversary proceeding.”¹⁵³

A seizure under the admiralty provisions has an additional constitutional flaw. To commence a seizure under Rule C of the Supplemental Rules, the government must file a complaint with a clerk. If the government has sufficient time to file a complaint with a clerk, the government has sufficient time to obtain a warrant through a probable cause hearing. Whenever the government initiates a seizure with a complaint, the government can have neither exigent circumstances nor a need for prompt action. Thus, the admiralty rules are only constitutional to the extent that they conform to the Due Process and the Fourth Amendment Seizure Clauses.

(iii) The Probable Cause Exception to the Statutory Seizure Mechanism Is Constitutionally Flawed

Like the admiralty mechanism for forfeiture, the alternative statutory mechanism is constitutionally flawed. Section 881(b)(1)-(4) provides four statutory mechanisms for initiating seizures. The mechanism that applies most aptly to drug forfeitures, section 881(b)(4), merely requires the Attorney General to have probable cause to believe that the property is subject to civil forfeiture. This mechanism requires neither a warrant nor the presence of one of the exceptions to the warrant requirement¹⁵⁴ in order to initiate the forfeiture.

To save the statute from constitutional attack, the courts must read into the statute a warrant requirement or a requirement that one of the recognized exceptions to the warrant requirement be present in order to initiate a forfeiture.¹⁵⁵ Both the First and the Ninth Circuits have actually taken this initiative and have read a requirement of exigent circumstances into the statute after holding that Congress cannot legislate a seizure provision that is contrary to

¹⁵² *Id.* at 1258.

¹⁵³ *Id.*

¹⁵⁴ *E.g.*, exigent circumstances. *See supra* note 148.

¹⁵⁵ Courts should invoke the familiar canon of statutory construction of interpreting statutes to conform to constitutional requirements. *See* Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 814-15 (1983). The logic behind this canon is that the object of statutory construction is to give meaning to the intent of the legislature, and presumably the legislature intends to enact law that is constitutional.

the fourth amendment warrant requirement.¹⁵⁶ The circuits, however, are far from unanimous. The Third, Fourth and Fifth Circuits have construed the statute literally, holding that the seizure can be warrantless even if there are no exigent circumstances.¹⁵⁷

The Third Circuit expressly rejected the First Circuit's reasoning, concluding that exigent circumstances are not required because the fourth amendment does not apply to civil forfeiture actions.¹⁵⁸ The Third Circuit's analysis, however, turns on a faulty premise. The court reasoned that the fourth amendment does not apply to forfeiture actions because forfeitures are actions in rem and objects do not have privacy expectations. The court cites its own precedent in support of this proposition.¹⁵⁹ This precedent, however, had been overruled by a later Supreme Court holding that forfeiture actions are subject to fourth amendment limitations.¹⁶⁰ Thus, the Third Circuit erroneously concluded that forfeitures are not bound by the fourth amendment, and consequently held that as Congress had deliberately chosen not to require exigent circumstances in forfeiture actions, this intent should be followed.

The Fourth Circuit took an innovative approach to this question in *United States v. Kemp*.¹⁶¹ Because forfeiture theoretically occurs the moment the vehicle is used illegally,¹⁶² the court held that the seizure merely recovered "property [which] belong[ed] to the United States."¹⁶³ Therefore, the court held that the government did not invade any "legitimate expectations of privacy" because the property does not belong to the defendant.¹⁶⁴

The Fourth Circuit's analysis effectively denies fourth amendment protections to forfeiture claimants and thereby sidesteps the Supreme Court's holding in *One 1958 Plymouth Sedan v. Pennsylvania*¹⁶⁵ that such actions are subject to the amendment. Although a drug smuggler might finance the purchase of a house

¹⁵⁶ See *United States v. Spetz*, 721 F.2d 1457, 1465 (9th Cir. 1983); *United States v. Pappas*, 613 F.2d 324, 327 (1st Cir. 1979). *But see* *In re Warrant to Seize One 1988 Chevrolet Monte Carlo*, 861 F.2d 307, 311 n.4 (1st Cir. 1988) (noting that *Pappas* has been criticized, and suggesting that its vitality may be questioned in the future).

¹⁵⁷ See *United States v. One 1978 Mercedes Benz, Four Door Sedan*, 711 F.2d 1297, 1302 (5th Cir. 1983); *United States v. Kemp*, 690 F.2d 397, 401-02 (4th Cir. 1982); *United States v. One 1977 Lincoln Mark V Coupe*, 643 F.2d 154, 157 (3d Cir.), *cert. denied*, 454 U.S. 818 (1981).

¹⁵⁸ *One 1977 Lincoln Mark V Coupe*, 643 F.2d at 157.

¹⁵⁹ *Id.* at 158 (citing *United States v. \$1,058 in United States Currency*, 323 F.2d 211, 213 (3d Cir. 1963)).

¹⁶⁰ See *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 697 (1964).

¹⁶¹ 690 F.2d 397 (4th Cir. 1982).

¹⁶² 21 U.S.C.A. § 881(h) (West Supp. 1989).

¹⁶³ *Kemp*, 690 F.2d at 401.

¹⁶⁴ *Id.*

¹⁶⁵ 380 U.S. 693 (1964).

with drug money, one would hope that few courts would allow the police to seize the house and its contents without a valid warrant. Furthermore, evidence found in a house so seized would be inadmissible in court.¹⁶⁶ *Kemp's* holding, however, implies that the seizure would be acceptable because under the forfeiture laws, the house belongs to the government. The drug smuggler could have no subjective, nor objectively reasonable, expectation of privacy in a government dwelling. This example points out the deficiency in *Kemp's* holding. *Kemp* assumes that the fourth amendment protects places and not people. The Supreme Court, however, held the opposite in *Katz v. United States*,¹⁶⁷ a non-forfeiture case. The Court reasoned that the fourth amendment protects those things which a person reasonably expects to be private.¹⁶⁸ Thus, if claimants reasonably expected their vehicles or houses to be private, the fourth amendment would protect those expectations.¹⁶⁹

To make Section 881's statutory seizure mechanism conform to the fourth amendment, courts must read an exigent circumstances requirement into the statute. The statute currently allows the government to seize property as long as it has probable cause to believe the property is subject to civil forfeiture. Although a literal reading of the statute may not require the agent to have exigent circumstances for making the seizure, such a reading violates the constitutional warrant requirement.

3. *It Is Unclear Whether Claimants Are Entitled to Eighth Amendment Protections*

The eighth amendment states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."¹⁷⁰ This prohibition limits the government's power in criminal settings.¹⁷¹ Perhaps because most courts view forfeitures as quasi-criminal actions, no court of record has yet to interpret forfeitures in light of the eighth amendment.¹⁷² If we ac-

¹⁶⁶ See *United States v. Real Property Located at 25231 Mammoth Circle*, 659 F. Supp. 925, 927 (C.D. Cal. 1987); *United States v. Life Ins. Co. of Va.*, 647 F. Supp. 732, 741 (W.D.N.C. 1986); *United States v. Certain Real Estate Property*, 612 F. Supp. 1492, 1498 (S.D. Fla. 1985).

¹⁶⁷ 389 U.S. 347, 351 (1967) (the fourth amendment protects "people [and] not places").

¹⁶⁸ *Id.*

¹⁶⁹ The Fifth Circuit has adopted the rationale of the Fourth Circuit's holding in *Kemp*. *United States v. One 1978 Mercedes Benz, Four Door Sedan*, 711 F.2d 1297, 1302 (5th Cir. 1983).

¹⁷⁰ U.S. CONST. amend. VIII.

¹⁷¹ See *Solem v. Helm*, 463 U.S. 277, 288-91 (1983).

¹⁷² See *id.*

cept 21 U.S.C. § 881 as a criminal statute, however, then it must conform to the requirements of the eighth amendment.

An eighth amendment analysis begins by determining if the statute requires bail, imposes a fine, or inflicts a punishment. The only penalty that Section 881 imposes is the forfeiture of property. Forfeiture is the functional equivalent of a fine¹⁷³ and it can be viewed as a monetary loss to the claimant.¹⁷⁴

The second step in an eighth amendment analysis is to determine if the fine is excessive. The Supreme Court held in *Solem v. Helm*¹⁷⁵ that a fine or a punishment is unconstitutionally excessive if it is disproportionate to the underlying conduct.¹⁷⁶ The Court in *Helm* ordered the state of South Dakota to resentence a repeat offender who had been sentenced to life imprisonment without benefit of parole for eight relatively minor felonies.¹⁷⁷ The Court mandated that courts compare the punishment to the severity of the crime, as well as to the sentences imposed upon others with similar records in the same and in other jurisdictions.¹⁷⁸ The Court rejected the idea that the eighth amendment is solely a restraint on torture and the death penalty. In so holding, the Court stated that "a criminal sentence must be proportionate to the crime for which the defendant has been convicted [N]o penalty is *per se* constitutional [A] single day in prison may be unconstitutional in some circumstances."¹⁷⁹

Helm has clear implications for the constitutionality of Section 881. In determining if the punishment is excessive, a court following *Helm* initially performs a proportionality review by comparing the severity of the crime to the severity of the punishment. With respect to the eighth amendment proportionality requirement, Section 881 should run afoul of the constitution whenever an individual forfeits extremely valuable property for the possession of a small amount of drugs. Such unconstitutional forfeitures are likely under the zero tolerance policy and should be rejected by the courts.

Helm considered an additional factor in its evaluation of excessive punishment. The Court compared the punishment of the defendant to the punishment of similarly situated defendants in the

¹⁷³ BLACK'S LAW DICTIONARY 595 (5th ed. 1979) (defines a fine to include civil forfeitures).

¹⁷⁴ Furthermore, the claimant can repurchase the property from the government. 19 U.S.C.A. § 1614 (West Supp. 1989).

¹⁷⁵ 463 U.S. 277 (1983).

¹⁷⁶ *Id.* at 285-86.

¹⁷⁷ *Id.* at 279-82.

¹⁷⁸ *Id.* at 291-92.

¹⁷⁹ *Id.* at 290.

same and in other jurisdictions.¹⁸⁰ The Court seemingly elevated the goal of treating similar cases alike to a constitutional requirement. However, the very nature of forfeiture laws prevents like cases from being treated similarly. The penalty in Section 881 is not linked to the nature of the underlying action, but is tied to the value of the property; two individuals with the same amount of drugs will be treated alike only if they fortuitously forfeit property with identical values.

It is not clear, however, that under *Helm* a court would strike down a forfeiture because it is disproportionate. Only three times has the Court struck down sentences (excluding death penalties) for violating the eighth amendment.¹⁸¹ But the Court's reluctance to strike down prison sentences on eighth amendment grounds should not control its action in regard to disproportionate forfeitures. The eighth amendment does not clearly prohibit disproportionate prison sentences. Only that punishment which is so disproportionate as to be "cruel and unusual" is prohibited by the amendment.¹⁸² By contrast, it is not necessary to strain the language of the amendment to strike down disproportionate forfeitures; the amendment specifically prohibits "excessive fines."¹⁸³

Helm's eighth amendment proportionality requirement is applicable to forfeitures for a second reason. The Court seems anxious to defer to the legislative branch's determination that a punishment is suited to the crime.¹⁸⁴ With forfeiture, however, there is no such determination. The legislature cannot determine that the forfeiture is proportional to the underlying activity because the degree of punishment is connected solely to the value of the property seized. Even if there was a legislative intent connecting any given punishment with any given activity, it should be even less controlling on the courts when we consider a case arising under the zero tolerance policy. Zero tolerance shifts the focus of the law from an attack on drug suppliers, like Congress envisioned, to an attack on drug users.¹⁸⁵ It therefore does not appear that Congress intended Section 881 to sanction very disproportionate seizures because Congress envisioned that most seizures would penalize drug smugglers, whose conduct is more culpable than that of drug users. Courts

¹⁸⁰ *Id.* at 291-92.

¹⁸¹ *Helm*, 463 U.S. 277 (life imprisonment without parole); *Robinson v. California*, 370 U.S. 660 (1962) (10-day jail sentence for being addicted to narcotics); *Weems v. United States*, 217 U.S. 349 (1910) (20 years in chains performing hard labor combined with the loss of assorted rights of citizenship).

¹⁸² *Helm*, 463 U.S. at 304-18 (1983) (Burger, J., dissenting).

¹⁸³ U.S. CONST. amend. VIII.

¹⁸⁴ See *Rummel v. Estelle*, 445 U.S. 263, 274, 283-84 (1980).

¹⁸⁵ See *supra* notes 6-12, 35-40 and accompanying text.

should therefore apply the *Helm* test to forfeitures, and strike down grossly disproportionate applications of Section 881 as a violation of the eighth amendment.

III

THE DRUG FORFEITURE LAWS VIOLATE FUNDAMENTAL NOTIONS OF FAIRNESS

Fairness is one of the goals of the judicial system.¹⁸⁶ The system, however, does not always achieve this goal. Section 881 is unfair: it imposes severe penalties for minimal amounts of drugs; it places an unreasonably high affirmative duty on owners to police those who use their vehicles; it does not permit courts to ameliorate harsh results; and the laches defense does not apply against the United States government.

A. Vessels Should Not Be Forfeit for Carrying Small Quantities of Drugs

Section 881 does not require proof of drug smuggling or the presence of a minimum amount of drugs in order to initiate a forfeiture.¹⁸⁷ This is paradoxical in light of the Section's legislative history, which indicates that Congress intended to attack large scale drug traffickers.¹⁸⁸ One possible explanation for this paradox is that Congress designed the law to facilitate prosecution of large scale drug traffickers, even when the traffickers were found carrying only small quantities of drugs. Likewise, Congress may have thought that such line drawing was unnecessary because the judicial system does not ordinarily have either the capacity or the desire to prosecute personal users.¹⁸⁹

Despite this legislative history, the courts have been fairly unanimous in concluding that they should follow the broad language of the statute even in cases involving personal users.¹⁹⁰ The courts have not struck down forfeitures where the police have only found small quantities of drugs. For example, the First Circuit has simply refused to read a minimum amount into the statute.¹⁹¹ The Ninth

¹⁸⁶ See generally John Rawls, *Justice as Fairness*, 67 PHIL. REV. 164 (1958).

¹⁸⁷ 21 U.S.C.A. § 881(a) (West 1981 & Supp. 1989).

¹⁸⁸ See *supra* notes 35-40 and accompanying text.

¹⁸⁹ Rangel, *supra* note 2.

¹⁹⁰ See *United States v. One 1976 Porsche 911S*, 670 F.2d 810 (9th Cir. 1979); *United States v. One Clipper Bow Ketch NISKU*, 548 F.2d 8 (1st Cir. 1977); *United States v. One 1973 Dodge Van*, 416 F. Supp. 43 (E.D. Mich. 1976); *United States v. One 1973 Pontiac Grand Am*, 413 F. Supp. 163 (W.D. Tex. 1976); *United States v. One 1971 Porsche Coupe Auto.*, 364 F. Supp. 745 (E.D. Pa. 1973).

¹⁹¹ *United States v. One Clipper Bow Ketch NISKU*, 548 F.2d 8, 11-12 (1st Cir. 1977).

Circuit went further by expressly rejecting the resort to legislative history, claiming that the statute is clear on its face.¹⁹²

Courts should not allow forfeitures when the government finds only small quantities of drugs unless the prosecution can link the owner to drug trafficking. Reading the statute to cover more conduct than Congress intended is unjustified judicial activism. If the statute were construed as criminal in nature, such applications would be invalid because courts must interpret criminal statutes strictly to avoid notice problems.¹⁹³ Even if the statute is civil, a standard rule of statutory construction requires courts to read statutes expansively only when the statutes are remedial.¹⁹⁴ Congress, however, has specifically recognized that 21 U.S.C. § 881 is not remedial but punitive,¹⁹⁵ and therefore the courts should not give the statute an expansive reading.¹⁹⁶ The courts should read the statute to be no broader than the implied congressional intent.

The second reason for limiting forfeiture to drug traffickers is that laws which target the users of small quantities of drugs are selectively and arbitrarily enforced.¹⁹⁷ One study, after it controlled for the amount of marijuana regularly used, found a higher arrest rates for possession of marijuana when the defendant was young, blue collar, active in the counter-culture, and non-white than when the user was older, white collar, within the mainstream culture, and white.¹⁹⁸ Discriminatory or selective enforcement is inherent with any law that is widely violated, because the police cannot arrest every violator.¹⁹⁹ An increase in police discretion results in the police having more power to make unreviewable decisions.²⁰⁰ In an ideal criminal justice system, police discretion is minimized so that policy choices can be made by judges and legislators rather than by individual officers.²⁰¹ The strong constitutional overtones of any seizure mandate that the system strive to reduce police discretion.

B. The Innocent Owner Defense Should Be Expanded

Section 881 creates two exceptions to the general forfeiture

¹⁹² United States v. One 1976 Porsche 911S, 670 F.2d 810, 812 (9th Cir. 1979).

¹⁹³ United States v. Bass, 404 U.S. 336, 347-48 (1971).

¹⁹⁴ *In re* Erickson, 815 F.2d 1090, 1094 (7th Cir. 1987) (Easterbrook, J.).

¹⁹⁵ See *supra* note 96.

¹⁹⁶ See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* 77 n.23 (2d ed. 1986).

¹⁹⁷ James F. Mosher, *Discriminatory Practices in Marijuana Arrests: Results from a National Survey of Young Men*, 9 CONTEMP. DRUG PROBS. 85, 101 (1980).

¹⁹⁸ *Id.* at 94, 98.

¹⁹⁹ Cf. *Smith v. Gogven*, 415 U.S. 566, 575 (1974) (language of flag statute so broad as to invite enforcement officials to pursue "personal predilections").

²⁰⁰ *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

²⁰¹ *Id.*

rule: first, when the vessel is stolen, and second, when the vessel is a common carrier and the owner was unaware of the presence of drugs.²⁰² In *Calero-Toledo v. Pearson Yacht Leasing Co.*,²⁰³ the Supreme Court created a third "innocent owner" defense available to any owner who can prove that he took *all* reasonable precautions to keep the vessel drug-free.²⁰⁴

The innocent owner exceptions, however, are not sufficient to remedy the harshness of forfeiture laws. The two statutory exceptions are rarely applicable because they are so narrow.²⁰⁵ And the *Calero-Toledo* defense is difficult to meet. Owners who prove that they have taken reasonable precautions will not succeed in reclaiming their property. Instead, owners must prove that they have taken *all* reasonable precautions; this requirement imposes a standard of proof capable of harsh application.²⁰⁶

The courts should expand the innocent owner defense to allow all owners to recover their property if the government cannot prove that the owner is linked to the illegal drugs. Owners should not forfeit their property for failing to act as a private police force which searches every person who borrows, leases, or is invited into the vehicle. Traditionally, Anglo-American criminal law has not placed such affirmative duties on individuals.²⁰⁷ It is unfair to impose vicarious liability in criminal contexts, especially because it could lend to countless intrusions on individual privacy. There is a strongly distasteful Orwellian overtone to the idea of overzealous individuals watching each other in order to safeguard against criminal activities.

C. Courts Should Examine the Equities of Every Forfeiture

A claimant seeking to recover forfeited property must apply for

²⁰² 21 U.S.C.A. § 881(a)(4)(A)-(B) (West 1981 & Supp. 1989).

²⁰³ 416 U.S. 663 (1974).

²⁰⁴ *Id.* at 685-86.

²⁰⁵ *See, e.g.,* *United States v. One Mercedes Benz 380 SEL*, 604 F. Supp. 1307 (S.D.N.Y. 1984), *aff'd*, 762 F.2d 991 (2d Cir. 1985) (use of a car without owner's knowledge or consent is not enough to invoke stolen vehicle exception).

²⁰⁶ An example of how stringently the courts can apply this standard is *United States v. One 1957 Rockwell Aero Commander 680 Aircraft*, 671 F.2d 414 (10th Cir. 1982). The court of appeals held that a plane used in a drug running operation was forfeit. The court rejected the owner's innocent owner defense when it concluded that the owner acted negligently. *Id.* at 418. The owner took possession of the plane as collateral for a defaulted loan, but never actually picked up the plane. *Id.* at 415-16. It sat in a hangar until someone used it for a drug run, and abandoned it. *Id.* at 415, 418. The owner could not prove that the plane was stolen, but there was no suggestion of collusion between the owner of the plane and the drug runner. The court decided that the owner was negligent in not picking up the plane and placing it in a more secure hangar. Therefore, he did not take all reasonable precautions, and the plane was forfeit. *Id.* at 418.

²⁰⁷ *Cf. H.L.A. Hart, Variety of Responsibility*, 83 *LAW Q. REV.* 346, 354-55 (1967).

remission.²⁰⁸ The effectiveness of such application, however, is questionable. The courts have held that, with the exception of a few limited defenses, the only available leniency lies within the Attorney General's discretion.²⁰⁹ As it is not possible to appeal the Attorney General's denial of remission,²¹⁰ the claimant has limited recourse. To bypass the strictness of the law, the courts have resorted to numerous defenses. The most frequently applied exception is the innocent owner defense.²¹¹ Courts apply another exception for bona fide purchasers for value.²¹² The typical exception, however, seems to be a reaction to the inequities of the particular case before the court and is seldom applied in other cases.²¹³

If the courts could review the Attorney General's denial of the remission request, then the courts would not feel compelled to create questionable loopholes. It would be better for Congress to create one exception which allows the courts to determine the equities of the forfeiture, and for Congress to suggest an illustrative list of the criteria for evaluating the equities. Such a statutory system would be superior to the present system, in which identical cases are often not treated identically. Vast discrepancies occur when the only variable seems to be the degree to which the judge feels committed to enforcing the strict terms of the statute.

D. The Defense of Laches Does Not Apply Against the United States

The Supreme Court held in *Costello v. United States*²¹⁴ that the

²⁰⁸ 19 U.S.C.A. § 1618 (West 1981 & Supp. 1989) (procedure for remission or mitigation of penalties); 21 U.S.C.A. § 881(d) (West Supp. 1989) (modifying § 1618 by replacing customs officials with the Attorney General). See *supra* note 47 and accompanying text.

²⁰⁹ *United States v. One Clipper Bow Ketch NISKU*, 548 F.2d 8, 12 (1st Cir. 1977).

²¹⁰ *United States v. One 1973 Buick Riviera Auto.*, 560 F.2d 897, 900 (8th Cir. 1977).

²¹¹ See *supra* text accompanying notes 203-04.

²¹² See *United States v. One 1976 Chevrolet Corvette*, 477 F. Supp. 32, 34 (E.D. Pa. 1979) (claimant's defense to forfeiture valid because she was not involved in wrongful activities and activities took place before her purchase); cf. *United States v. One Parcel of Real Estate Property*, 660 F. Supp. 483 (S.D. Miss.) (forfeiture valid where purchaser knew property was being used in smuggling operations), *aff'd*, 831 F.2d 566 (5th Cir. 1987).

²¹³ One example of a seemingly ad hoc exception is when the government fails to prove a sufficient nexus between the forfeited vehicle and a violation of the drug laws. See *United States v. \$38,600.00 in United States Currency*, 784 F.2d 694 (5th Cir. 1986); *United States v. One 1976 Ford F-150 Pick-up*, 769 F.2d 525 (8th Cir. 1985). Another exception is where the forfeiture fails to advance the public policy behind the law because the owner was innocent of wrongdoing but was unable to meet the "all reasonable steps" requirement. See *United States v. One 1979 Datsun 280 ZX*, 720 F.2d 543 (8th Cir. 1983).

²¹⁴ 365 U.S. 265 (1961).

defense of laches²¹⁵ does not apply against the United States.²¹⁶ The Court reasoned that on public policy grounds laches would not preserve public rights, property, and revenues from injury caused by the negligence of public officers. The implication for forfeitures is that the government may retrieve property years after the claimant used it illegally. This rule allowing government delay of seizure, coupled with the rule that property is considered to be forfeit the moment it is used in violation of the drug laws,²¹⁷ results in the defendant not being allowed to claim that the government has slept on its rights.²¹⁸ One odd implication is that the government conceivably could bring an action for rent or waste for the time that it allowed the property to remain in the possession of the claimant after it was forfeited. A second implication is that there are a lot of late 1960s V.W. micro-buses being driven to Grateful Dead shows that are actually owned by the government.

CONCLUSION

The drug forfeiture laws violate both the Constitution and fundamental notions of fairness. The constitutional infirmities stem from the quasi-criminal status of Section 881. The unfairness stems from Congress's failure to limit the applications of Section 881, allowing it to be applied inequitably. It is possible to remedy these flaws.

The constitutional flaws can be remedied by making several changes in the law. The Court should recognize that forfeiture is a criminal penalty and that claimants therefore are entitled to criminal due process protections. Currently, the statute violates the Constitution because the government need not prove all the necessary elements of the offense, the claimants can be subject to ex post facto laws and double jeopardy, the claimant is not always entitled to a jury of his or her peers, the claimant is not given all the necessary fourth amendment protections, and the penalty is frequently disproportional to the underlying offense.

The courts can remedy most of the defects through their power to interpret the statute. In the alternative, the courts can strike down the statute, requiring Congressional reformation. If Congress were to re-enact the statute, it should require the government to prove every element of the offense beyond a reasonable doubt when a claimant challenges the forfeiture. At a minimum, the government should prove that the owner had scienter and that the property

²¹⁵ Laches is a equitable time bar defense penalizing those who sleep on their rights.

²¹⁶ *Costello*, 365 U.S. at 281.

²¹⁷ 21 U.S.C.A. § 881(h) (West Supp. 1989).

²¹⁸ *United States v. Kemp*, 690 F.2d 397, 402 (4th Cir. 1982).

seized is connected to illegal drugs. Additionally, Congress should limit forfeiture to those cases where the government finds a large quantity of drugs or where the government can prove that the owner or lessor of the forfeited property is a distributor of drugs and that the forfeited property is substantially connected to this distribution. The third necessary revision is to conform the statutory mechanisms of Section 881 to reflect fourth amendment requirements. The admiralty mechanism should require a judicially approved warrant; the statutory forfeiture mechanism should permit warrantless searches only if the government has both probable cause and exigent circumstance.

Such revisions to Section 881 would cure not only its constitutional defects, but also remedy some of its fairness problems. If the government is required to institute forfeiture only when either the government finds a large quantity of drugs or when the property is substantially connected to the distribution of drugs, the proportionality concerns will be remedied. This revision would also cure the concern over placing a burdensome affirmative duty upon the owner of the property to inspect for drugs. The remainder of the fairness concerns would be met if Congress allowed courts to review the Attorney General's denial of remission, or allowed courts the power to conduct a *de novo* review.

Stopping the use of drugs that contribute to the destruction of our inner cities is obviously a high priority. But the solution to this problem should not come at the expense of constitutional rights, nor should it impose an unreasonably high burden on those unfortunate enough to be snared within a net, too widely cast.

Michael Schecter

