

2-1-1993

Forfeiture, Legitimation and a Due Process Right to Counsel

William J. Genego

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/blr>

Recommended Citation

William J. Genego, *Forfeiture, Legitimation and a Due Process Right to Counsel*, 59 Brook. L. Rev. 337 (1993).

Available at: <https://brooklynworks.brooklaw.edu/blr/vol59/iss2/3>

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Law Review by an authorized editor of BrooklynWorks.

FORFEITURE, LEGITIMATION AND A DUE PROCESS RIGHT TO COUNSEL

*William J. Genego**

INTRODUCTION

Why is a lawyer from California writing a law review article about the civil forfeiture decisions of the United States Court of Appeals for the Second Circuit? The answer stems from my participation as a law student in a clinical program that litigated a fair amount of cases before the Second Circuit, as well as before district courts under its jurisdiction. I was even permitted to argue before the Second Circuit as a student, as were a number of other students in the program. Most of the clinical program's cases concerned federal sentencing and parole, subjects about which there was little case law at that time. We observed first-hand the Second Circuit making new law as it mapped out constitutional and statutory boundaries in federal sentencing and parole. Learning from the example set by my instructors, I began following the court's decisions carefully to learn how each of the judges ruled in specific cases and on particular issues. Through that clinical experience, I came to believe the common wisdom that the Second Circuit was the first among equals, the second most important court in the country, save only the Supreme Court. The quality of the Second Circuit's opinions and the judges who wrote them confirmed that common wisdom, as did the court's role of frequently establishing new precedent that was later followed by federal courts in other circuits.

Long after I moved elsewhere to teach and practice, my interest in the court continued. Thus, even though I am no longer paid for writing law review articles, I welcomed the opportunity to examine the Second Circuit's recent civil forfei-

* B.S., New York University, 1972; J.D., Yale Law School, 1975; LL.M., Georgetown University Law Center, 1977.

ture decisions. Through those decisions, the court has exhibited the independence in its rulings, the clarity of thought in its opinions and the commitment to the fairness of the legal process in its outcomes that have historically marked it as a special court.

Perhaps most remarkable about the court's recent forfeiture decisions is how much they have changed from prior years. In 1991, a Second Circuit judge observed that "[t]he Second Circuit, at least for now, remains unable to avoid the inevitably unjust results [of civil forfeiture]."¹ While that observation accurately described the court's past forfeiture decisions—which for the most part consisted of routine affirmances of government forfeitures, no matter how innocent the owner or how egregious the government conduct—it did not accurately predict the court's future forfeiture decisions. Within a twelve-month period beginning in early 1992, the Second Circuit issued no less than five decisions favorable to civil forfeiture claimants. Two of these decisions established important new constitutional protections,² while the other three narrowly interpreted and applied forfeiture statutes in a manner that not only favored the claimants in those particular cases, but will similarly benefit future civil forfeiture claimants.³

The change was reflected not just in the court's holdings,

¹ George C. Pratt & William B. Petersen, *Civil Forfeiture in the Second Circuit*, 65 ST. JOHN'S L. REV. 653, 671 (1991).

² *United States v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896, 904-05 (2d Cir. 1992) (*ex parte*, pre-notice seizure of property violated due process); *United States v. 38 Whaler's Cove Drive*, 954 F.2d 29 (2d Cir.) (Eighth Amendment cruel and unusual punishment provision may apply to civil forfeiture)*cert. denied*, 113 S. Ct. 55 (1992); see *infra* at notes 44-60 and accompanying text.

The United States Supreme Court confirmed the Second Circuit's influential role in the development of the law when it subsequently addressed these issues to resolve conflicts among the circuit courts and, in each instance, sided with the position taken by the Second Circuit. See *United States v. Good*, No. 92-1180, 1993 WL 505539, at *6-11 (U.S. Dec. 13, 1993) (*ex parte*, pre-notice seizure of real property violates due process unless the government demonstrates the existence of exigent circumstances); *United States v. Austin*, 113 S. Ct. 2801 (1993) (agreeing with position of Second Circuit that Eighth Amendment applies to civil forfeitures, but holding that excessive fines provision, rather than cruel and unusual punishment provision, applies).

³ *United States v. \$31,990 in United States Currency*, 982 F.2d 851 (2d Cir. 1993); *Onwubiko v. United States*, 969 F.2d 1392 (2d Cir. 1992); *United States v. One 1987 Jeep Wrangler Automobile*, 972 F.2d 472 (2d Cir. 1992); see *infra* notes 66-82 and accompanying text.

but also in the dicta of its opinions. For example, in 1989 the court expressed no reluctance in upholding the summary judgment forfeiture of an entire 120 acre farm, including the house, barn and several other buildings because cocaine had been sold from the house. While the result might have seemed "harsh," the court commented that there was no doubt Congress intended such a result "in view of the magnitude of the national drug problem it was addressing."⁴ But by 1992, the court expressed concern on at least three occasions about the government's possible misuse of its forfeiture power, letting it be known that the "war on drugs" would no longer be accepted as a justification for broadly interpreting the government's forfeiture power. As the court stated in one of its 1992 opinions, "we do not believe that a disproportionately large forfeiture can be reasonably justified as a civil fine as opposed to punishment by placing full responsibility for the 'war on drugs' on the shoulders of every individual claimant."⁵ After years of routinely rubber stamping the government's exercise of its forfeiture powers, the Second Circuit appears to have adopted an approach that scrutinizes and questions the government's forfeiture power in nearly every respect.

This Article considers the Second Circuit's recent forfeiture decisions collectively, and attempts to find an explanation for the court's sudden shift. It suggests that the explanation lies in a theory of judicial decisionmaking that is based on the concept of legitimization. The changes in the court's forfeiture decisions reflect the court's need to legitimize its existence as an independent branch of government, and thereby affirm and maintain its power. Whether such decisions should be criticized or respected depends on whether a court is committed to seeing that the rights declared are respected.⁶ In the context of the

⁴ *United States v. 4492 Livonia Rd.*, 889 F.2d 1258, 1271 (2d Cir. 1989).

⁵ *38 Whaler's Cove Drive*, 954 F.2d at 37.

⁶ One might view decisions motivated by a court's concern for its own legitimacy with cynicism because they seem to be more concerned with affirming the court's power than with ensuring that the rights declared are secured. Decisions motivated by legitimization, however, are not necessarily subject to criticism. Even if motivated by a court's concern for its legitimacy, such decisions nevertheless may have the effect of advancing the law in a meaningful way. Why a court might reach a particular outcome or issue a particular decision that advances the law does not detract from the value of the decision. *See infra* notes 99-102 and accompanying text.

Second Circuit's recent forfeiture decisions, that commitment requires the court to recognize that in some circumstances, if civil forfeiture claimants are otherwise unable to afford representation, they must be provided with counsel. Recognizing that such claimants must be offered a right to counsel in certain circumstances is consistent with the path the Second Circuit has blazed in its recent forfeiture decisions. Taking the additional step of explicitly recognizing a right to counsel would further secure the Second Circuit's tradition of being first among equals.

Part I of this Article provides an overview of the history of forfeiture precedent generally and explains how the federal courts and, particularly, the Second Circuit virtually rubber stamped the government's exercise of its forfeiture power, even as those powers were greatly expanded in the 1980s. Part II identifies a sudden change in the Second Circuit's forfeiture decisions, and discusses five Second Circuit decisions issued in 1992 and early 1993 which favored claimants and provided them generally with important new rights. Part III next suggests that the sudden shift is explained by the court's need to legitimize its role and affirm its power. Finally, Part IV argues that for the court to make legitimation a meaningful concept, it should take the additional step of recognizing that claimants have a right to be assisted by counsel. Specifically, Part IV explains why and how the Due Process Clause of the Fifth Amendment can be read to provide for a right to counsel for claimants in civil forfeiture proceedings.

I. A BRIEF HISTORY OF JUDICIAL DEFERENCE TO FORFEITURE

A. *The Precedent Established*

The legal fiction on which civil forfeiture is based has never really fooled anyone. Judges sitting one hundred years ago were just as capable as judges are today of recognizing the potential oxymoron of "civil forfeiture."⁷ The legal fiction was

⁷ See, e.g., *Boyd v. United States*, 116 U.S. 616 (1886). An 1874 act authorized a court to order production of invoices, books and other private documents in rem proceedings for forfeiture of goods alleged to have been fraudulently imported without being assessed applicable custom's duties. The Court recognized that the

that inanimate property could be guilty of wrongdoing. This allowed the property to be named as a party to a lawsuit, which, in turn, meant that the case was a civil proceeding.⁸ Because forfeiture was a civil proceeding, the protections required in criminal cases, where the government seeks to punish a person for wrongdoing, were not required. Judicial acceptance of the legal fiction, however, did not change the fact that a civil forfeiture of property punished its owner, at least as the term "punish" is commonly understood.⁹ Indeed, from

action, though technically a civil proceeding, was in substance and effect a criminal one. Suits for penalties and forfeitures are of a "quasi-criminal" nature. To require a party to produce his private books to establish a breach of law—a predicate to establishing a right to forfeiture—is actually compelling him to furnish evidence against himself. Thus, although the proceeding is *in rem*, the owner of the goods that are sought to be forfeited is actually a substantial party to the suit and, therefore, should be entitled to all the privileges that apply to a person against whom forfeiture of property is sought based on the commission of a criminal offense. *Id.* at 634-38.

⁸ A judicial forfeiture action is initiated by the filing of a certified complaint by the government pursuant to Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims. SUPP. A.M.C. R. C. If initial review of the complaint by the court indicates that the requirements for an *in rem* action exist, the court will direct the clerk to issue a warrant for the arrest of the property. An authorized person then serves process on the *res* in accordance with Supplemental Rule E(4). Given the Supreme Court's recent decision in *United States v. Good*, No. 92-1180, 1993 WL 505539 (U.S. Dec. 13 1993), if the *res* is real property, the government will be required to give notice prior to executing the warrant of arrest and seizing the *res*. Even without the filing of a complaint for forfeiture, the government may seek to seize property that it intends to attempt to forfeit without prior notice or hearing by two other methods: (1) pursuant to the Customs Laws, which authorizes the attorney general to seize property without notice when he or she has probable cause to do so; and (2) where an *ex parte* probable cause determination is made by a magistrate or a judge who issues a seizure warrant pursuant to the Federal Rules of Criminal Procedure. It is often the case, especially when the *res* is not real property, that the property sought to be forfeited will already be in the custody of the government due to a seizure associated with a law enforcement investigation. Once the forfeiture complaint is filed, a claim must be filed within ten days after execution of process pursuant to Supplemental Rule C(6), or within such additional time as the court may permit. Supplemental Rule C also requires that an answer to the complaint must be served within 20 days after the filing of the claim. SUPP. A.M.C. R. C(6).

⁹ What constitutes punishment under current legal analysis, however, is determined not by what the person subject to the official action experiences, but ordinarily by what the official taking the action intends. *See, e.g., I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032 (1984). A deportation proceeding is a purely civil action to determine eligibility to remain in the country. The immigration judge's sole power is to order deportation, based not on punishment for any crime related to illegal presence in the country, but on a continuing violation of the immigration laws. There are circumstances where a sanction, although nominally civil, may constitute

the first use of civil forfeiture laws in the United States, courts have recognized the unfair results they could cause.¹⁰

Nevertheless, the Supreme Court and the lower federal courts consistently upheld the validity of forfeiture statutes against legal challenges. The Supreme Court had no trouble adopting the "guilty property" fiction of common law England as the basis for rejecting procedural and substantive challenges to civil forfeiture.¹¹ After embracing this legal fiction, the Court rejected subsequent challenges by relying on its own precedent.¹² Moreover, repeated efforts of property owners to assert innocence as a defense to forfeiture of their property were rejected just as frequently.¹³ Eventually, the Court came to dismiss such challenges out of hand and refused to consider fully arguments that forfeiture was unconstitutional because such challenges had been rejected repeatedly on so many previous occasions. Thus, in rejecting a challenge to civil forfeiture, Justice McKenna in 1921 explained that the "guilty property" fiction upon which civil forfeiture rested was "too firmly fixed in the punitive and remedial jurisprudence of the country to now be displaced."¹⁴

The Second Circuit's early forfeiture decisions similarly

punishment. See *United States v. Halper*, 490 U.S. 435 (1989) (civil penalty of \$130,000 would constitute punishment if government's costs were only \$16,000 because disparity is sufficient to make purpose of penalty punitive rather than remedial). Prior to *Halper*, the Court had articulated a test which rested upon the intent of the legislature as to whether a particular sanction was civil or criminal. *United States v. Ward*, 448 U.S. 242 (1980) (monetary penalty imposed by Federal Water Pollution Control Act against operator of drilling facility for dispersion of oil is civil penalty and not criminal punishment).

¹⁰ See, e.g., *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210, 233 (1844); *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827). In *Brig Malek Adhel*, the Court upheld the forfeiture of a ship because it was used in "piratical conduct," even though it was "fully established" that the owner of the ship was not guilty of any wrongdoing. See *Brig Malek Adhel*, 43 U.S. (2 How.) at 238. Similarly, in *The Palmyra*, the Court ruled that a ship could be forfeited because it was used in "piratical conduct," even though there was no criminal conviction for the alleged wrongdoing. *The Palmyra*, 25 U.S. (12 Wheat.) at 14-15.

¹¹ *The Palmyra*, 25 U.S. (12 Wheat.) at 14-15.

¹² See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 684 (1974) (explaining that the "guilty property" rationale of *The Palmyra* was relied upon by the Court in *Brig Malek Adhel* to reject the claimant's argument that forfeiture was unconstitutional).

¹³ See, e.g., *Dobbin's Distillery v. United States*, 96 U.S. 395 (1878).

¹⁴ See *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 511 (1921).

reflected acceptance and approval of the government's forfeiture power. As Judge Pratt has observed, "the Second Circuit[] [exhibited a] passive and tolerant attitude toward civil forfeiture in the first half of the twentieth century."¹⁵ The court gave short shrift to claimants' arguments, even when the result seemed obviously unfair. For example, in denying a challenge to the forfeiture of diamonds belonging to a claimant who had engaged in no wrongdoing, the court stated in 1918 that "even if . . . innocent persons suffer great hardships" as a result of a forfeiture action, that is not grounds for voiding a forfeiture judgment because "[t]he purpose of Congress is perfectly clear and must be carried out"¹⁶ Eventually, as did the Supreme Court, the Second Circuit came to rely on the entrenched nature of its own precedent as the reason for rejecting challenges to forfeiture. In explaining its rejection of a challenge to a civil forfeiture in 1928, the court wrote that the forfeiture provision in question had "been applied innumerable times without question of its validity" and, for that reason, there was "no ground to doubt its constitutionality."¹⁷

The courts' unwillingness even to address the merits of new challenges claimants made to the forfeiture laws was especially indefensible given the precedent upon which they relied in refusing to do so. The earlier cases on which the courts rested their summary rejection of claimants' arguments had never satisfactorily answered the valid objections made to the legal fiction on which forfeiture was based. Nevertheless, claimants' arguments, for the most part, continued to fall on deaf ears.

B. *The Expansion of Forfeiture and the Judicial Response*

After a flurry of forfeiture cases and decisions in the early part of the century, the government's use of forfeiture apparently decreased for a period of time, corresponding with the end of prohibition. Before long, however, criminal activity linked to illicit drugs led to a new series of forfeiture actions.

¹⁵ Pratt & Petersen, *supra* note 1, at 662.

¹⁶ *In re Four Packages of Cut Diamonds*, 255 F. 314, 317 (2d Cir. 1918), *modified*, 256 F.2d 305 (2d Cir. 1919).

¹⁷ *United States v. 416 Cases G.T. Whisky*, 27 F.2d 738 (2d Cir.), *cert. denied*, 278 U.S. 627 (1928).

Once again, the federal courts exhibited a "passive and tolerant" acceptance of the government's use of forfeiture. The Supreme Court reaffirmed its extreme deference to the government's forfeiture power in its 1974 opinion in *Calero-Toledo v. Pearson Yacht Leasing Co.*,¹⁸ a decision which guided and controlled federal courts' forfeiture decisions for nearly two decades. The owner of the yacht in *Pearson Yacht* leased it to two men. While the yacht was being used exclusively by the lessees, a small amount of marijuana was found on board the boat. It was undisputed that the owner of the yacht did not know of the contraband. The government seized the yacht pursuant to a statute which made property subject to forfeiture if it was used to transport or to facilitate the transportation of a controlled substance.¹⁹ A three-judge court, relying on the Supreme Court's due process analysis in *Fuentes v. Shevin*,²⁰ and its forfeiture decision in *United States v. United States Coin & Currency*,²¹ ruled that the seizure and forfeiture violated the Constitution.²² The Supreme Court reversed, rejecting the argument that *United States Coin & Currency* had overruled, *sub silentio*, its earlier forfeiture decisions.²³ The Court held that neither the seizure nor the forfeiture violated the Constitution, even though the owner was innocent of any wrongdoing.²⁴ The decision in *Pearson Yacht* proved particularly important because of the time it was decided.

In the early 1980s, when the government began what has become its current war on drugs, civil forfeiture was intended to be an important new weapon in the government's arsenal. Thus, in 1984, Congress for the first time authorized the forfeiture of real property.²⁵ As part of that same legislation, Congress authorized the government to seize real property potentially subject to forfeiture by obtaining an *ex parte* seizure warrant.²⁶ Congress further expanded the scope of the forfeiture

¹⁸ 416 U.S. 663 (1974).

¹⁹ *Id.* at 666.

²⁰ 407 U.S. 67 (1972).

²¹ 401 U.S. 715 (1971).

²² 363 F. Supp. 1337, 1342-43 (D.P.R. 1973).

²³ 416 U.S. at 680.

²⁴ *Id.* at 679-80, 686-91.

²⁵ 21 U.S.C. § 881(a)(7) (1988).

²⁶ *See id.* § 881(b); 18 U.S.C. § 981(b)(1) (1988).

laws by enlarging the type of conduct that would provide a basis for forfeiture, and by broadening the nature of the relationship between the property sought to be forfeited and the underlying activity associated with it.²⁷ Because of the Supreme Court's approval of the forfeiture in *Pearson Yacht*, the federal courts, including the Second Circuit, consistently approved and upheld the government's use of civil forfeiture. As Judge Pratt has noted, the "Second Circuit endorse[d] an aggressive and zealous use of civil forfeiture."²⁸ The court's endorsement of civil forfeiture was reflected in rulings that interpreted forfeiture statutes so broadly as to enlarge the range of property subject to forfeiture, and to make it easier for the government to prevail in forfeiture actions.

For example, in 1986 the Second Circuit ruled that it was permissible for the government to seize assets based on a forfeiture complaint without making a showing of probable cause, and that due process did not require a post-seizure probable cause hearing.²⁹ In that same case, the court ruled that to seek forfeiture of money that is traceable to a violation of the controlled substances act,³⁰ the government did not need to link the property to a particular illegal transaction. Conversely, when interpreting a statutory defense to forfeiture, the court did so narrowly. In *United States v. 141st Street Corp.*,³¹ the court ruled that to qualify for the "lack of consent" defense to forfeiture, a property owner-claimant had to establish that he or she did all that reasonably could be expected to prevent the illegal activity.³²

The court expressed its approval of the government's aggressive use of civil forfeiture in the war on drugs in dicta. When confronted with a challenge to the forfeiture of a Mercedes-Benz automobile because the remains of a marijuana cigarette were found in the car, the court did not hesitate to

²⁷ Until 1984, statutes allowed forfeiture of property that was used to transport a controlled substance or the proceeds of an illegal drug transaction. 21 U.S.C. § 881(a)(6) (1988). In 1984, property that was used to "facilitate" a violation of the controlled substances act became subject to forfeiture. 21 U.S.C. § 881(a) (1988).

²⁸ Pratt & Petersen, *supra* note 1, at 47-48.

²⁹ *United States v. Banco Cafetero Panama*, 797 F.2d 1154, 1162-63 (2d Cir. 1986).

³⁰ 21 U.S.C. § 881(a)(6).

³¹ 911 F.2d 870 (2d Cir. 1990).

³² *Id.* at 879-80.

uphold the forfeiture, relying on its earlier precedent that "the transportation of any quantity of drugs however minute is admittedly sufficient to merit the forfeiture of the vehicle."³³ Even more telling was the court's concluding paragraph in its *Livonia Road* decision.³⁴ The district court had granted summary judgment to the government, forfeiting a 120-acre parcel of land with a house, two barns and several small buildings under the theory that the defendant-property had "facilitated" the distribution of cocaine, even though all of the activity related to cocaine had occurred only at the house. The Second Circuit, in affirming the judgment of forfeiture, stated:

We are aware that the combined effect of the forfeiture statute and the summary judgment procedures create an unusual, and perhaps even harsh, result in this case. Nevertheless, this result fits squarely within the statutory framework for civil forfeitures that Congress has expressly provided; we certainly cannot say that Congress did not intend this result in view of the magnitude of the national drug problem it was addressing.³⁵

The state of forfeiture law at the conclusion of the 1980s in the Second Circuit and in the other circuits, was thus unmistakable. Following the lead provided by the Supreme Court in *Pearson Yacht*, and endorsing Congress's adoption of forfeiture as the favorite new weapon in the war on drugs, the federal courts consistently ruled against the interests of claimants and in favor of the government's broad use of forfeiture.

II. LEVELLING THE PLAYING FIELD FOR CLAIMANTS

Having been given the green light by the judiciary, Congress continued to expand the scope of the forfeiture laws. Thus, "money laundering"³⁶ was added to the list of conduct that can form the basis for forfeiture.³⁷ Significantly, not only are the "proceeds" of, or property used to "facilitate," money laundering subject to forfeiture, but Congress also authorized

³³ *United States v. One Mercedes-Benz*, 846 F.2d 2, 5 (2d Cir. 1988) (per curiam) (quoting *United States v. One 1974 Cadillac Eldorado*, 548 F.2d 421, 425 (2d Cir. 1977)).

³⁴ *United States v. 4492 S. Livonia Rd.*, 889 F.2d 1258 (2d Cir. 1989).

³⁵ *Id.* at 1271.

³⁶ 18 U.S.C. § 1956 (1988).

³⁷ *See* 18 U.S.C. § 981(a)(1)(A) (1988).

the forfeiture of property "involved in" money laundering.³⁸ Because nearly all crimes involving money will also commonly constitute money laundering, the potential implications of this particular expansion are enormous, given that any property "involved" in money laundering can be forfeited. As the United States Department of Justice has recognized, under the money laundering forfeiture provisions, prosecutors have the ability to seek forfeiture of property associated with conduct not otherwise included within the forfeiture laws (e.g., mail fraud) by characterizing such conduct as money laundering.³⁹

For a period of time, forfeiture seemed immune from criticism; after all, how could anyone argue that crime should pay? The expansion of civil forfeiture and the government's aggressive use of those laws, however, lead to criticism from some observers who maintained that the civil forfeiture process was so one-sided that it permitted government abuse and overreaching. One concern that has come to be widely shared by forfeiture critics is the financial self-interest of law enforcement in civil forfeiture. Under most forfeiture statutes, the proceeds go to law enforcement, often-times to the specific agency or organization responsible for the forfeiture. Therefore, there is a direct, positive correlation between the property that is forfeited and the amount of money available for the particular law enforcement agency. Critics suggest that the incentive to make money may become more attractive than curbing or solving crime, thereby skewing law enforcement's priorities and its true mission.⁴⁰ The corrupting influence of financial gain was recognized by a federal district judge, who wrote that he had been "misled particularly by the affidavits of the state law enforcement officials whose agencies stand to gain financially as a result of the forfeiture."⁴¹ Notwithstanding such

³⁸ *Id.*

³⁹ *Civil Forfeiture*, Crim. Prac. Man. (BNA) ch. 151, at 519 (Supp. Aug. 18, 1993).

⁴⁰ See, e.g., Pratt & Petersen, *supra* note 1, at 85; *Civil Forfeiture*, *supra* note 39, ch. 151, at 552; Jeff Brazil & Steve Berry, *Tainted Cash or Easy Money?*, ORLANDO SENT., June 14, 1992, at A1. The *Sentinel* conducted a study of the Volusia County Florida Sheriff's Office, which revealed that the office had obtained more than \$3.5 million in forfeiture proceeds from seizures along Interstate 95. Based on its study of the forfeiture practices of the Volusia County Sheriff's Office, *The Orlando Sentinel* suggested that the Office had come to spend time looking for drug money instead of fighting crime.

⁴¹ *United States v. 110 Collier Drive*, 793 F. Supp. 1048, 1052 (N.D. Ala.

expressions of concern, there seemed to be little reason to think that judicial scrutiny of forfeiture was likely to change, especially given the established precedent of years of prior decisions and the acknowledged deference to the government's forfeiture power that precedent embodied.⁴²

Change did come, however, at least in the Second Circuit. Compared to the usual pace of the common law, moreover, the change was sudden and dramatic. In 1992 and early 1993, the Second Circuit issued five decisions favorable to claimants. The issues in these cases ranged from constitutional rulings of broad effect to decisions based on statutory interpretation which, while based on the facts of the particular case, still provide important benefits to future civil forfeiture claimants.⁴³ Not only did the court's rulings favor claimants in a number of important respects, but the court repeatedly expressed its concern about the government's potential abuse of civil forfeiture. Another important message was communicated by the court's opinions; the government could no longer expect the court routinely to sanction use of the civil forfeiture laws simply because those laws might be perceived as helpful to the war on drugs.

For example, in one of its 1992 opinions, *United States v. All Assets of Statewide Auto Parts, Inc.*⁴⁴ ("Statewide"), the Second Circuit considered an issue that it had addressed twice before, once in 1989 and again in 1990—the pre-notice seizure of real property by means of an *ex parte* warrant.⁴⁵ In *Statewide*, the government filed an in rem forfeiture complaint that sought forfeiture of "all assets" of four corporations (including

1992).

⁴² Pratt & Petersen, *supra* note 1, at 671. Indeed, as noted above, in 1991 Judge Pratt commented that "[t]he Second Circuit, at least for now, remains unable to avoid the inevitably unjust results [of forfeiture proceedings]." *Id.*

⁴³ See *United States v. \$31,990 in United States Currency*, 982 F.2d 851 (2d Cir. 1993); *United States v. One 1987 Jeep Wrangler Automobile*, 972 F.2d 472 (2d Cir. 1992); *United States v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896 (2d Cir. 1992); *Onwubiko v. United States*, 969 F.2d 1392 (2d Cir. 1992); *United States v. 38 Whaler's Cove Drive*, 954 F.2d 29, 35 (2d Cir.), *cert. denied*, 113 S. Ct. 55 (1992).

⁴⁴ 971 F.2d 896 (2d Cir. 1992).

⁴⁵ The two earlier cases which had addressed this issue were *United States v. 141st St. Corp.*, 911 F.2d 870 (2d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991) and *United States v. 4492 S. Livonia Rd.*, 889 F.2d 1258 (2d Cir. 1989), *reh'g denied*, 897 F.2d 659 (2d Cir. 1990).

Statewide) and certain parcels of real property pursuant to 18 U.S.C. section 981(a)(1)(A).⁴⁶ According to the government's theory, the in rem defendants had been involved in the operation of a stolen car business. At the same time the government filed the forfeiture complaint, it submitted an *ex parte* application for a warrant to seize the in rem defendants, which was supported by an extensive declaration of a local (Nassau County) police detective detailing the "laundering" of stolen automobiles. After the seizure warrant was granted, the government executed it without prior notice. The government "seized" the property by sealing the premises, turning off the telephone service and hanging "out of business" signs on the outside doors. Statewide challenged the seizure and, when the district court refused to vacate the seizure, it appealed. Rejecting the government's argument that it did not have jurisdiction, the court ruled that the *ex parte*, pre-notice seizure violated the property owners' due process rights.⁴⁷ Employing the three-part balancing test of *Mathews v. Eldridge*,⁴⁸ the court recognized the legitimacy of the government's asserted interest in obtaining a pre-notice seizure and also acknowledged that the private interest at stake, while considerable, was not as great as it would have been had a home, as opposed to business premises been seized.⁴⁹ The court, however, nevertheless found the seizure to be illegal, essentially because there were no exigent circumstances which justified the government's complete and continuing seizure of the premises.⁵⁰ What is particularly notable about the court's ruling in *Statewide* is the court's own recognition that: "The *ex parte* procedures used here were virtually identical to those we permitted in [the Court's two previous cases involving *ex parte*, pre-notice forfeiture seizures] *141st Street Corp.*, and *Livonia*."⁵¹ Moreover,

⁴⁶ 971 F.2d at 898-99.

⁴⁷ *Id.* at 904-05.

⁴⁸ 424 U.S. 319, 335 (1976).

⁴⁹ *Statewide*, 971 F.2d at 902-03.

⁵⁰ According to the Court, the government's legitimate interests could have been satisfied by less-restrictive means, such as a "receivership, an occupancy agreement, and lis pendens—invoked separately or together—[which] would have served the government's interest more than adequately." *Id.* at 904-05.

⁵¹ *Id.* at 905; *United States v. 141st St. Corp.*, 911 F.2d 870, 875 (2d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991); *United States v. 4492 S. Livonia Rd.*, 889 F.2d 1258, 1260 (2d Cir. 1989), *reh'g denied*, 897 F.2d 659 (2d Cir. 1990).

those two earlier decisions involved property in which the *private* interest at stake was greater—*Livonia* involved the *ex parte*, pre-notice seizure of a home, and *141st Street Corp.* involved the *ex parte*, pre-notice seizure of an apartment building. To be sure, “the invasion of the property interest” in *Statewide* was greater than in either *Livonia* or *141st Street*. In *Livonia* the government reached an occupancy agreement with the claimant to remain in the house during the pendency of the forfeiture proceedings, and in *141st Street* the government reached an agreement which permitted certain tenants to remain in their apartments, whereas in *Statewide* the government had seized an entire business, effectively shutting it down completely. Even so, the different ruling in *Statewide* cannot be explained satisfactorily based on the greater property invasion. Although the greater invasion may have justified finding that the subsequent continuing seizure of the property was impermissible, the court ultimately allowed the government to continue its seizure. The court ruled that what was impermissible was not the continuing seizure, but the initial seizure of the premises itself without notice. That result is even more surprising inasmuch as *Statewide* only involved the seizure of business premises, whereas both *Livonia* and *141st Street Corp.* involved the seizure of people’s homes.

Not only had the Second Circuit ruled that the government had acted illegally in executing the *ex parte* seizure in *Statewide*, but it also expressed its concern over the government’s potential abuse of civil forfeiture: “[w]e continue to be enormously troubled by the government’s increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for the due process buried in those statutes.”⁵² This concern was emphasized even by Judge Van Graafeiland, who dissented from the majority’s holding that the seizure was unconstitutional. He concluded his dissenting opinion by stating that he “agree[d] wholeheartedly with the expression of concern contained in the majority’s” opinion.⁵³

In another 1992 decision, *United States v. 38 Whaler’s Cove Drive*,⁵⁴ the Second Circuit became the first federal court

⁵² 971 F.2d at 905.

⁵³ *Id.* at 910.

⁵⁴ 954 F.2d 29 (2d Cir.), *cert. denied*, 113 S. Ct. 55 (1992).

of appeals to rule explicitly that the Eighth Amendment's cruel and unusual punishment provision and the Fifth Amendment Double Jeopardy Clause could apply to civil forfeitures.⁵⁵ The holding that the Eighth Amendment can apply to civil forfeitures is especially important, given that the "nexus" that must be shown between the prohibited conduct and the property to be forfeited has been expanded to include "facilitation" or "involved in." As the statutory relationship between property and conduct that must be shown becomes more tenuous, the more likely it is that there will be disproportionate forfeitures, which necessitates some limit on the property that may be subject to forfeiture.⁵⁶ That the Double Jeopardy Clause may apply to a civil forfeiture proceeding is similarly important because it will help prevent civil forfeiture from being used as a "dry run" for a subsequent criminal prosecution.⁵⁷ Viewed in this light, the court's holding might seem unsurprising rather than worthy of special note. Prior to 1992, however, the court had been unwilling to reach such a decision, as had every other circuit that had occasion to address the question.⁵⁸

As in *Statewide*, the Second Circuit's message was communicated through more than just its holding. The court let it be known that the claimed importance of civil forfeiture to the "war on drugs" would no longer be reason to allow the government's forfeiture power to remain unchecked:

While we are extremely sympathetic to the need to address our nation's serious narcotics problems, we do not believe that a disproportionately large forfeiture can be reasonably justified as a civil fine as opposed to punishment by placing full responsibility for the "war on drugs" on the shoulders of every individual claimant.⁵⁹

⁵⁵ *Id.* at 35-37.

⁵⁶ The Second Circuit's ruling as to the applicability of the Eighth Amendment in *Whaler's Cove* has been modified by the Supreme Court's subsequent decision in *Austin v. United States*, 113 S. Ct. 2801 (1993). In *Austin*, the Supreme Court held that the excessive fines provision of the Eighth Amendment ordinarily applies to civil forfeitures, not the prohibition against cruel and unusual punishment.

⁵⁷ *Statewide*, 971 F.2d at 903.

⁵⁸ See *United States v. 141st St. Corp.*, 911 F.2d 870, 880-81 (2d Cir. 1990) (citing *United States v. One 107.9 Acre Parcel of Land*, 898 F.2d 396, 400-01 (3d Cir. 1990)); *United States v. 40 Moon Hill Rd.*, 884 F.2d 41, 43-45 (1st Cir. 1989); *United States v. Santoro*, 866 F.2d 232, 234-35 (9th Cir. 1988) (Eighth Amendment's protections do not apply in civil forfeiture).

⁵⁹ 954 F.2d at 37.

The court made the same point in another 1992 decision, *United States v. Lasanta*.⁶⁰ In *Lasanta*, the government maintained that 21 U.S.C. section 881(b)(4), which provides that the Attorney General may seize "[a]ny property subject to forfeiture" without process when he or she "has probable cause to believe that the property has been used or is intended to be used in violation of this subchapter," creates an exception to the warrant requirement of the Fourth Amendment.⁶¹ Thus, the government argued, the warrantless seizure and search of the defendant's automobile in *Lasanta* did not violate the Fourth Amendment because the car was seized when there was probable cause to believe it was subject to forfeiture and, under those circumstances, section 881(b)(4) obviated the need to obtain a warrant. Although the government's argument might seem so untenable that rejecting it would hardly have seemed significant,⁶² a number of other circuit courts had accepted the argument.⁶³ The Second Circuit, however, flatly rejected the government's argument. Moreover, in rejecting the argument, the court again let it be known that the "war on drugs" was not a talisman for ignoring the law: "We find no language in the fourth amendment suggesting that the right of the people to be secure in their 'persons, houses, papers and effects' applies to all searches and seizures except civil-forfeiture seizures in drug cases."⁶⁴

In two other 1992 forfeiture decisions, *United States v. \$31,990 in United States Currency*,⁶⁵ and *Onwubiko v. United States*,⁶⁶ the Second Circuit issued rulings that narrowly interpret and strictly apply particular forfeiture statutory provisions. In *\$31,990 in United States Currency*, the government sought \$31,990 in cash found in the trunk of a car whose driv-

⁶⁰ 978 F.2d 1300 (2d Cir. 1992).

⁶¹ *Id.* at 1304.

⁶² The government's argument appears strained for several reasons. First, the Fourth Amendment, and not the statute, determines whether a warrant is required; second, the statute says nothing to suggest that it is attempting to obviate the warrant requirement of the Fourth Amendment; and third, even if Congress did intend to supersede the warrant requirement by passage of the statute, it could not do so without violating the Constitution. *Id.* at 1304-05.

⁶³ *Id.* at 1304 (citations omitted).

⁶⁴ *Id.* at 1305.

⁶⁵ 982 F.2d 851 (2d Cir. 1993).

⁶⁶ 969 F.2d 1392 (2d Cir. 1992).

er was found in possession of one-half gram of cocaine. Relying on 21 U.S.C. section 881(b)(4), the government argued that the totality of the facts established probable cause to believe that the cash was connected to the exchange of a controlled substance. The court rejected the government's argument on the facts, and affirmed the district court's dismissal of the forfeiture action and its order returning the cash to the claimant. The decision is significant beyond its factually based holding for several reasons. First, the opinion demonstrates the court's willingness to examine critically the government's factual assertions to support forfeiture. Second, the court reaffirmed the principle that the government was required to show a "substantial connection . . . between the money to be forfeited and the exchange of a controlled substance."⁶⁷ Third, the court ruled that to obtain forfeiture, the government had to show that the property it sought was connected to a particular illegal transaction and not merely "related to *some* illegal activity."⁶⁸ Further, the court once again concluded its opinion by asserting that it was unwilling to allow the war on drugs to be used as a justification for ignoring the rights of civil forfeiture claimants: "While we recognize the formidable task faced by the government in its war on drugs, we decline to condone the abuse to civil forfeiture as a means of winning that war."⁶⁹

Onwubiko similarly involved a decision that, while factually based, has implications for future civil forfeiture cases. Mr. Onwubiko arrived in the United States with \$2,438 in U.S. currency on his person and "[seventy-two] heroin-filled balloons in his digestive tract."⁷⁰ The government sought forfeiture of the money based on the statutory provision that property used to "facilitate" a drug offense is subject to forfeiture.⁷¹ The facts on which the government relied to argue that the money was used to "facilitate" the heroin offense were that "(1)

⁶⁷ 982 F.2d at 854 (quoting *United States v. \$228,536 in United States Currency*, 895 F.2d 908, 916 (2d Cir.), *cert. denied*, 495 U.S. 958 (1990)).

⁶⁸ *Id.* at 854. This particular ruling is in contrast to the court's 1986 decision in *United States v. Banco Cafetero Panama*, 797 F.2d 1154 (2d Cir. 1986), where the court ruled that a connection to a particular illegal transaction was not required. *Id.* at 1157-58.

⁶⁹ 982 F.2d at 856.

⁷⁰ 969 F.2d at 1393.

⁷¹ *Id.* at 1399.

Onwubiko was carrying the heroin, and (2) Onwubiko was carrying the currency."⁷² The court ruled that these facts were insufficient to satisfy even the government's "featherweight initial showing that the currency was used to 'facilitate' the drug offense."⁷³ Moreover, the court went on to embrace fully the requirement that the government was required to show a "substantial connection" between the property to be forfeited and the underlying criminal activity.⁷⁴ This ruling was in contrast to the court's earlier rulings that to obtain forfeiture under a "facilitation" theory, the government need only show a "nexus" between the property and illegal activity.⁷⁵ In addition to the significance of these legal principles, the opinion in *Onwubiko* reveals a shift in the court's approach to forfeiture cases for two additional reasons. First, the court ruled that Mr. Onwubiko's inability to post a "cost bond" as required by statute could not be used, under the circumstances of the case, to preclude him from contesting the forfeiture.⁷⁶ Second, the court ruled that on remand, the district court should appoint counsel for Mr. Onwubiko.⁷⁷

In still another 1992 forfeiture decision, *United States v. One 1987 Jeep Wrangler Automobile* ("Jeep Wrangler"),⁷⁸ the Second Circuit exhibited a concern for claimants' rights not found in earlier years. In *Jeep Wrangler*, the government sought forfeiture of the defendant Jeep because the driver had possessed twenty grams of marijuana. The Drug Enforcement Administration ("DEA") refused to consider the claimant's request for administrative review of the forfeiture because, it

⁷² *Id.*

⁷³ *Id.* The court ultimately remanded the case for a trial on Mr. Onwubiko's claim, and noted that the government would have to present more than these facts to meet its initial burden. *Id.* at 1400.

⁷⁴ *Id.* at 1399-1400.

⁷⁵ See, e.g., *United States v. 38 Whaler's Cove Drive*, 954 F.2d at 29, 33 (2d Cir. 1992) (government only need show a nexus, not a substantial connection, between property and underlying criminal activity).

⁷⁶ 969 F.2d at 1399. The court referred to the government's argument that Mr. Onwubiko was precluded from challenging the forfeiture because he failed to post a cost bond as "Dickensian in its irony: The government took all of Onwubiko's money, but thereafter conditioned his right to put the government to its burden of proof on the payment of \$250." *Id.*

⁷⁷ *Id.* at 1399 (citing *Hodge v. Colon*, 802 F.2d 58, 61 (2d Cir. 1986)); see 28 U.S.C. § 1915(d) (1988 & Supp. IV 1993).

⁷⁸ 972 F.2d 472 (2d Cir. 1992).

maintained, the claimant had failed to comply with the applicable rules requiring a claimant to give notice of his or her intent to contest the proposed forfeiture. The court first ruled that while it is ordinarily without jurisdiction to review administrative forfeiture decisions, it had the power to do so here because it was reviewing the DEA's refusal to exercise its administrative jurisdiction.⁷⁹ Further, the court ruled that the DEA's refusal to consider the claimant's challenge to its administrative forfeiture action violated due process.⁸⁰

Viewed collectively, these 1992 forfeiture decisions constitute a remarkable change in the substantive content of the Second Circuit's forfeiture law. The opinions also reflect a marked change in the court's approach to reviewing civil forfeiture proceedings. These changes are even more noteworthy because of the relatively short time span in which the change occurred. Such a conclusion, however, is not intended to overstate the contrast from previous years; not every forfeiture decision in 1992 favored claimants, just as not all decisions in prior years favored the government.⁸¹ Nevertheless these differences do not undermine the essential point. 1992 was a

⁷⁹ *Id.* at 480.

⁸⁰ *Id.* at 482. The due process ruling is likely to have less direct impact on future forfeiture cases than the court's other 1992 decisions because the ruling depended on the particular circumstances, which are not likely to re-occur. Nevertheless, the decision is still important in reviewing the court's recent forfeiture decisions because it illustrates that the court is willing to police the civil forfeiture process even in comparatively small or seemingly insignificant cases, which probably would not have received the court's attention in earlier years.

⁸¹ For example, in another 1992 decision, *United States v. 755 Forest Rd.*, 985 F.2d 70 (2d Cir. 1992), the Second Circuit affirmed a summary judgment forfeiture of a claimant's home based on her husband's possession of narcotics and associated paraphernalia. In affirming, the court illustrated the same mechanistic rejection of the claimant's contentions typical of forfeiture decisions in earlier years. Judge Van Graafeiland, who had dissented earlier in the year to the decision in *United States v. Statewide Auto Parts, Inc.*, 971 F.2d 896, 906 (2d Cir. 1992), that the pre-notice seizure violated due process, dissented in *One Parcel* and expressed the view that "[t]his case is a glaring example of the Government's draconian use of civil forfeiture." 985 F.2d at 73. Conversely, even before 1992, the Second Circuit had issued opinions in civil forfeiture cases which exhibited concern for the rights of claimants. *See, e.g., United States v. 15 Black Ledge Drive*, 897 F.2d 97 (2d Cir. 1990) (claimant's flat denial of knowledge of underlying criminal activity may be sufficient to defeat summary judgment); *United States v. Property at 4492 Livonia Rd.*, 889 F.2d 1258, 1270 (2d Cir. 1989) (court expresses concern over failure of civil forfeiture statutes to place an express territorial limit on the forfeiture of real property).

watershed year for civil forfeiture claimants in the Second Circuit, unlike any previous year in the history of the court. The court's prior forfeiture decisions did not give reason to expect such a change.

III. THE ROLE OF LEGITIMATION IN THE SUDDEN SHIFT

A. *The Reason for the Sudden Shift*

An obvious question is why? What might explain the change in both the content and tone of the Second Circuit's forfeiture opinions in such a short period of time? One answer might be that Judge Pratt, who is particularly knowledgeable about forfeiture law,⁸² was on the panel and authored the opinions in three of the cases.⁸³ That suggestion, however, does not provide a satisfactory answer to the question because Judge Pratt was joined by other members of the court in each of his opinions and had no control over the decisions in the cases in which he did not sit.

Another possible answer might be changes in the war on drugs. If the government were winning the war, there might be less reason for the court to "endorse an aggressive and zealous use of civil forfeiture"⁸⁴ by the government; under that scenario, the perceived need for aggressive forfeiture tactics would not be so great, and the court could then exercise its own authority to restrict the government's forfeiture power without subjecting itself to criticism for restricting the government's ability to fight the war on drugs. But no one argues that the government is winning. Alternatively, if civil forfeiture had been shown to be ineffective, it might explain a change in the court's civil forfeiture cases from routine acceptance to critical examination of the process. No one appears to suggest, however, that civil forfeiture has no effect; indeed, the government continues to champion the cause of civil forfeiture, and its use of that process continues to increase.⁸⁵

⁸² See generally Pratt & Petersen, *supra* note 1.

⁸³ Judge Pratt was the author of the opinions in *United States v. Lasanta*, 978 F.2d 1300 (2d Cir. 1992), *United States v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896 (2d Cir. 1992) and *Onwubiko v. United States*, 969 F.2d 1392 (2d Cir. 1992).

⁸⁴ Pratt & Petersen, *supra* note 1, at 47-48.

⁸⁵ In 1992, the government filed 5083 civil forfeiture cases. See *United States*

One noticeable change was the media coverage of forfeiture. Typical of this coverage was what has been referred to as an "influential" six-day series on civil forfeiture in the Pittsburgh Press from August 11-16, 1991, entitled *Presumed Guilty: The Law's Victims in the War on Drugs*.⁸⁶ The series presented an impressive number of forfeiture "horror stories," in which innocent property owners were depicted as victims of the overzealous and self-interested enforcement of the civil forfeiture laws by federal and state authorities. Although media attention of the government's abuse of the forfeiture laws and the imbalance and unfairness built into the civil forfeiture process had begun before 1991, it had become much more common and frequent by 1991.

Notwithstanding this negative coverage, the government seemed unable to control its forfeiture litigation. It appeared almost willing to oblige forfeiture critics, as its civil forfeiture efforts provided plenty of examples of serious abuse.⁸⁷ Moreover, as noted above, law enforcement's financial self-interest in maximizing civil forfeiture revenue was further fuel for criticism.⁸⁸ In some instances, decisions as to the allocation of law enforcement resources appeared to be made more to maximize revenue than reduce crime.⁸⁹ The former head of the

v. \$30,440 in United States Currency, 2 F.3d 328 (9th Cir. 1993) (citing EXECUTIVE OFFICE OF THE UNITED STATES ATTORNEYS, STATISTICAL REPORT FOR THE FISCAL YEAR 1992 (1992) (Table 20)).

⁸⁶ See *Civil Forfeiture*, *supra* note 39, ch. 151, at 552.

⁸⁷ See, e.g., *United States v. 110 Collier Drive*, 793 F. Supp. 1048 (N.D. Ala. 1992); *Jones v. United States Drug Enforcement Admin.*, 819 F. Supp. 698 (M.D. Tenn. 1993). The *Jones* incident, in which the DEA seized all of the cash in Mr. Jones' possession after receiving a report that a black man had purchased an airplane ticket with cash, was widely featured in news stories and congressional hearings well before the district court published its decision in 1993.

⁸⁸ See *supra* notes 40-41 and accompanying text.

⁸⁹ Support for this criticism was provided by a Justice Department memorandum to all United States Attorneys' Offices in 1990 that advised as follows:

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

Executive Office for U.S. Attorneys, U.S. Dep't of Justice, *Memorandum*, 38 U.S. ATTORN. BULL. 180 (Aug. 15, 1990), *quoted in* Gary M. Malveal, *The Unemployed Criminal Alternative in the Civil War of Drug Forfeitures*, 30 AM. CRIM. L. REV. 35, 49-50 (1992).

The impact of this revenue-generating view of forfeiture on courts' treatment

Justice Department's Asset Forfeiture Office, Michael Zeldin, speaking at an ABA conference, essentially acknowledged that the government failed to control adequately its forfeiture efforts:

The intelligent thing to have done would have been to pick your cases carefully and not overreach. We had a situation in which the desire to deposit money into the asset forfeiture funds became the reason for being of forfeiture, eclipsing in certain measure the desire to effect fair enforcement of the laws as a matter of pure law enforcement objectives.⁹⁰

The impact of the media coverage was demonstrated in 1992 when Congressional hearings were scheduled on reforming the forfeiture laws.⁹¹ When the hearings were held, they become a further public forum for exposing civil forfeiture abuses.⁹² The impact of the media exposure of forfeiture abuse was also demonstrated when a Republican member of the House of Representatives, supported by numerous co-sponsors, introduced legislation that would have made significant changes in civil forfeiture law favorable to claimants.⁹³

Did the media coverage have anything to do with the change in the Second Circuit's forfeiture decisions? After all, the change in the court's opinions mirrored, both in time and attitude, the perceived change in the public's attitude toward forfeiture which was caused by the media coverage—that is, from a near universal acceptance of civil forfeiture as an important weapon in the war on drugs to increasing concern that it was being abused by law enforcement. Arguably, the public's change in attitude probably made it more acceptable for the court to criticize the government's forfeiture efforts and to appear to reign in the government to some degree. Article III

of the government's forfeiture powers was illustrated when Justice Kennedy quoted this same memorandum in his majority opinion in *United States v. Good*, No. 92-1180, 1993 WL 505539 (U.S. Dec. 13, 1993), as a justification for providing greater procedural protections for claimants.

⁹⁰ See *Civil Forfeiture*, *supra* note 39.

⁹¹ See *Current Reports*, 7 Crim. Prac. Man. (BNA) 300 (June 23, 1993) (interview of George Fishman, legislative counsel to Representative Henry Hyde, sponsor of proposed legislation to reform civil forfeiture).

⁹² See *Civil Forfeiture*, *supra* note 39, ch. 151, at 554-56.

⁹³ See *Civil Forfeiture*, *supra* note 39, ch. 151, at 554 (noting Representative Henry Hyde's (R. - ILL.) sponsorship of The Civil Forfeiture Act of 1993, H.R. 2417, 103d Cong., 1st Sess. (1993)).

judges, however, need not concern themselves with what is publicly acceptable. Moreover, that the change in public attitude may have affected the court's civil forfeiture jurisprudence does not explain why the court did not rely on the precedent and approach it had followed in earlier years.

Members of the court, as members of the public at large, may well have begun to share with the rest of the informed public concern about the government's possible abuse of the civil forfeiture laws. But if the members of the court felt a compelling need to express those concerns in their institutional roles, they could have done so through dicta without substantively changing the law. Thus, while concern with the possible abuse of the forfeiture laws may explain the change in the dicta found in the court's opinions (from statements endorsing civil forfeiture⁹⁴ to statements expressing concern that the law was being abused),⁹⁵ such concern fails to explain substantive changes in the law.

The change can best be explained by the Second Circuit's need to legitimize itself and its institutional role as a separate branch of government. For the court to do nothing in the face of increased public concern about the government's abuse of civil forfeiture law, and the unfairness of the civil forfeiture process generally, would be to jeopardize its institutional legitimacy and power. The public expects its courts to act to curb executive abuses of power. Judicial action in such circumstances is intrinsic to an "independent-but-equal" division of governmental responsibility among different branches. Given the public concern and attention that had developed, if the court were to do nothing when confronted with specific instances of government overreaching in the execution of forfeiture laws, it would render its role superfluous.⁹⁶ Judges establish or pro-

⁹⁴ See, e.g., *United States v. 4492 S. Livonia Rd.*, 889 F.2d 1258 (2d Cir. 1989).

⁹⁵ See, e.g., *United States v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896, 903-04 (2d Cir. 1992).

⁹⁶ All independent power possessed by the judicial branch depends upon public support for its institutional role. As Otto Kirchheimer has explained, courts cannot direct public opinion or force changes in society because they have no independent means by which to enforce their rulings. See OTTO KIRCHHEIMER, *POLITICAL JUSTICE* 3-21 (1961). But neither can they ignore public opinion or social change. Courts need to respond to public concerns because a failure to do so implies that judges are not fulfilling their institutional role and, therefore, will lose power by attrition. Judicial decisions establishing or protecting the rights of claimants are

tect legal principles that benefit unpopular litigants when they perceive that the failure to do so would mean that they were no longer fulfilling their institutional role. Being true to one's institutional identity and, thereby, maintaining one's institutional power, explains judicial lawmaking under such circumstances far more frequently than does intrinsic allegiance to pure principles of law or individual rights. It also best explains the change in the Second Circuit's forfeiture opinions in 1992 from earlier years.⁹⁷

B. *Is Legitimation Cynical?*

To suggest that courts' decisions are motivated or explained by legitimation—that is, by judges' self-interest in affirming and preserving institutional power—might be thought of as cynical. The suggestion is only cynical, however, if it is interpreted to mean that a court's decisions should not be so motivated. One could argue that a court's decisions should not be shaped by its self-interest in maintaining power. But even accepting that cases will not be decided strictly according to neutral principles of law, there are considerations other than the court's own self-interest that one might argue should inform court's decisions. Nevertheless, there is nothing intrinsically wrong with a court's decisions being motivated by legitimation.⁹⁸ Under our government structure, courts are

not motivated by sympathy for the individuals who most often benefit from those decisions—narcotics offenders and criminal defendants generally—but by the courts' concern with maintaining and legitimizing their own power.

⁹⁷ This analysis explains not only the change in the forfeiture decisions of the Second Circuit in 1992, but the even more remarkable substantive changes in the forfeiture decisions of the United States Supreme Court in its 1992 term and, to date, in its 1993 term. In each of its three forfeiture decisions in the 1992 term, the Court not only ruled against the government, but did so in a manner that seriously restricts the government's forfeiture powers, both procedurally and substantively. See *Austin v. United States*, 113 S. Ct. 2801 (1993) (deciding that the Eighth Amendment's excessive fines clause applies to an in rem civil forfeiture); *United States v. 92 Buena Vista Ave.*, 113 S. Ct. 1126 (1993) (extending the scope of the innocent owner exception beyond bona fide purchasers); *Republic Nat'l Bank of Miami v. United States*, 113 S. Ct. 554 (1992) (holding that jurisdiction over an in rem forfeiture action is not divested when possession is discontinued). Similarly, the Court's most recent forfeiture decision, *United States v. Good*, No. 92-1180, 1993 WL 505539 (U.S. Dec. 13, 1993), worked a major change in forfeiture law by holding that the due process clause ordinarily prohibits *ex parte*, pre-notice seizure of real property.

⁹⁸ Legitimation in this sense implies limitations. While courts will act to estab-

supposed to curb abuses of power by other branches of government and to protect the rights of individuals. To maintain their legitimacy, then, courts must perform those functions. The "true" reasons a court might have for making particular decisions do not detract from the value of the outcomes.

Acceptance of legitimation, therefore, is based on the assumption that even though a court's decisions may be motivated by self-interest in preserving institutional power, its decisions will necessarily accomplish the intended institutional result—curb government abuse of power and establish and protect individual rights. If legitimation is the reason a court rules in favor of individual rights, but without concern for whether those rights will be enforced, the court can appropriately be criticized. In that instance, the court is attempting to maintain power without meeting its institutional obligation. The Second Circuit's forfeiture jurisprudence raises such concerns.

While the Second Circuit's forfeiture decisions in 1992 certainly endorse expanded rights of claimants and exhibit concern that the forfeiture process be conducted fairly, serious questions remain as to whether the court's decisions will achieve those objectives. For example, while the court in *State-wide* found that the pre-notice seizure violated due process, it ultimately ruled that the error was harmless because the attorney for the claimants had failed to make a showing that constitutionally adequate notice would have resulted in a different outcome.⁹⁹ The court seemed to criticize the quality of the attorney's performance, without recognizing that the claimants' choice of counsel, or the ability of their attorney to perform adequately, may well have been compromised by the government's seizure of all of their assets.¹⁰⁰ Similarly, while

lish and protect individual rights, they will do so only when it is politically safe. That does not mean that a court's decisions simply reflect the will of the majority, but rather that a court must ensure that the public will understand its decisions to be a function of its institutional role and respect them for that reason. This restraint prevents courts from occupying as important a role in the progressive development of our society as some would advocate is appropriate. Nevertheless, legitimation allows, and indeed requires, that courts recognize and protect individual rights and prevent or remedy abuse of power by the other branches of government. To expect much more from courts is probably unrealistic.

⁹⁹ 971 F.2d at 905-06.

¹⁰⁰ *Id.* at 899 (court quotes from attorney's papers and affidavit with five "[sic]"

the court ruled in *Whaler's Cove* that the Eighth Amendment's cruel and unusual punishment provision and the Fifth Amendment double jeopardy clause could apply to civil forfeiture proceedings, it ultimately concluded that the claimants had not made an adequate case for a violation of either provision.¹⁰¹

A critical factor in assessing whether the Second Circuit's recent decisions represent a commitment to a positive view of legitimization is the position the court would take on whether a civil claimant should have a right to counsel. If the court is committed to legitimizing its power in the civil forfeiture arena, the court should be willing to recognize a right to counsel and, equally important, take the steps necessary to see that the right, once recognized, is enforced. As claimants gain additional substantive and procedural rights by judicial decision and legislation, the need for counsel increases. If the Second Circuit's recent forfeiture decisions are to benefit claimants, it is necessary that claimants be represented by counsel.

IV. A DUE PROCESS RIGHT TO COUNSEL FOR CLAIMANTS

When civil forfeiture cases were based primarily on transportation or exchange theories (i.e., allegations that a vehicle or vessel had been used to transport contraband or that property was obtained in exchange for contraband), counsel was less important. Transportation or exchange forfeitures are generally not factually or legally complex. However, the expansion of the law to permit forfeiture of property that "facilitated" a crime or was "involved in" a crime, as well as the expansion to allow forfeiture of real property and intangible property rights, has made the assistance of counsel important because of the legal and factual complexity of such forfeitures. The expanded reach of forfeiture under these theories also increases the likelihood that innocent owners, and others with legally valid claims, will face forfeiture of their property interests. To ensure that the claims of such persons are correctly adjudicated, the claimants need the assistance of counsel.

notations).

¹⁰¹ 954 F.2d 29, 38-39 (2d Cir.), cert. denied, 113 S. Ct. 55 (1992).

A. *The Importance of Counsel*

Only a few years ago, a suggestion that a court might find a constitutional right to counsel for civil forfeiture claimants would probably not have been taken seriously. Because of the potential for government abuse described above, however, the idea no longer seems improbable. Indeed, a bill introduced in Congress in 1993 to reform the federal civil forfeiture process, sponsored by Republican Representative Henry Hyde, would establish a right to counsel for claimants in civil forfeiture proceedings who are unable to afford an attorney.¹⁰² The proposed legislation recognizes what anyone who has attempted to litigate a civil forfeiture case already knows—without a lawyer, claimants have very little chance of success, regardless of the merits their claims. Even if an unrepresented claimant were able to file the notice of claim within the required time period, post the required cost bond, learn that the procedural aspects of the case will be governed by the Supplemental Rules of Civil Procedure and find the Supplemental Rules, the claimant would then confront having to master federal civil litigation. Add to that the task of comprehending substantive civil forfeiture law—which is probably changing more rapidly than any other area of federal law, and the need to take into account the potential effect of the forfeiture proceedings on any related criminal investigation or prosecution, there is an obvious imbalance that results.¹⁰³

The imbalance caused by the lack of counsel is emphasized further by the advantages possessed by opposing coun-

¹⁰² See *supra* note 94 and accompanying text; see also *Civil Forfeiture*, *supra* note 39, ch. 151, at 554.

¹⁰³ Courts have long recognized that in criminal cases, enforcement of a defendant's rights depends upon the assistance of counsel. *Powell v. Alabama*, 287 U.S. 45 (1932). The same is true in civil forfeiture proceedings. Without an attorney, claimants often will be unable to learn what their rights are, much less avail themselves of or protect those rights in litigation. As one court recently noted, "filing a claim in a forfeiture case is procedurally and, sometimes, conceptually complex." *United States v. 1604 Oceola, Wichita Falls, Texas*, 803 F. Supp. 1194, 1199 (N.D. Tex. 1992). This truism is illustrated well by even a cursory reading of *Jeep Wrangler*, where the claimant had to overcome substantial procedural barriers before his claim was heard. 972 F.2d 472 (2d Cir. 1992). If the claimant had not been represented by an attorney, it is doubtful that his claim would have ever been considered on the merits. *Id.* at 473. The claimant was represented by an attorney from the American Civil Liberties Union.

sel—Justice Department lawyers who have considerable resources at their disposal and whose specialty is civil forfeiture litigation. When encountering government counsel, the unrepresented civil forfeiture litigant also lacks an important protection afforded criminal defendants; while the prosecutor in a criminal case has an obligation to see that “justice” is done, it is unclear whether any similar obligation restrains the conduct of government lawyers in civil forfeiture cases. Accordingly, to remedy the imbalance and ensure fair treatment of all forfeiture claimants, courts should recognize a right to counsel. There are a number of sources of law, both statutory and constitutional, that potentially could provide a basis for providing counsel to indigent civil forfeiture claimants.

B. *The Possible Sources for a Right to Counsel*

1. Statutory Authority

One statutory provision that can be used to appoint counsel to civil forfeiture claimants is 28 U.S.C. section 1915(d).¹⁰⁴ In at least one reported instance, the Second Circuit has directed that counsel be appointed to a civil forfeiture claimant under section 1915(d). In *United States v. Onwubiko*, the court, in remanding the case for a trial, directed that the district court appoint counsel for the claimant.¹⁰⁵ Under section 1915(d), which provides district judges with authority to appoint counsel in civil cases, a court must consider a variety of factors in determining whether to do so.¹⁰⁶ Before considering those factors, however, the court must “first determine whether the indigent’s position seems likely to be of substance.”¹⁰⁷ This requirement potentially turns the appointment provision of section 1915(d) into a “catch 22:” a claimant with a “position of substance” may need the help of an attorney to articulate to

¹⁰⁴ Section 1915(d) provides as follows: “The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.” 28 U.S.C. § 1915(d) (1988).

¹⁰⁵ 969 F.2d 1392, 1399 (2d Cir. 1992) (citing *Hodge v. Colon*, 802 F.2d 58, 61 (2d Cir. 1986)).

¹⁰⁶ *Hodge*, 802 F.2d at 56.

¹⁰⁷ *Id.*

the court that his or her position has substance. Further, even if this first hurdle is overcome, the additional factors to be considered are sufficiently subjective that a district court has virtually unreviewable discretion in deciding whether or not to appoint counsel under section 1915. In addition, there are counter-incentives to a district court appointing counsel in a civil forfeiture case; while appointing counsel may make the process more fair, the efforts of the attorney may result in the case becoming time-consuming and more difficult for the district court to resolve.

Section 1915 has an additional drawback; while it provides for the appointment of counsel, it does not provide for payment of counsel. Although a civil forfeiture claimant represented by a private attorney who is not getting paid may receive adequate representation, the pool of lawyers who are both willing and sufficiently experienced and knowledgeable to litigate a civil forfeiture case without pay is, one suspects, quite small. Thus, while section 1915(d) may provide a basis for assigning counsel on an occasional basis to a deserving civil forfeiture claimant, it is not a realistic source for ensuring that civil forfeiture claimants in need of counsel are provided with adequate representation on a regular and continuing basis.

A second possible statutory source that might serve as a means for providing counsel is the Criminal Justice Act ("the Act").¹⁰⁸ The Act provides for appointment of counsel to indigent persons in federal criminal cases and "ancillary matters appropriate to the proceedings."¹⁰⁹ At least one district court has expressed the view that civil forfeiture proceedings are included within the "ancillary matters" provision of the Act.¹¹⁰ Even under this reading of "ancillary matters," however, the Act can not provide a means for making counsel available for civil forfeiture claimants on a regular and ongoing basis because counsel would only be available to civil forfeiture claimants who, as criminal defendants, already have appointed counsel under the Act. While that describes some civil forfeiture claimants, it by no means includes all of them. In fact, to

¹⁰⁸ Criminal Justice Act of 1964, 18 U.S.C. § 3006A (1988 & Supp. IV 1993).

¹⁰⁹ 18 U.S.C. § 3006A(a),(c).

¹¹⁰ *United States v. 1604 Oceola, Wichita Falls, Texas*, 803 F. Supp. 1194, 1198 (N.D. Tex. 1992).

rely on the Criminal Justice Act would create an undesirable result: those persons who are arguably most deserving or most in need of counsel—persons who have not been charged with any crime but face the loss of their property—would be precluded from obtaining appointed counsel. As a result, statutory authority for the assignment of counsel seems insufficient to provide claimants with counsel on a consistent basis.

2. Constitutional Authority

There is also a constitutional source of authority for providing counsel to civil forfeiture claimants, the Due Process Clause.¹¹¹ In *Lassiter v. United States Department of Social Services*,¹¹² the Supreme Court explained that historically, due process only required appointment of counsel in criminal cases where the defendant, if convicted, faced loss of liberty.¹¹³ While this history supports a presumption that due process will ordinarily only require appointment of counsel for persons facing a loss of liberty, that presumption is not irrebuttable. The Court has recognized that there may be a judicial proceeding other than one involving potential loss of liberty where due process would require that an indigent party be appointed counsel.¹¹⁴ Furthermore, the presumption against appointment of counsel must be balanced against the three-part due process analysis the Court propounded in *Mathews v. Eldridge*.¹¹⁵ Under the *Mathews* analysis, in determining whether a claimant should be appointed counsel, a court would consider: (1) the private interest at stake in the proceeding; (2) the risk of error without counsel, and the probable value of avoiding error by providing counsel; and (3) the government's

¹¹¹ Given the Supreme Court's willingness to recognize that in some circumstances a civil forfeiture may constitute "punishment," it may be possible to construct an argument that a right to counsel exists under the sixth amendment, notwithstanding its textual limitation to criminal cases. See *Austin v. United States*, 113 S. Ct. 2801, 2805 n.4 (1993) ("[P]rotections associated with criminal cases may apply to a civil forfeiture proceeding if it is so punitive that the proceeding must be considered criminal.").

¹¹² 452 U.S. 18 (1981).

¹¹³ *Id.* at 25.

¹¹⁴ *Id.* at 27, 31.

¹¹⁵ 424 U.S. 319 (1976); see *Lassiter*, 452 U.S. at 27, 31; *United States v. 1604 Oceola, Wichita Falls, Texas*, 803 F. Supp. 1194, 1196 (N.D. Tex. 1992).

interest, including any burden that would result from providing the claimant with counsel.¹¹⁶ The Supreme Court's recent decision in *United States v. Good*¹¹⁷ provides strong support for applying the *Mathews* analysis to civil forfeiture proceedings, and helpful guidance in doing so, especially in identifying the different interests.

The suggestion that a court should conclude that civil forfeiture claimants have a right to appointed counsel as a matter of due process under *Mathews v. Eldridge* must address the impact of *Lassiter*—if an indigent person does not have a due process right to counsel in a suit for the custody of his or her child, how could an indigent person have a due process right to counsel to prevent forfeiture of his or her property. There are two reasons which, taken together, provide an answer.

First, a critical distinction exists between the two situations; in the child custody context, the government has not caused the person to be indigent, whereas in the civil forfeiture context, the person has been made indigent by the government's seizure of his or her assets. Any due process analysis of a civil forfeiture claimant's right to counsel should take into account the fact that the government (the opposing party) has caused the claimant to be unable to retain counsel. Since due process governs the "balance of forces" in the adversary system,¹¹⁸ the fact that it is the government that has caused the claimant's indigency is an appropriate consideration. Indeed, to rule otherwise would provide the government with an incentive to seize all of a person's property so that they will be unable to obtain counsel.¹¹⁹

Second, application of the *Mathews* factors in the context of a forfeiture proceeding will consistently yield a different conclusion than in the context of a child custody proceeding. The

¹¹⁶ *Mathews*, 424 U.S. at 335.

¹¹⁷ No. 92-1180, 1993 WL 505539 (U.S. Dec. 13, 1993).

¹¹⁸ *Wardius v. Oregon*, 412 U.S. 470, 474 (1973).

¹¹⁹ Some might find this distinction objectionable because, when viewed *ex ante*, it implies that a person who is not indigent has a right to counsel whereas a person who was already indigent does not. While such a principle would be objectionable as a theoretical proposition, the reality is that in the forfeiture context it has no application because the indigent person will not have property to be seized by the government.

second factor, the risk of error, is significantly greater in the forfeiture context not only because of the complexity of the law, but, more importantly, because of the principles being adjudicated and the role of the presiding court. In the child custody context, the court will assume an active and important role in determining the effect of its decision on the welfare of the child. A forfeiture proceeding, on the other hand, resembles more closely a purely adversarial proceeding in which the court's role is limited to providing guidance to a jury's decision or, even in a non-jury forfeiture proceeding, to deciding which party has met its burden of proof.

These same reasons affect application of the third factor, the government's interest in seeing that counsel be provided to the litigants. In the child custody context, the government may actually desire that the proceeding be less adversarial, given the nature of the decision to be made and the role of the court in making that decision. In contrast, in the civil forfeiture context, there would appear to be no legitimate government interest weighing against the appointment of counsel for civil forfeiture claimants.¹²⁰ While there may be financial expenditures that the government would incur in compensating appointed counsel and, perhaps, in providing an administrative structure for the appointment process, given the enormous revenue the government receives from forfeitures, these burdens are insignificant.¹²¹ As a district court judge in Texas observed in determining whether due process required appointment of counsel to two indigent civil forfeiture claimants, "[p]erhaps the substantial imposition upon the government would be requiring the Plaintiff to oppose an attorney in a complicated and abstruse field where the Plaintiff normally expects to meet only pro-se litigants struggling through the

¹²⁰ In its decision in *Good*, the Supreme Court made it plain that the government interest is to be measured with respect to the particular procedural safeguard at issue, and not on government's general interest in forfeiture. See *United States v. Good*, No. 92-1180, 1993 WL 505539, at *8 (U.S. Dec. 13, 1993) ("The governmental interest we consider here is not some general interest in forfeiting property but the specific interest in seizing real property before forfeiture hearings.").

¹²¹ For example, in an eight-month period during 1989, the forfeitures obtained by the United States Attorney's Office for the Eastern District of New York totaled \$37,000,000, an amount that was four times the budget of the office during that period of time. See Pratt & Petersen, *supra* note 1, at 671.

claimant process.¹²²

A further question raised by the right to counsel suggestion might be whether the court of appeals should rule that a civil forfeiture claimant has a right to counsel under *Mathews*. Because a district court already has the authority to rely on the due process analysis of *Mathews v. Eldridge* to appoint counsel, and because that determination can perhaps best be made on a case-by-case basis, one can ask whether it is necessary or appropriate for a court of appeals to issue a ruling that merely affirms those principles. Although any given district court could utilize the due process analysis of *Mathews v. Eldridge* to appoint counsel to a civil forfeiture claimant, that should not preclude a circuit court from holding in an appropriate case that civil forfeiture claimants have a due process right to counsel. Moreover, while the determination of a right to counsel under the due process analysis of *Mathews* is ordinarily to be made on a case-by-case basis, a circuit court could provide important guidance as to the general application of the *Mathews* factors in the context of civil forfeiture proceedings. That is especially true given that application of the third factor (the government interest in not providing counsel) will consistently and strongly weigh in favor of providing a claimant with counsel, as will the second factor (risk of error), except in those cases where the outcome is foreordained.¹²³

It would be appropriate, then, for a circuit court to hold that whether or not counsel is required in civil forfeiture cases essentially turns on an assessment of the first two factors, the private interest at stake and the risk of an erroneous adjudication without counsel. It would also be appropriate for a circuit court to indicate that, given the complexity of the civil forfeiture process, the risk of error will be significant, unless the case is so one-sided that the correct result is obvious. Similar-

¹²² *United States v. 1604 Oceola*, Wichita Falls, Texas, 803 F. Supp. 1194, 1197 (N.D. Tex. 1992).

¹²³ Given the uniformity that the weighing of the applicable factor is likely to produce in the civil forfeiture context, as opposed to the child custody context, a case can be made that an appellate court could or should address the issue in a manner that its decision would be applicable to civil forfeiture cases generally. See, e.g., *United States v. Good*, No. 92-1180, 1993 WL 505539 (U.S. Dec. 13, 1993) (prohibiting pre-notice seizures in all civil forfeiture cases involving real property except where the government can demonstrate the existence of exigent circumstances).

ly, while the interest of the claimant at stake will obviously vary from one case to the next, a circuit court could provide important guidance by indicating that this factor is to be evaluated according to the value of the property to the individual claimant, rather than by the objective dollar value of the property sought to be forfeited.¹²⁴ In sum, a circuit court could provide that in a civil forfeiture case, due process will ordinarily require appointment of counsel except where the value of the property at stake is not significant to the particular claimant, or where the case for or against forfeiture is so strong that the risk an error would occur without counsel is insignificant.¹²⁵

CONCLUSION

The dramatic change in the Second Circuit's forfeiture jurisprudence reflected by the decisions discussed in this Article might be explained by the court's attempt to legitimize its institutional role and its power. The true test of this hypothesis is whether the court is prepared to recognize and enforce a right to counsel for civil forfeiture claimants. For the court's recent forfeiture decisions to have their full impact, claimants must be represented by counsel. If the court is committed to seeing that these decisions do, in fact, provide the procedural and substantive fairness in the civil forfeiture process they promise, the court should explicitly affirm that claimants have a due process right to counsel. The *Eldridge* analysis, conscientiously and carefully applied, is an appropriate method for deciding whether the government should be required to provide a civil forfeiture claimant with counsel.

It would take a court that is both bold in its thinking and confident in its judgment to acknowledge explicitly a due process right to counsel for civil forfeiture claimants, and to establish general guidance for the application of that right. Based

¹²⁴ This principle is necessary to insure that a claimant's right to counsel is not dependent on the dollar value of the property that the government seeks to seize. Of course, where a claimant has other property, not subject to possible forfeiture, which provides the claimant with the financial ability to obtain counsel, then the right to counsel would not obtain.

¹²⁵ See 1604 *Oceola*, 803 F. Supp. at 1197.

on its recent forfeiture decisions, there is no court better suited to take that step than the Second Circuit.



Art Rogers, "Puppies"

© 1980 Art Rogers—Point Reyes



Jeff Koons, "String of Puppies," 1988, Polychromed wood,
42 x 62 x 31 ins.

© 1988 Jeff Koons