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# FEDERAL PROPERTY FORFEITURE STATUTES: THE NEED TO GUARANTEE A PROMPT TRIAL\*

KENNETH KANDARAS\*\*

## INTRODUCTION

Property is often the subject of an offense or the instrumentality by which an offense is committed. In offenses such as smuggling undeclared goods,<sup>1</sup> or using a vehicle to transport counterfeit money,<sup>2</sup> firearms<sup>3</sup> or controlled substances,<sup>4</sup> the involvement of property is an essential element of the offender's scheme. Civil forfeiture statutes define the circumstances in which property is forfeited to the government as a result of its unlawful use.<sup>5</sup> Designed to deter and penalize the commission of an offense, forfeiture statutes generally make no distinction between the property interests of the guilty and the innocent.<sup>6</sup> Property is forfeited as a result of its unlawful use without regard to the owner's criminal culpability.<sup>7</sup> For the owner guilty of the underlying offense, forfeiture is an added penalty for wrongdoing and deprives the offender of the tools of his trade thereby curbing future offenses.<sup>8</sup> In the case of an innocent

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1. 19 U.S.C. §§1594, 1595(a) (1976) (vessels and vehicles used to violate customs-revenue laws may be seized).

2. 49 U.S.C. §782 (1976) (any vehicle, vessel, or craft used to transport contraband narcotics, firearms, or counterfeit money may be seized). See generally Note, *Operation of Federal Provisions Governing Forfeiture of Vehicles Used in Violating Federal Laws*, 27 NOTRE DAME LAW. 433 (1952).

3. 49 U.S.C. §782 (1976).

4. 21 U.S.C. §881(a)(3) (1976) (any containers or conveyances used to traffic in controlled substances may be seized).

5. Cf. 18 U.S.C. §1963 (1976) (providing for the forfeiture of property used in a criminal enterprise but contingent on the criminal conviction of the property user). See generally Kandaras, *Due Process and Federal Property Forfeiture Statutes: The Need for Immediate Post-Seizure Hearing*, 34 SW. L.J. 925 (1980); Note, *Bane of American Forfeiture Law — Banished At Last?*, 62 CORNELL L. REV. 768 (1977).

6. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 686-87 (1974).

7. *Id.* at 680-88; *accord*, *Various Items of Personal Property v. United States*, 282 U.S. 577, 581 (1930) (the offense is attached to the distillery without regard to the personal misconduct of the owner).

8. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 686-87 (1974). "Forfeiture of conveyances that have been used — and may be used again — in violation of the narcotics laws fosters the purposes served by the underlying criminal statutes, both by preventing further illicit use of the conveyance and by imposing an economic penalty, thereby rendering illegal behavior unprofitable." *Id. Accord*, *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700 (1965) (the object of a forfeiture proceeding is to act as a penalty for the commission of an offense and is quasi-criminal in character); *Van Oster v. Kansas*, 272 U.S. 465, 467-68 (1926) (the forfeiture of property is a secondary defense against the commission of offenses and dispenses with the need to prove collusion between the wrongdoer and

property owner, forfeiture in theory, is justified because it induces the owners to exercise caution and avoid the bailment of property to those who may violate the law.<sup>9</sup> Presently, forfeiture statutes apply to a wide range of subject areas including customs,<sup>10</sup> immigration,<sup>11</sup> internal revenue,<sup>12</sup> and conservation.<sup>13</sup>

Generally forfeiture statutes share a common mode of procedure. The operation of forfeiture is illustrated by its use in customs law.<sup>14</sup> Unlawfully imported goods or vehicles used in their importation are seized when probable cause exists to believe they are subject to forfeiture.<sup>15</sup> Thereafter, the government must initiate an *in rem* forfeiture proceeding.<sup>16</sup> From seizure to final adjudication the government has the sole right to possess the property.<sup>17</sup> Significantly, the owner's only opportunity to contest the merits of the government's claim is the hearing attendant to the *in rem* proceeding. Thus, if the government unreasonably delays the filing of the lawsuit, the owner is hampered in asserting his defense to the forfeiture. The absence in forfeiture statutes of procedural safeguards guaranteeing the property owner a prompt hearing upon seizure of his property raises serious questions of fairness and constitutional protection.

This article focuses on civil forfeiture statutes and the property owner's due process right to a prompt initiation of judicial proceedings. The judicial treatment of this right has revolved around two principal issues: first, the remedy available to a property owner whose right to a timely hearing has been violated; and second, the timetable mandated by the due process clause. This article discusses the various approaches that have evolved in response to these issues and suggests that only one approach, that which bars forfeiture in the event the government unreasonably delays initiation of proceedings, satisfactorily insures the owner's right to a hearing without unduly obstructing the government.

#### PROCEDURE UNDER FORFEITURE STATUTES — THE NEED FOR A REMEDY AND A TIMETABLE

Forfeiture statutes generally do not provide a specific time limit within which the government must initiate judicial proceedings after the seizure of

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the alleged innocent owner); *Goldsmith-Grant Co. v. United States*, 254 U.S. 505, 511 (1921) (the forfeiture of property is fixed in this country's punitive and remedial jurisprudence).

9. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 687-88 (1974).

10. See note 1 *supra*.

11. 8 U.S.C. §1324(b)(1) (Supp. III 1979) (applicable to the forfeiture of vessels, vehicles, and aircraft used in bringing in and harboring illegal aliens).

12. 26 U.S.C. §§7301-7303 (1976) (property intended for use in violating provisions of the internal revenue laws).

13. 16 U.S.C. §1860(a) (1976) (Fishery Conservation and Management Act of 1976). See generally Fidell, *Enforcement of the Fishery Conservation and Management Act of 1976: The Policeman's Lot*, 52 WASH. L. REV. 513 (1977).

14. See note 1 *supra*.

15. *United States v. One 1972 Chevrolet Nova*, 560 F.2d 464, 467-70 (1st Cir. 1977).

16. See notes 20-23 and accompanying text, *infra*.

17. 19 U.S.C. §1605 (1976).

property. After seizure, a customs officer must notify the property owner and all other persons with an interest in the property, either by publication<sup>18</sup> or personal notice,<sup>19</sup> of the seizure and the government's intent to seek forfeiture of the property.

Customs reporting procedures depend upon the value of the seized property. If the value exceeds \$10,000, the officer must promptly transmit a report to the United States attorney, which must include the results of the officer's investigation into the property's alleged unlawful use.<sup>20</sup> The United States attorney must then initiate judicial forfeiture proceedings if he determines the forfeiture claim is meritorious.<sup>21</sup> If the property's value does not exceed \$10,000, the customs officer and United States attorney need follow this procedure only if the owner files a claim to the property and posts a bond sufficient to insure payment of the government's court costs in the subsequent proceeding.<sup>22</sup> Property in this latter category is summarily forfeited if the owner's claim and bond are not timely filed.<sup>23</sup>

A judicial forfeiture action proceeds like any other civil claim. The parties are entitled to discovery and to a jury trial. Pending trial, of course, the appropriate customs officer has the sole right to possess the property.<sup>24</sup> Therefore, the government maintains exclusive possession of the property from seizure to final adjudication based solely upon a finding that the government has probable cause to believe the property is subject to forfeiture.

The property owner may have a meritorious defense. For example, the owner may avert forfeiture by proof of innocence and reasonable efforts to prevent the property's unlawful use. In *Calero-Toledo v. Pearson Yacht Leasing Co.*,<sup>25</sup> the Supreme Court stated that no legitimate purpose could be served by forfeiting the property of an "owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done

18. 19 U.S.C. §1607 (Supp. II 1978) (notice by publication of government's seizure and intent to forfeit property valued at less than \$10,000). Notice by publication, however, may violate the owner's right to due process if under the circumstances it is not reasonably calculated to provide actual notice of the impending forfeiture. See *Robinson v. Hanrahan*, 409 U.S. 34, 40 (1972) (per curiam) (involving a state forfeiture statute); *Menkarell v. Bureau of Narcotics*, 463 F.2d 88, 94-95 (3d Cir. 1972); *Jackel v. United States*, 304 F. Supp. 993, 998-99 (S.D.N.Y. 1969). See generally Note, *Forfeiture Proceedings—In Need of Due Process*, 3 FORDHAM URB. L.J. 347, 353-55 (1975).

19. 19 C.F.R. §162.31(a) (1979) (written notice to any individual who the facts of record indicate has an interest in the seized property).

20. 19 U.S.C. §§1603, 1610 (Supp. II 1978).

21. *Id.* §1604 (1976).

22. *Id.* §§1607, 1608 (1976 & Supp. II 1978). The \$10,000 threshold figure, contained in §1607, is the result of a 1978 amendment that increased the figure from \$2,500 to its present level. Congressional history indicates that the increase was necessary to keep pace with the rising value of automobiles and other merchandise. S. REP. NO. 95-778, 95th Cong., 2d Sess. 21, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 2211, 2232.

23. 19 U.S.C. §1609 (1976); see *Bramble v. Richardson*, 498 F.2d 968 (10th Cir.), cert. denied, 419 U.S. 1069 (1974); *Jary Leasing Corp. v. United States*, 254 F. Supp. 157 (E.D.N.Y. 1966).

24. See note 17 *supra*.

25. 416 U.S. 663 (1974).

all that reasonably could be expected to prevent the proscribed use of his property."<sup>26</sup>

Depending upon the particular statute, forfeiture is contingent on the government's demonstration that the owner is, in some degree, criminally culpable. In *United States v. United States Coins & Currency*,<sup>27</sup> the Supreme Court considered the forfeiture provisions of the internal revenue laws and concluded that Congress intended to limit forfeitures to cases where owners had significant criminal involvement in the wrongful use of the property.<sup>28</sup> Though the decision was limited to the internal revenue laws, the Court's conclusion is applicable to any federal forfeiture statute providing for the administrative return of property seized from an owner who was either innocent or excusably negligent<sup>29</sup> with respect to the wrongful use of the property.

An owner may also defend against forfeiture on constitutional grounds.<sup>30</sup> In *One 1958 Plymouth Sedan v. Pennsylvania*,<sup>31</sup> the Court held that the exclusionary rule bars the government from seeking forfeiture of property where the seizure violates the fourth amendment.<sup>32</sup>

The defense may also relate to the sufficiency of the evidence. Custom law provides that the owner has the burden of proving by a preponderance of the evidence that the property was not unlawfully used.<sup>33</sup> The owner can avoid forfeiture by meeting this burden of proof.

To the property owner the consequence of unnecessary delay in the initiation of the forfeiture proceeding may be severe. The seized property is often quite valuable,<sup>34</sup> and the actual delay between seizure and filing may be a

26. *Id.* at 689.

27. 401 U.S. 715 (1971).

28. *Id.* at 719, 721-22.

29. *Id.* at 721-22.

30. 380 U.S. 693 (1965).

31. *But see United States v. Janis*, 428 U.S. 433 (1976) (federal forfeiture action allowed though property was seized unconstitutionally by state law enforcement officers and transferred to federal officers).

32. 19 U.S.C. §1615 (1976).

33. *See Lee v. Thornton*, 538 F.2d 27, 33 (2d Cir. 1976); *United States v. Eight Rhodesian Stone Statues*, 449 F. Supp. 193 (C.D. Cal. 1978); *Kandaras*, *supra* note 5, at 932.

34. The following cases illustrate the actual delay experienced by an owner after seizure of his property. Appropriate reference is made to those cases in which the court held the delay unconstitutional. Unless otherwise indicated, the time reflects the period from the property's seizure to commencement of judicial forfeiture proceedings. *United States v. One 1970 Ford Pickup*, 564 F.2d 864 (9th Cir. 1977) (11 months held unconstitutional); *United States v. One 1973 Buick Riviera Auto.*, 560 F.2d 897 (8th Cir. 1977) (5 months); *United States v. One 1972 Mercedes-Benz 250*, 545 F.2d 1233 (9th Cir. 1976) (13½ months from the automobile's seizure to the close of the pleadings); *United States v. One Motor Yacht Named Mercury*, 527 F.2d 1112 (1st Cir. 1975) (12½ months); *United States v. One 1972 Wood 19 Foot Custom Boat*, 501 F.2d 1327 (5th Cir. 1974) (10 months); *States Marine Lines, Inc. v. Shultz*, 498 F.2d 1146 (4th Cir. 1974) (16½ months from seizure of cargo from a commercial vessel to claimant's suit seeking its return); *Sarkisian v. United States*, 472 F.2d 468 (10th Cir.) (14 months held unconstitutional in seizure of jewelry), *cert. denied*, 414 U.S. 976 (1973); *In re Behrens*, 39 F.2d 561 (2d Cir. 1930) (12½ months from seizure of utensils used in brewery to claimant's suit for return); *United States v. Eight Rhodesian Stone Statues*, 449 F. Supp. 193 (C.D. Cal. 1978) (16 months held unconstitutional); *United States*

year or longer.<sup>35</sup> Thus, for the owner with a meritorious defense, the government's delay needlessly forestalls the recovery of his property. During this interim period, the owner may be wholly unable to secure property suitable as a substitute.

Decisional law has introduced one element of due process that protects the owner's property rights. Due process requires that the government convene an immediate post seizure hearing to determine if the government had probable cause to seize the property.<sup>36</sup> The hearing guards against the erroneous seizure of property by requiring the government to adduce facts sufficient to substantiate the seizure and allowing the owner an opportunity to rebut those facts.<sup>37</sup> The hearing, however, is limited to the preliminary concern of probable cause. The owner's right to litigate the merits of the forfeiture claim is postponed until the government initiates judicial proceedings.

The absence of specific temporal requirements within which the government must initiate suit serves a legitimate purpose. After the seizure, the government must thoroughly investigate the property's alleged unlawful use and determine the likely success of a forfeiture suit.<sup>38</sup> Because the factual complexity of each case varies, in many instances the government would be unable to complete a thorough investigation within a predetermined time limit. In lieu of a fixed period, customs law utilizes general phrases to describe the speed with which each stage of the forfeiture process must proceed. After the seizure, the appropriate customs officer must "promptly" report the seizure to the United States attorney.<sup>39</sup> The United States attorney must make a factual inquiry, and initiate forfeiture proceedings "without delay."<sup>40</sup>

No matter how the government interprets the statutory timetable, it is still obliged to initiate judicial forfeiture proceedings within a period that satisfies the property owner's right to due process. The due process clause guarantees a property owner the right to an evidentiary hearing before the government terminates his property rights,<sup>41</sup> and the United States Supreme Court has held that this hearing must occur within a meaningful time and in

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v. One Douglas A-26B Aircraft, 436 F. Supp. 1292 (S.D. Ga. 1977) (11 months held unconstitutional); *United States v. One 1973 Ford LTD*, 409 F. Supp. 741 (D. Nev. 1976) (14 months); *United States v. One 43 Foot Sailing Vessel Winds Will*, 405 F. Supp. 879 (S.D. Fla. 1975) (at least 11 months), *aff'd*, 538 F.2d 694 (5th Cir. 1976); *United States v. One 1971 Volvo 2-Door Sedan*, 393 F. Supp. 843 (C.D. Cal. 1975) (2 months); *United States v. A Quantity of Gold Jewelry*, 379 F. Supp. 283 (C.D. Cal. 1974) (22 months held unconstitutional), *aff'd, in part, vacated in part, and remanded*, 554 F.2d 1072 (9th Cir. 1977); *United States v. One 1970 Buick Riviera*, 374 F. Supp. 277 (D. Minn. 1973) (20 months from the automobile's seizure to trial); *United States v. One 1971 Opel G.T.*, 360 F. Supp. 638 (C.D. Cal. 1973) (13½ months held unconstitutional).

35. *Lee v. Thornton*, 538 F.2d 27, 33 (2d Cir. 1976). See *Kandaras, supra* note 5, at 936-39.

36. *Kandaras, supra* note 5, at 932-36.

37. See notes 20-22 and accompanying text, *supra*.

38. 19 U.S.C. §§1603, 1610 (1976 & Supp. II 1978).

39. *Id.* §1604.

40. *Id.*

41. *Mackey v. Montrym*, 443 U.S. 1 (1979); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1972); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170-72 (1951) (Frankfurter, J., concurring).

a meaningful manner.<sup>42</sup> Specifically, a hearing is not timely if the owner suffers serious practical disabilities attributable to a delay.<sup>43</sup> In the area of forfeiture, protection of the property owner's right to a timely hearing requires some safeguard that serves the dual purpose of reasonably insuring the government's prompt initiation of forfeiture proceedings while not unduly encumbering the government's law enforcement effort.

*Proceedings Instituted by the Property Owner:  
The Castlebury/Behrens Approach*

The decisions in *Castlebury v. Alcohol, Tobacco & Firearms Division*<sup>44</sup> and *In re Behrens*<sup>45</sup> held that the government cannot unreasonably delay the filing of the suit. In *Castlebury* an automobile owner claimed that the government unreasonably delayed initiation of forfeiture proceedings and sought an injunction directing the property's return. The Fifth Circuit ruled that officers with administrative or prosecutorial duties must have sufficient time to complete their responsibilities.<sup>46</sup> Implicit in the court's opinion is the notion that government officers have a reasonable time, given the practical demands of the case, to initiate forfeiture proceedings. In *In re Behrens* the Second Circuit considered a similar request by a property owner and as with *Castlebury*, fashioned a reasonable limitation upon government delay.<sup>47</sup>

The remedy assigned for unreasonable governmental delay in *Castlebury* and *Behrens*, however, was limited. In both cases the courts concluded that the only recourse available to the owner is a suit to compel the government to file judicial forfeiture proceedings. The trial court in that action must then determine whether the government has any excuse for the delay. If the court finds there is no justification for the delay, the government may be ordered to initiate proceedings within a judicially prescribed deadline or to abandon the forfeiture and return to property.<sup>48</sup> To remedy the owner's loss of possession of property, the decisions stated that those owners who successfully defended their property against forfeiture may be entitled to money damages.<sup>49</sup>

The *Castlebury* and *Behrens* approach does not adequately guarantee the owner's right to a timely hearing. While this right may be subject to reasonable conditions, the requirement that the owner compel the government to initiate proceedings serves no legitimate purpose.<sup>50</sup> The government is

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42. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *accord*, *Barry v. Barchi*, 443 U.S. 55 (1979).

43. *See* *Armstrong v. Manzo*, 380 U.S. 545, 551 (1965).

44. 530 F.2d 672 (5th Cir. 1975).

45. 39 F.2d 561 (2d Cir. 1930).

46. 530 F.2d at 676-77.

47. 39 F.2d at 564.

48. 530 F.2d at 677; 39 F.2d at 563-64.

49. 530 F.2d at 677; 39 F.2d at 564.

50. *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 374 (1971) (the owner must refrain from contributing to any unnecessary delay). *See also* *Lee v. Thornton*, 538 F.2d 27, 33 (2d Cir. 1976) (the owner must make a timely request for a hearing).

under constitutional obligation to file suit in a timely manner. *Castlebury* and *Behrens* acknowledge the owner's right to avoid unreasonable delay in the filing of the suit and concede that government delay beyond the limit set by the trial court bars forfeiture. But the supposition that the government must previously be told by a court to do that which the Constitution independently mandates gives insufficient content to due process protection. Little benefit is derived from forcing the owner to bear the cost of an independent suit and requiring a trial court to determine, in its own time-consuming manner, that the government has already unreasonably delayed the start of the suit.<sup>51</sup>

*Castlebury* and *Behrens* mistakenly rely upon the Supreme Court's decision in *Slocum v. Mayberry*.<sup>52</sup> The *Slocum* decision, rendered in 1817, held that federal courts under the then existing embargo statute had exclusive jurisdiction to decide cases when the property was lawfully seized by a federal officer. The embargo statute provided for the seizure and subsequent forfeiture of vessels unlawfully used to transport goods. After disposing of the jurisdictional issue, the Court stated that in the event a federal officer unduly delayed initiation of judicial proceedings the district court had jurisdiction to provide provisional relief by directing the officer either to file suit within a reasonable time or abandon forfeiture.<sup>53</sup> Additionally, the Court noted that a federal officer may be liable for damages if he wrongly detained the property.<sup>54</sup>

There is ample reason to reject the Court's outlined remedy as the owner's exclusive form of relief. In particular, the *Slocum* decision should be limited to the jurisdictional question it decided. *Slocum* must be understood in the context of the then existing tension over the definable limits of federal court jurisdiction. At that time federal district courts lacked a general grant of federal question jurisdiction.<sup>55</sup> As the remedy discussed by the Court did not affect the outcome of the case, its inclusion may be viewed as an attempt by the Court to elaborate on the federal district court's inherent power to enforce the embargo statute.<sup>56</sup> In addition, the Court's treatment of provisional relief and monetary damages was based solely upon statutory construction.<sup>57</sup> The owner did not raise, nor did the Court note the owner's right to due process. The decision is devoid of any attempt to address the owner's constitutional right to a timely hearing.

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51. See *United States v. Eight Rhodesian Stone Statues*, 449 F. Supp. 193 (C.D. Cal. 1978). In response to the government's argument that the property owner could have avoided the delay in initiating the suit by either demanding referral of the action to compel reference of the case to the U.S. attorney or by filing some form of possessory action, the court stated, "[An owner] ought not to be required to spend his own money to force the government to take action which the government is bound by law to take and take promptly." *Id.* at 205-06.

52. 15 U.S. (2 Wheat.) 1 (1817).

53. *Id.* at 3.

54. *Id.*

55. C. WRIGHT, A. MILLER, & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION* §3503 (1975).

56. See 15 U.S. at 3-4.

57. Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1129 n.91 (1969).



*Unreasonable Delay as a Bar to Forfeiture:*  
*United States v. Thirty-Seven Photographs*

The need for a more compelling remedy to insure observance of a property owner's due process rights has prompted some courts to bar forfeiture in the event of unreasonable governmental delay. This position draws its principal support from the Supreme Court's decision in *United States v. Thirty-Seven Photographs*.<sup>58</sup> The Court there held that the seizure, under customs law, of allegedly obscene material violated the first amendment because it failed to provide for a swift adjudication of the controversy. To avoid the statute's unconstitutionality the Court construed the statute to require the initiation of forfeiture proceedings within fourteen days after seizure and the adjudication of the suit within sixty days thereafter.<sup>59</sup> Though the decision was limited to the statute's first amendment implications, it has affected forfeiture litigation in general by prompting courts to establish a timetable within which the government must initiate suit and by treating the government's failure to comply as a bar to the forfeiture.<sup>60</sup> Even within the general contours of this relief, however, courts have reached different results.

In *Sarkisian v. United States*,<sup>61</sup> the Tenth Circuit Court of Appeals stated that the seizure of imported jewelry "presents a constitutional claim of no less dignity than that arising from . . . dirty pictures."<sup>62</sup> Consequently, the court held that customs law must be interpreted to include the timetable provided for in *Thirty-Seven Photographs*.<sup>63</sup> But in *State Marine Lines Inc. v. Schultz*,<sup>64</sup> the Fourth Circuit rejected the rationale of *Sarkisian* and distinguished the due process clause requirements from the first amendment protection in the customs law forfeiture context. Rather than impose a rigid timetable like that mandated in *Thirty-Seven Photographs*, the court held that the government must file suit within a reasonable period after the property is seized. The reasonableness of the intervening period was to be determined by the relative complexity of the case and the government's explanation for the delay.<sup>65</sup>

The *State Marine Lines* decision has contributed in no small way to what a district court in *United States v. Eight Rhodesian Stone Statues*<sup>66</sup> described as "A chorus of decisions holding that if the delay between the seizure and commencement of district court proceedings is substantial, unexcused and unreasonable, such delay will, on due process grounds, itself bar the government from proceeding further."<sup>67</sup>

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58. 402 U.S. 363 (1971).

59. *Id.* at 367-74.

60. See note 67 *infra*.

61. 472 F.2d 468 (10th Cir. 1973).

62. *Id.* at 472.

63. *Id.*

64. 498 F.2d 1146 (4th Cir. 1974).

65. *Id.* at 1155.

66. 449 F. Supp. 193 (C.D. Cal. 1978).

67. *Id.* at 204. See, e.g., *United States v. One 1973 Buick Riviera*, 560 F.2d 897, 901 (8th Cir. 1977); *United States v. One Motor Yacht Named Mercury*, 527 F.2d 1112, 1114 (1st Cir. 1975); *United States v. One Douglas A-26B Aircraft*, 436 F. Supp. 1292, 1296 (S.D. Ga. 1977); *Boston v. Stephens*, 395 F. Supp. 1000, 1003 (S.D. Ohio 1975); *United States v. A Quantity of*

Under the post-*Thirty-Seven Photographs* cases the issue of unreasonable delay may arise as an affirmative defense to the government's forfeiture suit.<sup>68</sup> Therefore, unlike the remedy announced in *Castlebury* and *Behrens*, the owner is not required to sue the government to protect his right to a prompt trial, although the post-*Thirty-Seven Photographs* cases leave that option available to the owner.<sup>69</sup>

### *The Appropriate Timetable and Remedy*

Courts have the inherent authority and responsibility to protect an individual's constitutional rights.<sup>70</sup> Where Congress has provided no statutory remedy, courts must fashion a remedy that substantially protects those rights.<sup>71</sup> Thus, in *Davis v. Passman*,<sup>72</sup> the Supreme Court held that a remedy may be implied directly from the fifth amendment due process clause where no statutory remedy exists.<sup>73</sup> Although the Court has more often considered whether a damage recovery may be imposed to protect civil rights, the Court has enumerated certain factors that must be considered in implying a constitutional remedy. First, the remedy should be drawn from those traditionally available to the courts;<sup>74</sup> second, it should reasonably deter the constitutional violation;<sup>75</sup> and third, the court should carefully consider any special factors counselling hesitation in the absence of affirmative action by Congress.<sup>76</sup>

In considering the appropriate remedy, an initial concern is whether a court, under any circumstance, may bar the government's forfeiture for unreasonable delay. Certainly, courts have traditionally precluded a party's claim based upon laches.<sup>77</sup> Actions in equity are dismissed without consideration of the merits of the claim because of the claimant's failure to file his complaint in a timely manner.<sup>78</sup> Whether the Constitution requires such a remedy is a separate inquiry.

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Gold Jewelry, 379 F. Supp. 283, 286-87 (C.D. Cal. 1974), *aff'd*, 554 F.2d 1072 (9th Cir. 1977); United States v. One 1971 Opel G.T., 360 F. Supp. 638, 642 (C.D. Cal. 1973). Cf. United States v. One 1970 Ford Pickup, 564 F.2d 864, 865 (9th Cir. 1977) (based upon statutory interpretation, unreasonable delay barred the government's forfeiture).

68. See United States v. One Motor Yacht Named Mercury, 527 F.2d 1112 (1st Cir. 1975); United States v. One Douglas A-26B Aircraft, 436 F. Supp. 1292 (S.D. Ga. 1977); United States v. A Quantity of Gold Jewelry, 379 F. Supp. 283 (C.D. Cal. 1974).

69. Boston v. Stephens, 395 F. Supp. 1000 (S.D. Ohio 1975).

70. See Carlson v. Green, 100 S. Ct. 1468 (1980); Bivens v. Six Unknown Named Agents, 403 U.S. 388, 395-97 (1971). See generally Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972); Hill, *supra* note 55.

71. See Bivens v. Six Unknown Named Agents, 403 U.S. 388, 396-97 (1971); Bell v. Hood, U.S. 678, 684 (1946).

72. 442 U.S. 228 (1979).

73. *Id.*, at 245.

74. Bivens v. Six Unknown Named Agents, 403 U.S. 388, 395-96 (1971); Bell v. Hood, 327 U.S. 678, 684 (1946).

75. See Carlson v. Green, 100 S. Ct. 1468, 1473-74 (1980); accord, Carey v. Piphus, 435 U.S. 247, 256-57, 257 n.11 (1977).

76. 442 U.S. at 246-47; Bivens v. Six Unknown Named Agents, 403 U.S. 388, 396 (1971).

77. J. POMEROY, EQUITY JURISPRUDENCE §VIII(418) (1941).

78. "Laches in legal significance, is not mere delay, but delay that works a disadvantage

The post-*Thirty-Seven Photographs* cases and *Castlebury/Behrens* present two conflicting approaches to the guarantee of a prompt hearing. On the one hand, the post-*Thirty-Seven Photographs* cases provide the only remedy suitable to deter the government from unreasonable delay. Under the *Thirty-Seven Photographs* rationale the government is given a reasonable time to prepare its forfeiture suit, and forfeiture is barred only if the government cannot demonstrate that the delay was reasonable under the circumstances. Thus, the threatened failure of the forfeiture proceeding works as a deterrent to the government's violation of the owner's right to a prompt hearing.

The *Castlebury/Behrens* approach, on the other hand, does not guarantee a prompt hearing. The remedy requires that the owner undertake an independent suit to establish that the government has exceeded a reasonable delay. This approach needlessly adds to trial courts' workloads and wrongly assumes that owners are financially capable of pursuing the remedy.<sup>79</sup> This approach, however, is most defective in its assumption that the government should be judicially reminded in every case of its constitutional duty to avoid delay. In the vast majority of cases, the government is well aware of that duty.

Furthermore, a damage claim for violation of the owner's possessory rights, the deterrent element of *Castlebury/Behrens*, is not satisfactory. Placing a monetary value on the right to possess an object may be speculative in many instances,<sup>80</sup> and often the costs of litigation will far outweigh provable damages. Unlike a damage claim against a state official for violation of due process under the Civil Rights Act of 1871,<sup>81</sup> an individual suing a federal officer is not entitled to recover attorney's fees if he is ultimately successful.<sup>82</sup> As the Supreme Court noted in *Carey v. Piphus*,<sup>83</sup> the deterrent value of a damage award for violation of a person's right to due process of law is intimately related to the cost of retaining counsel to pursue the claim. Thus, when the total cost of litigation is considered, it is unlikely that the owner will view a damage award as a profitable remedy. Consequently, the damage claim provided for in *Castlebury/Behrens* is illusory. The *Castlebury/Behrens* approach lacks sufficient threat of punitive impact to deter government officers from excessive delay.

There are no special considerations that militate against barring forfeiture. The remedy does not lead to potential conflicts between the judiciary

to another. . . . When a court sees negligence on one side and injury therefrom on the other it is a ground for denial (of a party's claim to relief)." *Id.* §419(d).

79. See *Boddie v. Connecticut*, 401 U.S. 371 (1971). A serious question of due process is raised whenever the right to a hearing is conditioned upon the individual's ability to satisfy some financial requirement. *Wiren v. Eide*, 542 F.2d 757, 763 (9th Cir. 1976); *Lee v. Thornton*, 538 F.2d 27, 32 n.3) (2d Cir. 1976) (holding that the summary forfeiture of property conditioned upon the property's value and the owner's compliance with the bond requirement, as mandated by 19 U.S.C. §1609 (1976), is unconstitutional as applied to persons financially unable to comply with the bond provision).

80. See, e.g., *Seguin v. Eide*, 645 F.2d 804 (9th Cir. 1981).

81. 42 U.S.C. §1983 (1979).

82. 42 U.S.C. §1988 (1976) (Civil Rights Attorney's Fees Award Act of 1976). See, e.g., *NAACP v. Civiletti*, 609 F.2d 514 (D.C. Cir. 1979).

83. 435 U.S. 247 (1978).

and the legislative or executive branch. Unlike the situation in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,<sup>84</sup> the court need not consider whether a damage recovery is ultimately one against the federal government or an individual government officer.<sup>85</sup> Nor must the court consider a damage claim against a United States Congressman and the implications of the speech and debate clause as in *Davis v. Passman*.<sup>86</sup> Further, the propriety of barring the government's claim must be evaluated in light of the many situations in which a party's failure to comply with procedural requirements bars the suit. A party's claim or defense may be stricken for failure to comply with civil discovery provisions<sup>87</sup> or pretrial orders,<sup>88</sup> or the plaintiff's claim may be dismissed in the event he fails to prosecute his case diligently.<sup>89</sup> In federal criminal proceedings the Speedy Trial Act of 1974 applies this approach to the government's initiation of criminal suits.<sup>90</sup> The remedy is certainly not novel.

As to the appropriate timetable, the fixed time limitations proposed in *Sarkisian v. United States* are unwarranted. The *Sarkisian* court uncritically equated ordinary personal property with property protected by the first amendment. In the latter area, the Supreme Court has long struggled over the issue of pre-publication censorship and the inherent problem of defining when the government may suppress publication of written material.<sup>91</sup> The short timetables and expedited trial schedule in *Thirty-Seven Photographs* are an attempt to resolve the persistent problem of unlawful government censorship in light of the government's need to control the importation of goods.<sup>92</sup> To ignore the distinction between the two forms of property is also to ignore the role of the due process clause in ensuring the orderly adjudication of property claims. Further, the wisdom of requiring that forfeiture cases be tried within sixty days of their initiation seems wanting, particularly where a jury is demanded. Nor can the case be made that the government, in every instance, is capable of initiating proceedings within fourteen days after the seizure.<sup>93</sup>

#### CONCLUSION

Because forfeiture statutes fail to protect a property owner's due process right to a prompt post-seizure hearing, courts should fashion a remedy which insures that right. While the remedy must accommodate the government's

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84. 403 U.S. 388 (1971); see 435 U.S. at 257 n.11.

85. 403 U.S. at 396.

86. 442 U.S. at 246-47.

87. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976).

88. *Link v. Wabash R.R.*, 370 U.S. 626 (1962).

89. Fed. R. Civ. P. 41(b); see *J. F. Edwards Constr. Co. v. Anderson Safeway Guard Rail Co.*, 542 F.2d 1318, 1323 (7th Cir. 1976).

90. 18 U.S.C. §§3161, 3162 (1976).

91. See *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Freedman v. Maryland*, 380 U.S. 51, 58 (1965); *Marcus v. Search Warrant*, 367 U.S. 717, 731-33 (1961); *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 441-42 (1957).

92. 402 U.S. at 367-75.

93. See *Castlebury v. Alcohol, Tobacco & Firearms, Div.*, 530 F.2d 672, 677 (5th Cir. 1976); see notes 20-22 and accompanying text, *infra*.

reasonable law enforcement needs, it should also deter government officers from undue delay. The post-*Thirty Seven Photographs* cases, which bar the government's forfeiture claim in the event of unreasonable delay, correctly place upon the government the responsibility for guaranteeing the property owner's due process right. At the same time, the government is given an adequate opportunity to pursue the forfeiture. And, unlike the *Castlebury/Behrens* approach, the owner is not needlessly required to sue the government to protect his constitutional rights. Though money damages may indeed compensate the owner for his actual economic loss, the relative cost of litigating such a claim renders that remedy inadequate to guarantee that government officers avoid unreasonable delay. Although a review of the *Castlebury/Behrens* and the post-*Thirty-Seven Photographs* cases demonstrates that the circuit courts diverge substantially on this question, the Supreme Court has recently declined an opportunity to address the issue.<sup>94</sup> It is hoped that this article has established the need for Supreme Court review and has laid the foundation for a rational choice among the divergent approaches.

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94. *United States v. Miller*, 571 F.2d 573 (3d Cir. 1978), *cert. denied*, 99 S. Ct. 85 (1978) (owner contended delay of 38 months from seizure to institution of judicial proceedings violated due process).