

CARPE OMNIA: Civil Forfeiture in the War on Drugs and the War on Piracy

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ABSTRACT

This article explores the evolution of the federal government's civil asset forfeiture practices from the war on drugs in the 1980s and 1990s to the currently escalating war on intellectual property piracy. I argue that recent developments in the war on piracy provide strong proof that legislative reform of the federal civil forfeiture system in 2000, which was intended to make the system fairer to property owners and less prone to abuse by law enforcement agents, did not substantially succeed in achieving either goal. The constitutional problems that remain in the federal civil forfeiture system are most acute with respect to the ex parte seizure of property alleged to facilitate crime—so-called facilitation property. Within that category, Internet domain names allegedly tainted by copyright crime present unique problems. "Property" is the pigeon hole into which domain names have been stuffed, but they are different from physical property in ways for which civil forfeiture law should account. Under a straightforward application of existing Supreme Court precedents, their ex parte seizure by federal agents fighting online copyright crime offends both due process and the First Amendment. To achieve deterrent effects that are transitory at best in the online environment, the ex parte seizure and civil forfeiture of Internet domain names exacts disproportionately high constitutional costs and undermines the legitimacy and accountability of law enforcement.

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TABLE OF CONTENTS

INTRODUCTION.....	684
I. CIVIL FORFEITURE AND ITS ENABLING FICTIONS	688
II. CIVIL FORFEITURE IN THE WAR ON DRUGS	694
III. CIVIL FORFEITURE REFORM	700
A. Drug War Abuses and the Demand for Reform.....	700
B. The Civil Asset Forfeiture Reform Act of 2000 (CAFRA).....	703
C. CAFRA’s Aftermath	706
IV. CIVIL FORFEITURE IN THE WAR ON PIRACY	708
A. Civil Forfeiture Goes Online.....	710
B. Constitutional Issues in the Civil Forfeiture of Cyberproperty	712
1. Domain Names as Immovable Property	713
2. Domain Names as Mass Dual-Use Property.....	718
3. Domain Names as Instrumentalities of Speech.....	722
CONCLUSION.....	726

INTRODUCTION

As law enforcement campaigns fueled by moral panic and waged against irrepressible global black markets, the war on drugs and the war on intellectual property (IP) piracy have a lot in common. Both have demanded an outsized share of public resources,¹ and both have been used to ratchet up

1. The FY 2013 budget request for the Obama administration’s drug control strategy was \$25.6 billion, an increase of \$415.3 million over the FY 2012 allocation. OFFICE OF NAT’L DRUG CONTROL POLICY, EXEC. OFFICE OF THE PRESIDENT, NATIONAL DRUG CONTROL STRATEGY FY 2013 BUDGET AND PERFORMANCE SUMMARY 1 (2012), *available at* http://www.whitehouse.gov/sites/default/files/ondcp/fy2013_drug_control_budget_and_performance_summary.pdf. The Congressional Budget Office estimated that the costs of implementing the Prioritizing Resources and Organization for Intellectual Property (PRO-IP) Act of 2008, which was enacted to enhance government enforcement of intellectual property rights (IPRs), would be \$435 million from 2009–2013. H.R. REP. NO. 110-617, at 34 (2008). Those estimated costs are in addition to other significant expenditures on IPR enforcement, which are spread across multiple federal agencies and are therefore difficult to break out and aggregate.

the powers of law enforcement and expand the reach of criminal laws.² Together, they have been an ongoing preoccupation of the United States government for the better part of the last half century.³ With their respective “czars” and permanent staffs operating out of the Executive Office of the President, these two crime wars have become entrenched public institutions with their own internal cultures and imperatives.⁴

The Obama Administration has linked both the war on drugs and the war on piracy to the preservation of national security, bundling them with the wars on terror and cybercrime into a sort of meta-war on transnational organized crime, denominated “TOC” in administration documents.⁵ A primary component of the administration’s unified strategy for fighting transnational organized crime is targeting and dismantling the infrastructure of criminal enterprises through coordinated domestic and international enforcement, including the aggressive use of civil asset forfeiture.⁶

Civil forfeiture is the statutory process by which the government can seize and take title to allegedly crime-tainted property, wholly independent of a

2. See Lydia Pallas Loren, *Digitization, Commodification, Criminalization: The Evolution of Criminal Copyright Infringement and the Importance of the Willfulness Requirement*, 77 WASH. U. L. Q. 835, 842 (1999) (describing a “snowball effect” in the evolution of criminal copyright law); Steven Wisotsky, *Introduction: In Search of a Breakthrough in the War on Drugs*, 11 NOVA L. REV. 891, 899 (1987) (“[T]he reflexive response of the system is always to do more, always to expand. . . . When one initiative and then the next fails to produce any discernible or lasting impact on the black market in drugs, the frustrated impetus for control carries the system to its next ‘logical’ extension.”).

3. In what is generally recognized as the beginning of the war on drugs, President Nixon delivered a special address to Congress in 1971 in which he outlined plans for “a full-scale attack on the problem of drug abuse in America.” Richard Nixon, Special Message to the Congress on Drug Abuse Prevention and Control, 203 PUB. PAPERS 739 (June 17, 1971), *available at* <http://www.presidency.ucsb.edu/ws/?pid=3048>. Although there is no corresponding official declaration of war on piracy, trade groups representing corporate rights owners testified before Congress as early as 1979 in support of stricter criminal laws to curb infringement of copyrights in sound recordings and films. See Loren, *supra* note 2, at 842 n.35.

4. See generally Prioritizing Resources and Organization for Intellectual Property (PRO-IP) Act of 2008, Pub. L. No. 110-403, 122 Stat. 4256 (creating the Office of the Intellectual Property Enforcement Coordinator (IPEC)); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (creating the Office of National Drug Control Policy (ONDCP)).

5. See NAT’L SECURITY COUNCIL, EXEC. OFFICE OF THE PRESIDENT, STRATEGY TO COMBAT TRANSNATIONAL ORGANIZED CRIME: ADDRESSING CONVERGING THREATS TO NATIONAL SECURITY, 5-7 (2011), *available at* http://www.whitehouse.gov/sites/default/files/Strategy_to_Combat_Transnational_Organized_Crime_July_2011.pdf.

6. See *id.* at 20 (describing plans to “detect, disrupt, and reduce the economic power of TOC” by “freez[ing] the assets of criminal networks . . . and/or seiz[ing] them under existing forfeiture laws”).

criminal prosecution.⁷ It has been a weapon of choice for police and prosecutors in the war on drugs since passage of the Nixon-era Comprehensive Drug Abuse Prevention and Control Act (CDAPCA).⁸ It became part of the copyright enforcement repertoire with passage of the Prioritizing Resources and Organization for Intellectual Property (PRO-IP) Act of 2008.⁹ Civil forfeiture differs in important ways from impoundment and destruction, which are copyright remedies that go back to the 1909 Act.¹⁰ Orders of impoundment may be issued by a court at any time during the pendency of a copyright infringement action.¹¹ Orders of destruction may be issued as part of any final judgment.¹² Unlike orders of impoundment and destruction, civil forfeiture of allegedly tainted property can occur even if a claim of infringement against the owner of the property is never brought.¹³ And unlike orders of impoundment, which courts have held must meet the

7. See Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 511, 84 Stat. 1236, 1276–78 (1970).

8. See *id.*

9. See 18 U.S.C. § 2323(a) (2008) (setting forth types of property subject to civil forfeiture and procedures for forfeiting subject property).

10. 17 U.S.C. § 503 (2010) (providing for impoundment and destruction of infringing copies and the means of reproducing them); Act of Mar. 4, 1909, ch. 320, § 25(c)–(d), 35 Stat. 1075, 1081 (repealed 1978) (providing, respectively, for impoundment and destruction); see also MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 14.07 (Matthew Bender rev. ed. 2013) (describing the parameters of impoundment and destruction under § 503).

11. 17 U.S.C. § 503(a) (providing that the court may order impoundment on terms that it deems reasonable “[a]t any time while an action under this title is pending”).

12. *Id.* § 503(b) (providing that the court may order destruction of impounded property “[a]s part of a final judgment or decree”).

13. See JOHN WORRALL, OFFICE OF CMTY. ORIENTED POLICING SERVS., U.S. DEP’T OF JUSTICE, PROBLEM-ORIENTED GUIDES FOR POLICE RESPONSE GUIDE SERIES NO. 7: ASSET FORFEITURE 3–4 (2008), available at <http://www.cops.usdoj.gov/Publications/e1108-Asset-Forfeiture.pdf> (explaining that civil forfeiture proceedings are independent of criminal proceedings and that nearly 90% of civil forfeitures are not accompanied by criminal charges).

standard for a preliminary injunction,¹⁴ arrest warrants for property subject to civil forfeiture issue on a mere showing of probable cause.¹⁵

This article is about civil asset forfeiture, its use and abuse in the war on drugs, and its problematic translation into the realm of online copyright crimes. Part I provides a general overview of federal civil forfeiture and the legal fictions on which it relies—fictions that upset common notions of fair play and that systematically skew outcomes in favor of the government and against affected property owners. Part II focuses on the evolution of civil forfeiture as a law enforcement technique during the war on drugs, exploring both the reasons for and the troubling consequences of its explosive growth. Part III discusses the civil forfeiture reform movement of the 1990s and the significant but modest reforms it achieved through the Civil Asset Forfeiture Reform Act of 2000 (CAFRA). Part IV considers the importation of civil forfeiture into the war on piracy with emphasis on Operation In Our Sites (IOS), an enforcement initiative launched in 2010 through which U.S. Immigration and Customs Enforcement (ICE) agents have seized the domain names associated with more than 1,700 websites alleged to traffic in pirated and counterfeit goods.¹⁶ Part IV argues that CAFRA's reforms are insufficient to address the due process and First Amendment harms that arise when Internet domain names, which differ from real and personal property in legally significant ways, are seized *ex parte* and civilly forfeited as property facilitating copyright crimes.

14. *WPOW, Inc. v. MRLJ Enters.*, 584 F. Supp. 132, 135 (D.D.C. 1984) (holding that a plaintiff seeking an impoundment order under § 503 “must meet the requirements for permanent or preliminary injunctive relief”); see Paul S. Owens, *Impoundment Procedures under the Copyright Act: The Constitutional Infirmities*, 14 HOFSTRA L. REV. 211, 226 (1985) (stating that the “clear trend” under the 1976 Copyright Act’s impoundment provision is for a court “to order impoundment and issue a writ of seizure contemporaneously with the issuance of a temporary restraining order or a preliminary injunction,” effectively conditioning the issuance of the writ on a Rule 65 (of the Federal Rules of Civil Procedure) showing of irreparable injury and a likelihood of success on the merits).

15. See 18 U.S.C. § 981(b) (2012) (providing that seizures “shall be made pursuant to a warrant obtained in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure,” unless an exception to the warrant rule applies).

16. U.S. INTELLECTUAL PROP. ENFORCEMENT COORDINATOR, EXEC. OFFICE OF THE PRESIDENT, 2013 JOINT STRATEGIC PLAN ON INTELLECTUAL PROPERTY ENFORCEMENT 65 (2013), available at <http://www.whitehouse.gov/sites/default/files/omb/IPEC/2013-us-ipeec-joint-strategic-plan.pdf>.

I. CIVIL FORFEITURE AND ITS ENABLING FICTIONS

To begin with a very general overview, forfeiture is an uncompensated taking of private property that the government alleges to be connected in some way to criminal activity.¹⁷ Forfeiture proceedings come in two varieties, criminal and civil.¹⁸ Criminal forfeiture operates *in personam* as an adjunct to a criminal prosecution.¹⁹ Property forfeited to the government through criminal forfeiture proceedings is forfeited as part of sentencing following the property owner's conviction.²⁰ Civil forfeiture, by contrast, operates *in rem* and is justified by the legal fiction that the property itself is guilty of wrongdoing and therefore subject to confiscation.²¹ Whereas criminal forfeiture requires an adjudication of the property owner's guilt beyond a reasonable doubt of an underlying crime, the due process requirements for civil forfeiture are not so exacting.²²

The civil forfeiture process begins with seizure of the "guilty" property.²³ Personal property valued at less than \$500,000, and cash of any value, may be seized administratively (i.e., *ex parte*) by law enforcement authorities on a showing of probable cause that the property is subject to forfeiture under an applicable statute.²⁴ An arrest warrant is generally required.²⁵ Following the property's seizure, the owner or an interested third party may file a claim on it.²⁶ If that occurs, the government must convert the administrative forfeiture to a judicial one by filing a civil complaint for forfeiture in federal district court.²⁷ The government's burden in court is to show by a preponderance of the evidence that the property is forfeitable.²⁸ If no claim is filed, however, the administratively seized property is summarily forfeited to the government

17. See Worrall, *supra* note 13, at 1.

18. *Id.* at 3.

19. Stefan D. Cassella, *Overview of Asset Forfeiture Law in the United States*, U.S. ATTORNEYS' BULL., Nov. 2007, at 8, 13–14.

20. Worrall, *supra* note 13, at 3.

21. Cassella, *supra* note 19, at 15–16.

22. See *id.* at 17 (contrasting the standards of proof in criminal actions and civil forfeiture actions).

23. See *id.* at 12–13.

24. See Craig Gaumer, *A Prosecutor's Secret Weapon: Federal Civil Forfeiture Law*, U.S. ATTORNEYS' BULL., Nov. 2007, at 59, 63 (describing procedures for administrative forfeitures). Real property, no matter the value, must always be forfeited judicially. Cassella, *supra* note 19, at 13.

25. See Cassella, *supra* note 19, at 13 (listing exceptions to the warrant requirement, including cases of seizure incident to lawful arrest and cases in which the property is mobile).

26. *Id.*

27. *Id.* at 13, 19.

28. *Id.* at 16.

without any adversary hearing or other judicial intervention.²⁹ In the vast majority of drug cases, civil forfeitures are uncontested, so the government is seldom put to its proof.³⁰ The seizing agency simply files a declaration of forfeiture when the time for filing a claim lapses, and that declaration has the legal effect of a judgment.³¹

The fiction that the property itself is guilty (also known as the *in rem* fiction) relieves the government of the obligation to prove the criminal guilt of the property owner, even though the alleged criminal activity of the property owner, or her complicity in criminal activity, is the predicate for the forfeiture. Few commentators fail to remark on the backwardness of this logic or the extent to which it conflicts with basic notions of procedural fairness.³² In cases where no claim to the seized property is filed, the government's only burden is the showing of probable cause required to secure the seizure warrant.³³ The government retains title to civilly forfeited property whether or not prosecutors ever file criminal charges against the property owner, which they fail to do in as many as 90% of cases.³⁴

According to Oliver Wendell Holmes, modern forfeiture law is rooted in the medieval concept of the deodand, a chattel forfeited by its owner to atone for having caused a death.³⁵

The origins of the deodand are traceable to Biblical and pre-Judeo-Christian practices, which reflected the view that the instrument of death was accused and that religious expiation was required. The value of the instrument was forfeited to the King, in the belief that the King would provide the money for Masses to be said for the good of the dead man's soul, or insure that the deodand was put to charitable uses.³⁶

29. See *id.* at 13 (stating that, if no claim is filed, "the agency concludes the matter by entering a declaration of forfeiture that has the same force and effect as a judicial order").

30. See *id.* at 12 (stating that 80% of Drug Enforcement Agency forfeitures are uncontested).

31. *Id.* at 13.

32. See, e.g., Bruce Voss, *Even a War Has Some Rules: The Supreme Court Puts the Brakes on Drug-Related Civil Forfeitures*, 16 U. HAW. L. REV. 493, 493 (1994) (describing federal forfeiture law as existing in "a procedural no-man's land between civil and criminal law").

33. *Id.* at 497.

34. See Worrall, *supra* note 13, at 4 (citing a statistic from a book published in 1995 by Congressman Henry Hyde).

35. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 681 n.16 (1974) (explaining that the word "deodand" comes from the Latin *Deo dandum*, which means "to be given to God").

36. *Id.* (citing Holmes).

Over time, forfeited deodands ceased to be used for charitable purposes and became a source of revenue for the Crown.³⁷ Under the revenue regime, forfeiture was justified as a punishment for a negligent property owner's carelessness in having her property used for unlawful or injurious purposes.³⁸

While some legal historians dispute the proposition that modern forfeiture evolved directly from the medieval deodand,³⁹ the Supreme Court concluded in *Calero-Toledo v. Pearson Yacht Leasing Co.* that modern forfeiture statutes are "likely a product of the confluence and merger of the deodand tradition and the belief that the right to own property could be denied the wrongdoer."⁴⁰ Cases and commentaries that discuss the history of civil forfeiture inevitably trace a path back to the deodand's curious logic of morally culpable objects.⁴¹ From a modern, secular perspective, the view of civil forfeiture as a penalty for carelessness is a more persuasive rationale than one rooted in religious beliefs about the expiation of sins. But the negligence justification fatally undermines the fiction of the *property's* guilt by implicating the property owner as the real object of the state's action. As the Court said in *Shaffer v. Heitner*, the pretense that "an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification."⁴² In civil forfeiture cases, the property owner may be unreachable *in personam* because prosecutors lack sufficient evidence to convict her of the underlying crime.⁴³ Alternatively, the owner might be unreachable because she is, like the defendants in *Shaffer*, beyond the law's

37. *Id.* (citing Blackstone).

38. *Id.* at 682.

39. See Donald J. Boudreaux & A.C. Pritchard, *Civil Forfeiture and the War on Drugs: Lessons from Economics and History*, 33 SAN DIEGO L. REV. 79, 94–95 (1996).

40. *Calero-Toledo*, 416 U.S. at 682.

41. See, e.g., *United States v. Bajakajian*, 524 U.S. 321, 330 n.5 (1998); *Austin v. United States*, 509 U.S. 602, 611 (1993); *Calero-Toledo*, 416 U.S. at 680–81; *United States v. United States Coin & Currency*, 401 U.S. 715, 720 (1971); *Crowell v. Benson*, 285 U.S. 22, 41 n.6 (1932); 29 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 711.01 (3d ed. 1999).

42. *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977); see also *id.* at 206 (stating that "an adverse judgment *in rem* directly affects the property owner by divesting him of his rights in the property before the court"). Citing fundamental fairness, the Court in *Shaffer* reversed a decision permitting the use of *in rem* jurisdiction to reach property owners who lacked minimum contacts with the forum state and were thus beyond the reach of the court's *in personam* jurisdiction. See *id.* at 212 ("[C]ontinued acceptance [of the *in rem* fiction] would serve only to allow state-court jurisdiction that is fundamentally unfair to the defendant.").

43. See Gaumer, *supra* note 24, at 62 (pointing out that property may be subject to civil forfeiture even if the property owner is never charged, or is charged and ultimately acquitted).

territorial reach.⁴⁴ Whatever the circumstances, the *in rem* fiction gives the government power over property owners that it otherwise couldn't get because of the heightened due process protections that apply when it acts *in personam*.

A second fiction on which civil forfeiture is premised is the fiction that it is a civil (as opposed to a criminal) sanction. Similar in effect to the *in rem* fiction, the civil sanction fiction operates to limit constitutional protections for property owners by obscuring the legal reality that civil forfeiture's underlying purpose is punitive and retributive, not merely remedial.⁴⁵ Whereas a remedial purpose is ordinarily associated with civil actions, punishment is traditionally regarded as a hallmark of criminal proceedings.⁴⁶ As early as the 1880s, the Supreme Court recognized that civil forfeiture is a criminal proceeding clothed as a civil one.⁴⁷ More recent cases—including *Austin v. United States*, which held that civil forfeiture sanctions under the CDAPCA are subject to the Eighth Amendment's Excessive Fines Clause—treat civil forfeiture realistically as a hybrid of civil and criminal law.⁴⁸ The government argued in *Austin* that the Excessive Fines Clause didn't apply because the underlying purpose of civil forfeiture is not punitive but remedial, namely to remove instruments of crime from circulation and to compensate

44. The defendants in *Shaffer*, which was brought in Delaware state court, were non-residents of Delaware who owned stock in Greyhound, Inc., a Delaware corporation. *See Shaffer*, 433 U.S. at 189. Sequestered common stock certificates owned by the defendants were the proffered basis for *in rem* jurisdiction over the action in Delaware. *See id.* In order to contest the sequestration, the defendants would have been required under Delaware law to enter a general appearance, thus establishing the court's *in personam* jurisdiction over them. *See id.* at 195 n.12.

Many of the registrants whose domain names are being seized in IOS are foreign nationals over whom U.S. courts have no *in personam* jurisdiction. *See* News Releases, *Operation In Our Sites Protects American Online Shoppers, Cracks Down On Counterfeiters*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT (Nov. 28, 2011), <https://www.ice.gov/news/releases/1111/111128washingtondc.htm> (reporting that goods from seized websites were shipped from suppliers abroad).

45. Mary M. Cheh, *Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1354–55 (1991).

46. *See id.* (“At one end of the spectrum, civil and criminal cases most clearly diverge when the objective is recompense of the injured, which is the hallmark of a civil proceeding . . . At the other end of the spectrum, the criminal and civil law most clearly diverge when the goal is to exact a penalty capable of expressing condemnation—commonly termed retribution. Although some civil sanctions, particularly punitive damages, can be partially retributive in nature, criminal law alone has the retributive characteristics associated with lengthy incarceration or execution.”).

47. *See Boyd v. United States*, 116 U.S. 616, 634 (1886) (stating that a civil forfeiture information brought under tariff laws “though technically a civil proceeding, is in substance and effect a criminal one”).

48. *Austin v. United States*, 509 U.S. 602, 606 (1993).

the government for the expense of law enforcement.⁴⁹ The Court disagreed, concluding that both historically and in their modern incarnation, forfeiture statutes are punitive, even if they also serve a remedial purpose.⁵⁰

The blurred line between civil and criminal sanctioning that exists in federal civil forfeiture statutes is symptomatic of what Aaron Fellmeth and others view as a far-reaching Congressional expansion of prosecutorial power.⁵¹ Fellmeth describes a tautological process by which Congress arbitrarily labels a penalty civil and then justifies that label by prescribing civil procedures to govern its imposition.⁵² By denominating both the sanction and the action that precedes it as civil instead of criminal, lawmakers enable prosecutors to bypass protections that the Bill of Rights guarantees to defendants in nominally criminal matters.⁵³ Courts, however, including the Supreme Court in *Austin*, have looked beyond statutory labels to the reality of legislative intent, and many opinions describe civil forfeiture proceedings as “quasi-criminal” in nature.⁵⁴ The hybrid civil-criminal nature of civil forfeiture helps to explain the mixed bag of constitutional protections held to apply in such cases.⁵⁵ The Court’s opinion in *Austin* provides a summary of the bewildering jurisprudence in this area:

[T]he Court has held that the Fourth Amendment’s protection against unreasonable searches and seizures applies in forfeiture proceedings, but that the Sixth Amendment’s Confrontation Clause does not. It has also held that the due process requirement that guilt

49. *Id.* at 620.

50. *Id.* at 618 (“We conclude, therefore, that forfeiture generally and statutory *in rem* forfeiture in particular historically have been understood, at least in part, as punishment.”).

51. See Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 GEO. L.J. 1, 4 n.6 (2005) (collecting scholarly articles remarking on the erosion of the boundary between criminal and civil law in modern legislation).

52. *Id.* at 5 (“By [labeling a sanction ‘civil’], the legislature can achieve . . . precisely the same policy goals as it could using criminal law, in nearly the same manner, and without the inconvenience of affording to the suspect or defendant the enhanced protections and procedures nominally guaranteed by the Constitution in criminal cases.”).

53. *Id.*

54. See, e.g., *United States v. Any & All Radio Station Transmission Equip.*, 204 F.3d 658, 667 (6th Cir. 2000) (stating that “[f]orfeiture actions, although nominally civil, are quasi-criminal in nature”); *United States v. Marolf*, 173 F.3d 1213, 1217 (9th Cir. 1999) (stating that the court should be “particularly wary of civil forfeiture statutes, for they impose ‘quasi-criminal’ penalties without affording property owners all of the procedural protections afforded criminal defendants”); *United States v. One 1973 Rolls Royce By & Through Goodman*, 43 F.3d 794, 819 (3d Cir. 1994) (holding that the rule of lenity applies because civil forfeiture is quasi-criminal in nature).

55. See *United States v. All Assets of G.P.S. Auto. Corp.*, 66 F.3d 483, 485 (2d Cir. 1995) (describing civil forfeiture as “a cross-breed of the criminal and civil law”).

in a criminal proceeding be proved beyond a reasonable doubt does not apply to civil forfeiture proceedings.

The Double Jeopardy Clause has been held not to apply in civil forfeiture proceedings, but only in cases where the forfeiture could properly be characterized as remedial. Conversely, the Fifth Amendment's Self-Incrimination Clause, which is textually limited to "criminal case[s]," has been applied in civil forfeiture proceedings, but only where the forfeiture statute had made the culpability of the owner relevant, or where the owner faced the possibility of subsequent criminal proceedings.⁵⁶

As the foregoing summary demonstrates, civil forfeiture for constitutional purposes is sometimes regarded as more criminal than civil and sometimes vice versa. To determine on which side of the civil-criminal divide a nominally civil statutory scheme falls, courts apply an elaborate seven-factor test to assess legislative intent.⁵⁷ The outcome is difficult to predict with any certainty, not only because of the large number of factors in play but also because they often break fairly evenly in support of opposing conclusions.⁵⁸ In applying the test, however, courts put a heavy thumb on the civil side of the scale: "Because the Court ordinarily defers to the legislature's stated intent, only the clearest proof will suffice to override that intent and transform what has been denominated a civil remedy into a criminal penalty."⁵⁹ This high standard makes it very difficult for a challenger to overcome the legislature's categorization of a sanction as civil.

When it comes to procedural due process and the burden of proof it requires, as the Court stated in *Austin*, civil forfeiture proceedings have been held to fall on the civil side of the fence—a determination that makes life for prosecutors comparatively easy. The relaxed burden of proof means that prosecutors in civil forfeiture cases are not required, as they would be in criminal cases, to prove the commission of the crime in question beyond a reasonable doubt; they are required to do so only by a preponderance of the

56. *Austin v. United States*, 509 U.S. 602, 608 n.4 (1993) (internal citations omitted).

57. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963) (setting forth the following factors for determining whether a sanction is primarily punitive and therefore triggers the procedural safeguards required in criminal prosecutions: "[w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned").

58. *See id.* at 169 (pointing out that the factors "may often point in differing directions").

59. *Smith v. Doe*, 538 U.S. 84, 85 (2003).

evidence.⁶⁰ The same relaxed standard applies to proof by the government that the seized property is forfeitable (i.e., that it was derived from or used to commit the alleged crime).⁶¹ Straining intuition, the relaxed burden of proof in civil forfeiture proceedings means that the claimant can lose his or her property even after being acquitted of the underlying crime.⁶² The claimant may assert an innocent owner defense, but in order to do so she must first prove ownership of the property.⁶³ Then, to prevail on the defense and recover her property, the claimant must prove her (property's) innocence by a preponderance of the evidence.⁶⁴ Through the magical operation of the civil sanction fiction, the tables of justice are turned on the alleged criminal property owner: the government's duty to prove the offending property owner's guilt beyond a reasonable doubt is transformed into the accused property owner's duty to prove her (property's) innocence by a preponderance of the evidence. Title to the "accused" property hangs in the balance, with the government already in possession when the claim is filed.

The *in rem* fiction and the civil sanction fiction are two powerful legal fictions that combine in civil forfeiture actions to ease burdens on the government and to diminish constitutional protections for property owners. The *in rem* fiction permits the government to act through property on property owners who would otherwise be beyond its reach. The civil sanction fiction entitles the government to take property allegedly tainted by a crime without actually having to prove commission of the crime beyond a reasonable doubt. Either of these fictions operating alone would give rise to serious due process concerns. Operating together, they show the extent to which Congress and the courts have been willing to bend both legal reality and Constitutional principles to accommodate aggressive crime-fighting.

II. CIVIL FORFEITURE IN THE WAR ON DRUGS

Civil forfeiture in the United States dates from colonial times, but it was seldom called upon until its meteoric rise in the enforcement of federal drug

60. See Cassella, *supra* note 19, at 17 (discussing the burden of proof).

61. See *id.*

62. See *id.* (citing the lack of a need for criminal conviction as a tactical advantage of civil forfeiture for prosecutors).

63. Stefan D. Cassella, *The Uniform Innocent Owner Defense to Civil Asset Forfeiture: The Civil Asset Forfeiture Reform Act of 2000 Creates a Uniform Innocent Owner Defense to Most Civil Forfeiture Cases Filed by the Federal Government*, 89 KY. L.J. 653, 672-73 (2001).

64. *Id.* at 671.

laws beginning in the 1980s.⁶⁵ In 1984, the Reagan administration escalated the war on drugs with passage of the Comprehensive Crime Control Act (CCCA).⁶⁶ The CCCA created the National Assets Seizure and Forfeiture Fund, which is administered by the Department of Justice (DOJ).⁶⁷ The fund was established to make asset forfeiture programs financially self-sustaining, thereby enabling law enforcement agencies to spend their scarce appropriated resources on other operations.⁶⁸ All monies from the seizure and forfeiture of assets under laws enforced and administered by the DOJ flow into the fund.⁶⁹ In 1985, its first year, the fund ingested \$27 million in assets seized under federal law.⁷⁰ By 1991, annual deposits had grown to \$644 million—an increase of over 2,000%.⁷¹ In 1992, the take for the fund peaked at \$874 million before falling in 1993 and 1994 to around the 1991 level.⁷² According to a report issued by the DOJ in 1990, the war on drugs led to an increase in federal asset forfeitures of more than 1,500% between 1985 and 1990.⁷³

As the money rolled in, criticism of the civil forfeiture system and its stinting of due process mounted. Writing in 1991, Tamara Piety called federal civil forfeiture a “legal juggernaut, crushing every due process claim thrown

65. See *C.J. Hendry Co. v. Moore*, 318 U.S. 133 (1943) (explaining the history of forfeiture law in admiralty cases in England and the colonies); Chip Mellor, *Civil Forfeiture Laws and the Continued Assault on Private Property*, FORBES (June 8, 2011, 5:30 PM), <http://www.forbes.com/2011/06/08/property-civil-forfeiture.html> (“Modern civil forfeiture expanded greatly during the early 1980s as governments at all levels stepped up the war on drugs. No longer tied to the practical necessities of enforcing maritime law, the forfeiture power has become one of the most powerful weapons in the government’s crime-fighting arsenal.”).

66. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976.

67. See 28 U.S.C. § 524(c) (establishing the fund); see also U.S. DEP’T. OF JUSTICE, ASSETS FORFEITURE FUND: FY 2012 PERFORMANCE BUDGET 1 (2013), available at <http://www.justice.gov/jmd/2012justification/pdf/fy12-aff-justification.pdf> (giving historical background on the fund).

68. See U.S. DEP’T. OF JUSTICE, *supra* note 67, at 1.

69. See *id.*

70. Kyla Dunn, *Reining in Forfeiture: Common Sense Reforms in the War on Drugs*, FRONTLINE: DRUG WARS, <http://www.pbs.org/wgbh/pages/frontline/shows/drugs/special/forfeiture.html> (last visited Sept. 2, 2014).

71. *Id.*

72. Eric L. Jensen & Jurg Gerber, *The Civil Forfeiture of Assets and the War on Drugs: Expanding Criminal Sanctions While Reducing Due Process Protections*, 42 CRIME & DELINQ. 421, 424 (1996).

73. See U.S. DEP’T OF JUSTICE, EXEC. OFFICE FOR ASSET FORFEITURE, OFFICE OF THE DEPUTY ATT’Y GENERAL, FEDERAL FORFEITURE OF THE INSTRUMENTS AND PROCEEDS OF CRIME: THE PROGRAM IN A NUTSHELL I (1990), available at <https://www.ncjrs.gov/pdffiles1/Digitization/127204NCJRS.pdf>.

in its path.”⁷⁴ Three years later, the Cato Institute’s Roger Pilon referred to it with irony as an addiction for law enforcement, which had come to rely on forfeited assets to augment shrinking budgets in an era of smaller government.⁷⁵ Given the open reliance of law enforcement on revenue derived from civil forfeitures, property rights advocates and other critics adopted the phrase “policing for profit” to convey the perversity of the incentives created for law enforcement agencies by the National Assets Seizure and Forfeiture Fund.⁷⁶ Bruce Benson and David Rasmussen described the self-funding mechanism Congress designed for the federal civil forfeiture system as a form of “predatory public finance.”⁷⁷

One driver of the acceleration in civil forfeitures during the mid-1980s and 1990s was a provision in the CCCA establishing an “equitable sharing” program by means of which state and local authorities were incentivized to assist in the enforcement of federal drug laws.⁷⁸ Through equitable sharing, non-federal law enforcement agencies can keep up to 80% of the value of the assets they seize under federal law.⁷⁹ To give some sense of the impact of equitable sharing on participation in the federal forfeiture system by non-federal law enforcement agencies, over 90% of police departments in jurisdictions serving populations of 50,000 or more and over 90% of sheriff’s departments serving populations of 250,000 or more received federal drug asset forfeiture funds in 1990.⁸⁰ Following the introduction of equitable sharing, civil forfeiture became a mainstay for state and local law enforcement agencies. Critics argued, with statistics to back them up, that

74. Tamara Piety, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process*, 45 U. MIAMI L. REV. 911, 921 (1991).

75. See Roger Pilon, *Can American Asset Forfeiture Law Be Justified?*, 39 N.Y.L. SCH. L. REV. 311, 311 (1994).

76. See Eric Blumenson & Eva Nilson, *Policing for Profit: The Drug War’s Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 56 (1998) (“The most intuitively obvious problem presented by [forfeiture laws] is the conflict of interest created when law enforcement agencies are authorized to keep the assets they seize. It takes no special sophistication to recognize that this incentive constitutes a compelling invitation to police departments to stray from legitimate law enforcement goals in order to maximize funding for their operations.”); Worrall, *supra* note 13, at 2 (“Though it is an enforcement tool, asset forfeiture can also help in the budgeting realm by helping to offset the costs associated with fighting crime.”).

77. Bruce L. Benson & David W. Rasmussen, *Predatory Public Finance and the Origins of the War on Drugs, 1984–1989*, 1 INDEP. REV. 163, 181 (1996).

78. See Dunn, *supra* note 70; see also Worrall, *supra* note 13, at 8–9 (describing “adoptive forfeiture” and equitable sharing).

79. See Worrall, *supra* note 13, at 8.

80. See Benson & Rasmussen, *supra* note 77, at 179 (citing a report issued by the Bureau of Justice Statistics).

equitable sharing led to over-enforcement in the area of drug crime and under-enforcement in other areas.⁸¹

Another driver of the civil forfeiture boom was the incremental—and ultimately all-encompassing—expansion in the scope of forfeitable property under federal drug laws between 1970 and 1984. Prior to 1967, the only property the government was permitted to seize was property that “the private citizen was not permitted to possess,” including the fruits of crime and instrumentalities of crime.⁸² When the CDAPCA was enacted in 1970, it hewed to this narrow definition, providing for forfeiture of controlled substances and tangible property closely connected to their manufacture and distribution:

- (1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this title.
- (2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance or listed chemical in violation of this title.
- (3) All property which is used, or intended for use, as a container for [controlled substances, raw materials, or equipment for their manufacture and distribution].
- (4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of [controlled substances, raw materials, or equipment for their manufacture and distribution].

81. *See id.* at 181 (“The asset forfeiture provisions of the federal statute created an exogenous change in state and local law enforcement agencies’ bureaucratic incentives, inducing them to join the federally declared war on drugs. Police agencies seeking to increase their budget discretion were encouraged to use an increasing portion of their resources against drug offenders and to devote fewer resources to other crimes.”); *see also* Worrall, *supra* note 13, at 17 (stating that “generous forfeiture laws appear to increase agencies’ enforcement activities in areas where the chances of receiving proceeds are greatest”). *But see* John L. Worrall & Tomislav V. Kovandzic, *Is Policing for Profit? Answers from Asset Forfeiture*, 7 CRIMINOLOGY & PUB. POL’Y 219, 239 (2008) (“Importantly, we did not—nor could we, based on the research design—find that asset forfeiture distorts law enforcement goals; we did not find that the revenue generation aspect of asset forfeiture is more important than crime control.”).

82. *See* United States v. 92 Buena Vista Ave., 507 U.S. 111, 121 (1993) (“Indeed, until our decision in *Warden, Md. Penitentiary v. Hayden* . . . , the Government had power to seize only property that ‘the private citizen was not permitted to possess.’”) (quoting *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 303 (1967)).

(5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this title.⁸³

This tightly circumscribed definition of forfeitable property led to forfeitures between 1970 and 1979 of only \$30 million in the aggregate.⁸⁴ In 1978, the definition of forfeitable property was amended to include

all moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance or listed chemical in violation of this title, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this title.⁸⁵

According to the Supreme Court in *United States v. 92 Buena Vista Avenue*, the addition of proceeds to the list of forfeitable property “marked an important expansion of governmental power.”⁸⁶ A further expansion came in 1984 with the CCCA, which made forfeitable “all real property, . . . or any lot of land and any . . . improvements, which is used, or intended to be used, . . . to commit, or to facilitate the commission of, a violation of this title punishable by more than one year’s imprisonment.”⁸⁷ After 1984, no type of property—real or personal, tangible or intangible—was beyond the reach of civil forfeiture, and the DOJ had a fast-growing bank balance to prove it. With aid from a willing Congress, asset forfeiture in the Reagan era boomed.

A third driver in the explosive growth of civil forfeiture was the sheer ease of it for the government. It is critical to note in this regard that the evidentiary burdens for prosecutors described in Part I are actually more onerous than the burdens that applied in the heyday of the war on drugs. Prior to 2000, the evidentiary burdens in civil forfeiture cases were even more “prosecution oriented,” to borrow a phrase from a DOJ technical assistance report

83. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 511, 84 Stat. 1236, 1276 (codified at 28 U.S.C. § 881(a)(1)–(5)).

84. See Jensen & Gerber, *supra* note 72, at 423 (making the point that the statute saw relatively little use during the first decade of its existence).

85. Psychotropic Substances Act of 1978, Pub. L. No. 95-633, § 301, 92 Stat. 3768, 3777–78 (codified at 28 U.S.C. § 881(a)(6)).

86. *92 Buena Vista Ave.*, 507 U.S. at 121. The Court pointed out that “before [the 1978] amendment, the statute had authorized forfeiture of only the illegal substances themselves and the instruments by which they were manufactured and distributed.” *Id.* at 121–22.

87. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 306, 98 Stat. 1976, 2050 (codified at 28 U.S.C. § 881(a)(7)).

published in 1988 for state and local authorities.⁸⁸ Probable cause was the only evidentiary standard the government had to meet in a civil forfeiture proceeding, even if the property owner contested the forfeiture by making a claim on the property.⁸⁹ In the judicial hearing triggered by the filing of a claim, the burden shifted to the claimant, following the government's proof of probable cause, to prove the property's innocence by a preponderance of the evidence.⁹⁰ If the claimant failed to produce any evidence, the property was forfeited.⁹¹ For property alleged to have been used in the facilitation of drug crimes, there was no requirement for the government to show a substantial connection between the property and the crime, and courts in many circuits upheld facilitation forfeitures on a showing of only a tenuous link.⁹² In addition, the government was permitted to rely on hearsay and circumstantial evidence to show probable cause.⁹³ These light burdens on the government were matched by heavy burdens on claimants. In order to file a claim on seized property, the property owner was required to post a bond of 10% of the value of the property, up to a maximum of \$5,000.⁹⁴ If the owner failed to post a bond, the property was forfeited without a hearing.⁹⁵ In addition to posting a bond, a property owner contesting a civil forfeiture was

88. MICHAEL GOLDSMITH, POLICE EXEC. RESEARCH FORUM, CIVIL FORFEITURE: TRACING THE PROCEEDS OF NARCOTICS TRAFFICKING 4 (1988), *available at* <http://babel.hathitrust.org/cgi/pt?id=pur1.32754061516625;view=1up;seq=1>; *see also* George C. Pratt & William B. Peterson, *Civil Forfeiture in the Second Circuit*, 65 ST. JOHN'S L. REV. 653, 665 (1991) ("A glance at the current civil forfeiture procedure demonstrates that it weighs heavily in favor of the government.").

89. Sandra Guerra Thompson, *Congressional Reform of Civil Forfeiture: Punishing Criminals Yet Protecting Property Owners*, 14 FED. SENT'G REP. 71, 72 (2001).

90. *United States v. Daccarett*, 6 F.3d 37, 57 (2d Cir. 1993) (questioning the fairness of forcing the owner of seized property to prove the property's innocence but pointing out that the statutory allocation of burdens of proof in forfeiture cases had survived constitutional challenge), *superseded by statute*, 18 U.S.C. § 983(c)(3) (2009), *as recognized in* *United States v. Sum of \$185,336.07 U.S. Currency*, 731 F.3d 189, 196 (2d Cir. 2013); GOLDSMITH, *supra* note 88, at 3 (explaining the allocation of burdens pre-CAFRA).

91. GOLDSMITH, *supra* note 88, at 3.

92. *See, e.g., Daccarett*, 6 F.3d at 56 (holding that the government must show only a "nexus" between the seized property and illegal drug activity, not a "substantial connection"); Thompson, *supra* note 89, at 71.

93. *United States v. Route 2, Box 61-C*, 727 F.Supp. 1295, 1298 (W.D. Ark. 1990) (stating that in civil forfeiture proceedings, the government may use certain types of evidence that are normally excluded in criminal proceedings, specifically hearsay evidence and circumstantial evidence); *see also* JOHN J. RABIEJ ET AL., MOORE'S FEDERAL PRACTICE—CIVIL § 711.10 (Matthew Bender 3d ed.) (explaining changes instituted by CAFRA).

94. Thompson, *supra* note 89, at 72.

95. *Id.*

required to retain and pay for counsel.⁹⁶ Courtesy of the civil sanction fiction, the property owner had no Sixth Amendment right to counsel because of the nominally civil nature of the proceeding.⁹⁷ And because the claimant's burden of proof was heavier than the government's, lawyers willing to take civil forfeiture cases on a contingency fee basis were hard to find.⁹⁸ Given such a "favorable climate," a 1988 DOJ report explained, "civil forfeitures have flourished federally."⁹⁹ That flourishing, however, was very much in the eye of the beholder; many, including the commentators cited above, viewed the expansion of the civil forfeiture system through the 1980s and 1990s as something more akin to a metastasis.

III. CIVIL FORFEITURE REFORM

A. *Drug War Abuses and the Demand for Reform*

As the 1980s passed into the 1990s, and the crack cocaine epidemic began to abate,¹⁰⁰ there was a growing perception among lawmakers and the public that the existing structure of the federal civil forfeiture system had encouraged overreaching and abuse. Both the academic literature and the case law are full of examples. *Austin*, discussed above, is an often-cited case which involved the forfeiture of "facilitation" property.¹⁰¹ *Austin* pled guilty in South Dakota to one count of possession of two grams of cocaine with intent to distribute.¹⁰² He was sentenced to seven years in prison.¹⁰³ Following his plea, the government initiated a civil forfeiture action against his auto body shop, where he had arranged a drug deal, and his mobile home, where

96. *Id.*

97. *Id.* CAFRA introduced a very limited right to counsel. *See id.* at 72–73 (explaining that under CAFRA the right is limited to claimants of a forfeited primary residence and to those who are already represented by appointed counsel in a related criminal case).

98. *Id.*

99. Goldsmith, *supra* note 88, at 3.

100. In major U.S. cities, crack use increased sharply beginning in 1985 and peaked in 1989. Roland G. Fryer, Jr. et al., *Measuring Crack Cocaine and its Impact*, 51 *ECON. INQUIRY* 1651, 1653–54 (2013). Although the crack epidemic eased through the 1990s, crack use remained at 60–75% of peak levels in 2000. *Id.*

101. *See Austin v. United States*, 509 U.S. 602, 602 (1993) (explaining that the United States filed an *in rem* action in Federal District Court against *Austin*'s mobile home and auto body shop under 21 U.S.C. §§ 881(a)(4) and (a)(7), which provide for the forfeiture of vehicles and real property "used, or intended to be used, to facilitate the commission of certain drug-related crimes").

102. *Id.* at 604.

103. *Id.*

the cocaine was stored.¹⁰⁴ Austin's case, one of three civil forfeiture cases decided by the Court in 1993,¹⁰⁵ highlighted the frequent and sometimes gross lack of proportionality in the civil forfeiture system between the value of forfeited property and the severity of the underlying criminal activity. It highlighted, too, the extent to which prosecutors were using civil forfeiture to pile up sanctions against criminal defendants who were already serving time. For selling two grams of cocaine, Austin lost not only his freedom, but also his home and his business.¹⁰⁶

A much more egregious case than Austin's was that of Donald Scott, the owner of a 200-acre ranch in Malibu, California that was valued at over \$5 million when it was raided in 1992 by a multi-jurisdictional law enforcement team looking for marijuana plants.¹⁰⁷ The team was acting on an uncorroborated tip from an informant.¹⁰⁸ Scott, a sixty-one-year-old recluse, was shot and killed in the military-style raid as his wife looked on.¹⁰⁹ A subsequent investigation into his death revealed that much of the evidence supporting the search warrant was false, that exculpatory surveillance evidence had been withheld from the judge who issued the warrant, and that the Los Angeles police knowingly sought the warrant on information that was legally insufficient.¹¹⁰ The investigation concluded that forfeiture of the ranch was a substantial motivating factor in the raid.¹¹¹ That conclusion was supported by the fact that officers attending a briefing before the raid were given an appraisal of Scott's property, a parcel map of Scott's property showing the sale price of another property in the area, and a direction that the

104. *Id.* at 604–05.

105. *See also* United States v. James Daniel Good Real Prop., 510 U.S. 43, 62 (1993) (holding that, absent exigent circumstances, the due process clause requires the government to give notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture); United States v. 92 Buena Vista Ave., 507 U.S. 111, 116, 126 (1993) (holding that an “innocent owner” defense is available to prevent the forfeiture of a primary residence purchased by the girlfriend of an alleged drug dealer using a monetary gift from him that she did not know was traceable to criminal activity).

106. Low-level dealers like Austin really got the short end of the civil forfeiture stick in the 1990s. Dealers and distributors higher up the food chain were often able to bargain their way out of jail time by agreeing up front to substantial asset forfeitures. *See* Blumenson & Nilsen, *supra* note 76, at 72 (citing cases to support the proposition that the wealthiest criminal defendants with the most assets to forfeit routinely served either no time at all or less time than street-level offenders).

107. *Id.* at 73–75 (reciting facts surrounding the raid on Scott's ranch from an investigative report issued in 1993 by the Ventura County District Attorney's Office).

108. *Id.* at 73.

109. *Id.* at 73–74.

110. *Id.* at 74.

111. *Id.* at 74–75.

ranch was to be seized if the search turned up as few as fourteen marijuana plants.¹¹² Ultimately, no marijuana plants were found.¹¹³

Abuses of the civil forfeiture process during the 1990s were not limited to facilitation property; they extended as well to alleged drug proceeds.¹¹⁴ Under 21 U.S.C. § 881, which governs civil forfeitures for drug law violations, law enforcement agents may seize property without a warrant if there is probable cause to believe that the property is subject to forfeiture and the seizure is made pursuant to a lawful arrest or search.¹¹⁵ In 1992, the *Orlando Sentinel Tribune* in Florida reported on a Volusia County drug squad that stopped thousands of drivers on Interstate 95 who matched a “drug courier profile” and seized any money they had in excess of \$100.¹¹⁶ More than 70% of the drivers stopped were either African American or Latino.¹¹⁷ On-the-spot seizures of cash from travelers fitting the “drug courier profile” were also being executed in New York at that time.¹¹⁸ The practice, a form of racial profiling, was scathingly criticized by the Second Circuit in *United States v. \$31,990 in U.S. Currency*:

Forfeiture is a harsh and oppressive procedure which is not favored by the courts. Since there is little to discourage federal agents from seizing property illegally and then seeking evidence of probable cause, courts must guard against the abuse of forfeiture in the government’s zeal to apprehend and prosecute drug dealers. To support forfeiture of the money in the instant case, the government suggests a drug courier profile which indicates that, whenever two Dominicans are driving a cab on the New York State Thruway between Schenectady and New York City, any money found in the trunk wrapped and bundled in plastic bags must be connected with the illegal sale of drugs While we recognize the formidable task faced by the government in its war on drugs, we decline to condone the abuse of civil forfeiture as a means to winning that war.¹¹⁹

112. *Id.* at 75.

113. *Id.* at 74.

114. *See Pilon, supra* note 75, at 317–18 (giving examples of law enforcement abuses reported in the media).

115. 21 U.S.C. § 881(b) (2006) (cross-referencing 18 U.S.C. § 981(b) (2006)).

116. *See Pilon, supra* note 75, at 317 (citing a newspaper article by Jeff Brazil and Steve Berry).

117. *Id.*

118. *See United States v. \$31,990 in U.S. Currency*, 982 F.2d 851, 852 (2d Cir. 1993) (deciding a constitutional challenge to the seizure of cash by New York police who stopped a “gypsy” cab with a suspended registration on the New York State Thruway near Albany).

119. *Id.* at 856.

Federal courts throughout the 1980s and 1990s were confronted with cases like *\$31,990 in U.S. Currency*—cases that caused judges to balk at both the audacity of forfeiture operations and the fact that Congress was encouraging such operations through statutes that pushed the envelope with respect to Fourth and Fifth Amendment compliance.¹²⁰

B. The Civil Asset Forfeiture Reform Act of 2000 (CAFRA)

In 2000, after years of mounting criticism from across the political spectrum, Congress passed the Civil Asset Forfeiture Reform Act (CAFRA), which amended the CCCA “[t]o provide a more just . . . procedure for federal civil forfeitures.”¹²¹ CAFRA began in 1996 as a pair of competing bills in the House of Representatives.¹²² The original bill, H.R. 1916 (104th Cong.), was drafted by civil forfeiture’s most vocal critic in Congress, Rep. Henry J. Hyde (R.-Ill.).¹²³ A less ambitious alternative to the Hyde bill was drafted by the Department of Justice and introduced by then-Rep. Charles E. Schumer (D.-N.Y.).¹²⁴ It would be four years and several bills later before a compromise was finally struck.¹²⁵

CAFRA brought several important changes to the civil forfeiture regime. Most notably, it altered the allocation of burdens in civil forfeiture proceedings by raising the government’s burden of proof from probable cause to a preponderance of the evidence.¹²⁶ In doing so, it foreclosed the government’s use of hearsay evidence in forfeiture proceedings.¹²⁷ At the same time, it eliminated the burden shift that required claimants to prove their property’s innocence following the government’s showing of probable cause.¹²⁸ A proposal to raise the government’s burden of proof still higher—

120. See Voss, *supra* note 32, at 493–95 (discussing cases in which the Supreme Court reined in the government’s civil forfeiture authority).

121. Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202.

122. See Stefan D. Cassella, *The Civil Asset Forfeiture Act of 2000: Expanded Government Forfeiture Authority and Strict Deadlines Imposed on All Parties*, 27 J. LEGIS. 97, 97–101 (2001) (providing legislative history of CAFRA).

123. See *id.* at 98. In 1995, Rep. Hyde authored a tendentious monograph on civil forfeiture, published by the Cato Institute. See HENRY HYDE, *FORFEITING OUR PROPERTY RIGHTS: IS YOUR PROPERTY SAFE FROM SEIZURE?* (1995).

124. Cassella, *supra* note 122, at 98.

125. See *id.* at 97–101 (providing legislative history).

126. *Id.* at 108–09; see also 18 U.S.C. § 983(c) (setting forth the new standard of proof and allocation of burdens).

127. Cassella, *supra* note 122, at 108–09.

128. *Id.* at 109.

to clear and convincing evidence—did not find its way into the final version of CAFRA but did appear in an earlier draft of the bill.¹²⁹

To make the process fairer for claimants, CAFRA eliminated the cost bond and provided for assistance of counsel in cases involving primary residences or the filing of related criminal charges.¹³⁰ It created a uniform innocent owner defense for claimants who either did not know their property was being used for an illegal purpose or who, upon finding out, did all that could reasonably be expected under the circumstances to stop the illegal use.¹³¹ The statute also eased requirements for obtaining the release of seized property pending trial in cases where the claimant could show hardship.¹³² For property seized on a theory of facilitation, CAFRA required the government to show a substantial connection between the property and the offense.¹³³ Moreover, CAFRA authorized claimants to challenge forfeitures as excessive if the value of the property forfeited is grossly disproportional to the gravity of the offense.¹³⁴ Many of these changes codified court decisions that had found constitutional violations in the existing framework.¹³⁵

CAFRA also added special safeguards for the forfeiture of real property, tracking a narrow reading of the Supreme Court's decision in *United States v. James Daniel Good Real Property*.¹³⁶ The claimant in that case, James Daniel Good, pled guilty in 1985 to charges of promoting a harmful drug under Hawaii law after a search warrant executed on his house produced eighty-nine pounds of marijuana and associated drug paraphernalia.¹³⁷ Good was sentenced to a year in jail with five years' probation and fined \$1,000.¹³⁸ In addition, he was required to forfeit \$3,187 in cash found in the search.¹³⁹ Four and a half years later, in 1989, the United States sought forfeiture of his

129. See H.R. REP. No. 106-192, at 12 (1999) (stating that “H.R. 1658 provides that the burden of proof should not shift to a property owner upon a showing of probable cause, but should remain with the government with a standard of clear and convincing evidence that the property is subject to forfeiture”).

130. See Cassella, *supra* note 122, at 112–13, 143 (describing CAFRA's appointment of counsel provision, and discussing elimination of the cost bond, respectively).

131. *Id.* at 110–11; see also 18 U.S.C. § 983(d) (setting forth the elements of the affirmative defense).

132. Cassella, *supra* note 122, at 106–07; see also 18 U.S.C. § 983(f) (providing for the release of seized property upon a showing of “substantial hardship to the claimant”).

133. Cassella, *supra* note 122, at 109; 18 U.S.C. § 983(c)(3).

134. Cassella, *supra* note 122, at 109; 18 U.S.C. § 983(g).

135. As an example, the provision on proportionality, § 983(g), codified the Supreme Court's ruling in *United States v. Bajakajian*, 524 U.S. 321 (1998). See Cassella, *supra* note 122, at 109.

136. 510 U.S. 43 (1993).

137. *Id.* at 46.

138. *Id.*

139. *Id.*

house and the four-acre parcel on which it was located.¹⁴⁰ In an *ex parte* proceeding, a U.S. magistrate judge issued an arrest warrant *in rem* for the property.¹⁴¹ Shortly thereafter, the government seized the property without prior notice or a hearing.¹⁴² Good contested the forfeiture on due process and other grounds.¹⁴³ The Supreme Court granted certiorari to resolve a circuit split over whether due process requires pre-seizure notice and an opportunity to be heard in cases involving the forfeiture of real property.¹⁴⁴ The Court answered the question in the affirmative, distinguishing the facts of the case from those of the previously decided *Calero-Toledo v. Pearson Yacht Co.*¹⁴⁵ *Calero-Toledo*, the Court explained, involved a yacht, and yachts can be moved.¹⁴⁶ The mobility of the yacht in *Calero-Toledo* “created a special need for very prompt action that justified the postponement of notice and hearing until after the seizure.”¹⁴⁷ Real property, however, is different: “Because real property cannot abscond,” the Court said, “the court’s jurisdiction can be preserved without prior seizure.”¹⁴⁸ The Court thus made it clear in *James Daniel Good Real Property* that *Calero-Toledo* created an “exigent circumstances” exception to due process for civil forfeiture cases involving movable property; it did not announce a general rule that prior notice and a hearing are not required in civil forfeiture cases.¹⁴⁹ Responsive to the Court’s holding in *James Daniel Good Real Property*, CAFRA precluded administrative forfeiture of real property.¹⁵⁰ In civil forfeitures of real property, CAFRA mandated commencement of the action by filing a complaint (i.e., judicial forfeiture), posting notice on the subject property, and

140. *Id.* at 47.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 48.

145. 416 U.S. 663 (1974).

146. See *James Daniel Good Real Prop.*, 510 U.S. at 52 (“Central to our analysis in *Calero-Toledo* was the fact that a yacht was the sort of property that could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given.”) (internal quotations and citation omitted).

147. *Id.* (internal quotations and citations omitted).

148. *Id.* at 57.

149. See *id.* at 62 (“[W]e hold that the seizure of real property under § 881(a)(7) is not one of those extraordinary instances that justify the postponement of notice and hearing. Unless exigent circumstances are present, the Due Process Clause requires the Government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture.”).

150. See 18 U.S.C. § 985(a) (providing that “all civil forfeitures of real property and interests in real property shall proceed as judicial forfeitures”).

serving notice on the property owner.¹⁵¹ CAFRA's extra protections did not extend, however, to personal property, even though the reasoning in *James Daniel Good Real Property* makes it clear that the movability of the property in the case, and not its status as real or personal property, was the relevant consideration for determining whether the exigency exception applied.

C. CAFRA's Aftermath

Looking back on CAFRA from a distance of ten plus years, David Pimentel has argued that a more rational approach to differentiating property in the civil forfeiture context would be to divide it for procedural purposes, as the statutes do for definitional purposes, into contraband, proceeds, and facilitation property, with increasing levels of protection afforded as the property's nexus to the alleged underlying crime becomes more attenuated.¹⁵² To put it another way, where the policy justification for taking the property is weakest, the procedural protections afforded to the property owner should be greatest. Under such a framework, the highest level of procedural protection would be afforded to property accused of facilitating criminal activity—a sensible approach given that the margin for enforcement error is substantially higher for facilitation property than it is for intrinsically illegal property like banned substances.¹⁵³ In cases involving facilitation property, CAFRA did mandate that the government show a “substantial connection” between the property and the offense.¹⁵⁴ As courts have interpreted that requirement, however, it is relatively easy for prosecutors to meet.¹⁵⁵

For as much as CAFRA accomplished, and it did accomplish a good deal from the perspective of due process for property owners, it left the core of the civil forfeiture system intact and did nothing to disrupt its powerful enabling

151. *See id.* § 985(c) (setting forth procedures for initiating a civil forfeiture of real property).

152. *See* David Pimentel, *Forfeitures Revisited: Bringing Principle to Practice in Federal Court*, 13 NEV. L.J. 1, 3 (2012).

153. *See id.* (asserting that “the most serious problems arise in the context of facilitating-property forfeitures”).

154. 18 U.S.C. § 983(c)(3) (2012).

155. *See, e.g.*, *United States v. Herder*, 594 F.3d 352, 364 (4th Cir. 2010) (holding that “[s]ubstantial connection may be established by showing that use of the property made the ‘prohibited conduct less difficult’”) (internal citation omitted); *United States v. \$22,173.00 in U.S. Currency*, 716 F. Supp. 2d 245, 250 (S.D.N.Y. 2010) (holding that the government “need not prove that there is a substantial connection between the property and any *specific* drug transaction”) (emphasis added) (internal citation omitted); *United States v. \$1,700,000.00 in U.S. Currency*, 545 F. Supp. 2d 645, 649 (E.D. Mich. 2008) (stating that “[t]he burden of proving a substantial connection . . . does not require the government to prove a direct connection between the illegal activity and the seized assets”).

fictions.¹⁵⁶ Most problematically, the property owner's legal liability (or non-liability) for the crime that allegedly tainted her seized property remains irrelevant to the civil forfeiture analysis. Even after CAFRA, the government can forfeit property if its owner is never indicted for—and even if its owner is ultimately acquitted of—the underlying crime.¹⁵⁷ The divide between the government's burden of proof in a civil forfeiture case and its burden in a criminal case is less yawning than it was before CAFRA, but it remains great, and that discrepancy is a continuing source of injustice. Moreover, in light of the rarity of challenges to administrative forfeitures, the government's *de facto* burden in the vast majority of civil forfeiture cases remains what it was *de jure* before CAFRA: probable cause. As many judicial opinions in the civil forfeiture context recite, that standard requires only more than a mere suspicion.¹⁵⁸ Proof beyond a reasonable doubt is evidentiary miles away. And even with CAFRA's "innocent owner" defense, the burden is still on the property owner to prove her property's innocence, assuming she has the time and other resources necessary to contest the forfeiture.

With respect to the types of forfeitable property that should be entitled to pre-seizure notice and an opportunity to be heard, CAFRA myopically focused on real property. According to the Supreme Court's reasoning in *James Daniel Good Real Property*, pre-seizure notice and an opportunity to be heard are the rule in civil forfeiture cases, with a narrow exception for exigent circumstances.¹⁵⁹ The Court's due process analysis in the case turned not on the difference between real and other property, but on the difference between immovable and movable property.¹⁶⁰ Although Congress appears to have missed this point when drafting CAFRA, decisions from the Sixth and Ninth Circuits reflect an understanding of *James Daniel Good Real Property*

156. As Professor Pimentel has noted, CAFRA "smacks of patchwork, adjusting standards and overturning the doctrines responsible for the worst injustices, but neither reexamining the foundations of forfeiture law nor establishing a sound policy rationale for forfeiture procedure overall." Pimentel, *supra* note 152, at 15.

157. See Cassella, *supra* note 19, at 15 ("Because a civil forfeiture does not depend on a criminal conviction, the forfeiture action may be filed before indictment, after indictment, or if there is no indictment at all.").

158. See, e.g., *United States v. Approximately \$1.67 Million (US) in Cash, Stock & Other Valuable Assets*, 513 F.3d 991, 999 (9th Cir. 2008) ("Accordingly, for the government to meet its burden, it must demonstrate that it had reasonable grounds to believe that the [money] was related to an illegal drug transaction, supported by less than prima facie proof but more than mere suspicion.") (internal citation omitted); *United States v. 1948 S. Martin Luther King Dr.*, 270 F.3d 1102, 1111 (7th Cir. 2001) ("Probable cause is reasonable ground for the belief of guilt supported by less than prima facie proof but more than mere suspicion.") (internal citation omitted).

159. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 57 (1993).

160. *Id.*

in which the dispositive question is the movability of the property to be seized.¹⁶¹ The Sixth Circuit, citing *James Daniel Good Real Property*, upheld an *ex parte* seizure of radio equipment used in unlicensed broadcasting because the equipment was easily movable.¹⁶² The Ninth Circuit upheld an *ex parte* seizure of currency for the same reason.¹⁶³ Because notice and a pre-seizure hearing are the constitutional rule to which *Calero-Toledo* created a narrow exception for movable property, CAFRA's enhanced due process protection for real property is under-inclusive; the requirement of judicial forfeiture should extend to all forms of immovable (or not easily movable) property, including, as argued in Part IV.B below, Internet domain names.

IV. CIVIL FORFEITURE IN THE WAR ON PIRACY

The 2008 presidential election precipitated a significant policy shift in the war on drugs. In 2009, Obama drug czar Gil Kerlikowske told a journalist that the “war on drugs” was an unproductive metaphor because it translates inevitably in the public imagination into a “war on people.”¹⁶⁴ In May of 2010, Kerlikowske formally announced an end to the executive branch's forty-year focus on enforcement, committing the administration to a new drug control strategy oriented toward prevention and treatment.¹⁶⁵ Instead of viewing drug addiction primarily as a criminal justice issue, Kerlikowske said, the ONDCP would approach it going forward as a public health and public safety issue.¹⁶⁶ The new strategy telegraphed a conclusion about drug

161. See *United States v. Any & All Radio Station Transmission Equip.*, 218 F.3d 543, 550 (6th Cir. 2000) (stating that the holding in *James Daniel Good Real Property* does not apply to forfeiture actions involving easily movable personal property); *United States v. \$129,727.00 in U.S. Currency*, 129 F.3d 486, 493 (9th Cir. 1997) (stating that the dispositive distinction for the Court in *James Daniel Good Real Property* was “the distinction between non-movable real property and movable personal property”).

162. See *Any & All Radio Station Transmission Equip.*, 218 F.3d at 550 (holding that “immediate seizure was necessary” because “the target of the government's forfeiture action was radio transmission equipment, which is movable personal property”).

163. See *\$129,727.00 in U.S. Currency*, 129 F.3d at 493 (stating that *James Daniel Good Real Property* “explicitly did not require any additional due process safeguards for movable personal property such as currency”).

164. See Gary Fields, *White House Czar Calls for End to ‘War on Drugs,’* WALL ST. J. (May 14, 2009, 12:01 AM), <http://online.wsj.com/article/SB124225891527617397.html> (summarizing an interview with Mr. Kerlikowske).

165. Sam Hananel, *Obama Shifts Strategy away from War on Drugs: Will Now Focus on Prevention and Treatment*, BOSTON.COM (May 12, 2010) http://www.boston.com/news/nation/washington/articles/2010/05/12/obama_shifts_strategy_away_from_war_on_drugs/.

166. *Id.*

control policy that had become obvious over the decades following Nixon's declaration of war on drugs: interdiction and expansive criminalization have proven ineffective.¹⁶⁷

Displaced from the realm of drug control policy, the criminal justice approach to eliminating black markets has found a new home in the war on IP crime. In the waning days of the Bush presidency, Congress enacted the Prioritizing Resources and Organization for Intellectual Property (PRO-IP) Act of 2008, which provided for "enhancements" to civil and criminal intellectual property laws, including civil and criminal forfeiture of property tainted by IP crime.¹⁶⁸ The PRO-IP Act was intended to leverage and focus the resources of the federal criminal justice system to decrease the supply of infringing goods and to impose harsh sanctions on those who produce and distribute them.¹⁶⁹ By expanding the penalties for civil and criminal infringement and creating a federal bureaucracy for coordinating criminal IP enforcement, Congress delivered a major public subsidy to corporate IP owners and greatly increased their access to the government's coercive power.¹⁷⁰

The PRO-IP Act required appointment of the IP czar, known officially as the Intellectual Property Enforcement Coordinator (IPEC), to oversee the coordination of law enforcement efforts across a wide range of federal

167. Cf. Eduardo Porter, *Numbers Tell of Failure in Drug War*, N.Y. TIMES (July 3, 2012) http://www.nytimes.com/2012/07/04/business/in-rethinking-the-war-on-drugs-start-with-the-numbers.html?pagewanted=all&_r=0 ("Despite billions spent on measures from spraying coca fields high in the Andes to jailing local dealers in Miami or Washington, a gram of cocaine cost about 16% less [in 2011] than it did in 2001.").

168. See Prioritizing Resources and Organization for Intellectual Property (PRO-IP) Act of 2008, Pub. L. No. 110-403, § 206, 122 Stat. 4256, 4262-63 (2008) (codified as amended at 18 U.S.C. § 2323) (amending criminal copyright law to, *inter alia*, add civil and criminal forfeiture as remedies); Mary Spicuzza, *PRO IP Act Allows Law Enforcement to Seize Knock-Off Peddlers Equipment and Proceeds*, ASS'N OF CERTIFIED FIN. CRIME SPECIALISTS (Nov. 6, 2008), <http://www.acfcs.org/pro-ip-act-allows-law-enforcement-to-seize-knock-off-peddlers-equipment-and-proceeds/> (quoting the Director of Congressional and Public Affairs for the U.S. Chamber of Commerce: "If you've been storing counterfeit goods in a warehouse, that warehouse should be forfeited.").

169. Cf. Declan McCullagh, *Copyright Bill Boosts Penalties, Creates New Agency*, CNET.COM (Dec. 5, 2007, 10:43 PM), http://news.cnet.com/8301-13578_3-9829826-38.html (reporting on key provisions of the PRO-IP Act).

170. See Declan McCullagh, *RIAA, MPAA Resume Lobbying Push to Expand Copyright Law*, CNET.COM (Sept. 11, 2008, 9:55 AM) http://news.cnet.com/8301-13578_3-10039238-38.html (reporting on the entertainment industries' support for pending legislation that was eventually enacted as the PRO-IP Act); see also PRO-IP Act, Pub. L. No. 110-403, § 503, 122 Stat. 4256, 4279 (expressing "the sense of Congress that effective criminal enforcement of the intellectual property laws against violations in all categories of works should be among the highest priorities of the Attorney General").

agencies.¹⁷¹ To fulfill her mandate, the first IPEC, Victoria Espinel, created the National Intellectual Property Rights Coordination Center (IPR Center).¹⁷² The IPR Center is a multi-agency task force that runs criminal investigations and enforcement operations from within the Department of Homeland Security.¹⁷³ The IPR Center self-identifies as an entity focused on interdiction, with a supply-side focus borrowed from a bygone era in the war on drugs.¹⁷⁴ Operation In Our Sites (IOS), which began in June of 2010, was among its first high-profile enforcement initiatives.

A. *Civil Forfeiture Goes Online*

The forfeiture provisions in the PRO-IP Act, which are the statutory basis for IOS, incorporate by reference corresponding provisions from federal drug laws, revealing the (perhaps surprising) debt that Obama-era IP policy owes to Nixon-era drug policy.¹⁷⁵ The overlaps are procedural and substantive. Both the PRO-IP Act and the CDAPCA, as amended by CAFRA and other laws, incorporate the civil forfeiture procedures discussed at length in Parts I and II above, which are codified at section 981 of title 18.¹⁷⁶ Substantively, the categories of property forfeitable under the PRO-IP Act align with the CDAPCA's triad of contraband, proceeds, and facilitation property.¹⁷⁷ Specifically, the PRO-IP Act permits forfeiture of (1) criminally infringing articles, (2) direct or indirect proceeds of the production or distribution of infringing articles, and (3) property used or intended to be used to commit or

171. See PRO-IP Act, Pub. L. No. 110-403, § 301, 122 Stat. 4256, 4264 (providing that the President shall appoint an Intellectual Property Enforcement Coordinator who shall chair a multi-agency advisory committee charged with developing and implementing a Joint Strategic Plan against counterfeiting and infringement).

172. See *About Us*, IPR CENTER, <http://www.iprcenter.gov/about-us> (last visited Aug. 5, 2013).

173. See *National Intellectual Property Rights (IPR) Coordination Center/IPR Investigations*, IPR CENTER, <http://www.iprcenter.gov/reports/fact-sheets/national-intellectual-property-rights-ipr-coordination-center-ipr-investigations> (last visited Aug. 5, 2013).

174. See *About Us*, IPR CENTER, <http://www.iprcenter.gov/about-us> (last visited Aug. 5, 2013).

175. See, e.g., PRO-IP Act § 206(a), 122 Stat. at 4263 (codified as amended at 18 U.S.C. § 2323(b)(2)(A)) (providing that “[t]he forfeiture of property under paragraph (1) . . . shall be governed by the procedures set forth in section 413 of the Comprehensive Drug Abuse Prevention and Control Act of 1970”).

176. See *id.* at 4262 (“The provisions of chapter 46 relating to civil forfeitures [i.e., 18 U.S.C. § 981 *et seq.*] shall extend to any seizure or civil forfeiture under this section.”); 21 U.S.C. § 881(b) (incorporating by reference the procedures from 18 U.S.C. § 981(b)).

177. See 18 U.S.C. § 881(a) (enumerating types of property subject to civil forfeiture).

facilitate the production or distribution of infringing articles.¹⁷⁸ The underlying federal crimes that make property forfeitable under the PRO-IP Act are copyright infringement, trademark infringement, and misappropriation of trade secrets under the Economic Espionage Act.¹⁷⁹

Only a month after the ONDCP swore off an enforcement-centered approach to the war on drugs, ICE agents operating under the auspices of the IPR Center launched IOS by securing seizure warrants against 10 domain names of websites offering first-run movies.¹⁸⁰ By 2012, IOS had become a well-oiled civil forfeiture machine. In February, “Operation Fake Sweep” targeted 16 sites suspected of illegally streaming live sporting telecasts and 291 sites suspected of selling counterfeit merchandise.¹⁸¹ In July, “Project Copy Cat” shuttered 70 more sites suspected of selling counterfeit merchandise.¹⁸² The seizures continued throughout the fall of 2012 and into the holiday season. In September and October, “Project Bitter Pill” eliminated 686 sites suspected of selling counterfeit branded medicines.¹⁸³ In November and December, “Project Cyber Monday” targeted 15 sites suspected of selling counterfeit sporting goods and 89 sites suspected of selling other types of counterfeit goods.¹⁸⁴ In 2012 alone, over 1,000 domain names were seized and administratively forfeited by federal agents on the theory that they were being used to facilitate criminal infringement and counterfeiting. U.S.-based operators of the relevant domain name registries were ordered to redirect web traffic from the seized domains to a site

178. See PRO-IP Act § 206(a), 122 Stat. at 4262 (codified as amended at 18 U.S.C. § 2323(a)(1)(A)–(C)) (identifying types of property subject to civil forfeiture).

179. See *id.* (identifying types of property subject to civil forfeiture with reference to specific criminal infringement provisions of the United States Code).

180. News Releases, “*Operation In Our Sites*” Targets Internet Movie Pirates: ICE, Manhattan U.S. Attorney Seize Multiple Web Sites for Criminal Copyright Violations, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT (June 30, 2010), <http://www.ice.gov/news/releases/1006/100630losangeles.htm>. It is not clear from the press release whether the sites were offering program streams or downloads.

181. News Releases, *Special Agents and Officers Seize More Than \$4.8 Million in Fake NFL Merchandise and Seize 307 Websites During ‘Operation Fake Sweep,’* U.S. IMMIGRATION & CUSTOMS ENFORCEMENT (Feb. 2, 2012), <https://www.ice.gov/news/releases/1202/120202indianapolis.htm>.

182. News Releases, *ICE-Led IPR Center Seizes 70 Websites Duping Consumers into Buying Counterfeit Merchandise*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT (July 12, 2012), <https://www.ice.gov/news/releases/1207/120712washington.htm>.

183. News Releases, *HSI Seizes 686 Websites Selling Counterfeit Medicine to Unsuspecting Consumers*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT (Oct. 4, 2012), <https://www.ice.gov/news/releases/1210/121004washingtondc.htm>.

184. News Releases, *Houston HSI Seizes 89 Websites Selling Counterfeit Goods*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT (Dec. 20, 2012), <https://www.ice.gov/news/releases/1212/121220houston.htm>.

displaying an anti-piracy banner bearing the logos of Homeland Security Investigations, the IPR Center, and the DOJ.¹⁸⁵

B. Constitutional Issues in the Civil Forfeiture of Cyberproperty

IOS and related online enforcement initiatives raise important questions about the status of Internet domain names as forfeitable property and the extent to which they may differ in legally relevant ways from the physical property more commonly seized in the government's anti-piracy and anti-counterfeiting operations. Federal agents and representatives of the content industries habitually refer to the domain names seized in IOS as "pirate sites" or "infringing sites,"¹⁸⁶ thereby conflating the seized domain names with both the web sites to which they refer and the content available (by display or download) through them.¹⁸⁷ This imprecise shorthand suggests that the seized domain names are themselves a form of contraband. They are not—at least not with respect to alleged copyright crimes. Whereas a domain name can be *trademark* infringing, it cannot be *copyright* infringing.¹⁸⁸ Seizing a "pirate site" is not the same as seizing a "pirate DVD." And the difference matters. To be precise, the domain names seized for their alleged connection to online copyright crimes are seized on the theory that they are facilitation property.¹⁸⁹

185. See Seizure Warrant, In the Matter of the Seizure of Rapgodfathers.com et al., No. 10-2822M (C.D. Cal. Nov. 30, 2010) (requiring the domain name registry Verisign to redirect browser traffic to the seized domain names from the Internet Protocol (IP address) of the domain name owner's server to an IP address belonging to an ICE server).

186. See News Release, "Operation In Our Sites" Targets Internet Movie Pirates: ICE, Manhattan U.S. Attorney Seize Multiple Web Sites for Criminal Copyright Violations, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT (June 30, 2010), <http://www.ice.gov/news/releases/1006/100630losangeles.htm> (referring to domains seized in IOS as "pirate Web sites"); *Frequently Asked Questions: Content Protection FAQs*, MOTION PICTURE ASS'N OF America (last visited Aug. 14, 2013), www.mpa.org/contentprotection/faq (referring to sites that host infringing content as "pirate sites").

187. A domain name is a string of alphanumeric text (e.g., www.uidaho.edu) that points to the Internet Protocol (IP) address (e.g., 129.101.70.186) of a server on which the digital content comprising a particular web site is stored. See *infra* Part IV.B.3 (providing a detailed explanation of how the domain name system operates).

188. See 37 C.F.R. § 202.1 (2014) (excluding from copyright protection "words and short phrases such as names, titles, and slogans"); *Moody v. Morris*, 608 F. Supp. 2d 575, 579 (S.D.N.Y. 2009) (stating that "it is axiomatic that words, short phrases, titles, and slogans are not subject to copyright, even if they can be trademarked").

189. See, e.g., Application and Affidavit for Seizure Warrant at 3, In the Matter of the Seizure of Rapgodfathers.com, No. 10-2822M (C.D. Cal. Nov. 24, 2010) (asserting that "there is probable cause to believe that the *subject domain names* are property used, or intended to be used to commit or facilitate criminal copyright infringement, in violation of 18 U.S.C. § 2319 and 17 U.S.C. § 506(a)") (emphasis added).

As discussed in Part III.C above, forfeitures of facilitation property warrant closer constitutional scrutiny than do forfeitures of contraband, because facilitation property is not inherently illegal and because, of the three categories of forfeitable property, it has the weakest nexus to alleged criminal activity.¹⁹⁰

Three specific attributes of domain names as facilitation property counsel a higher level of procedural protection than is being provided in IOS and other online criminal copyright enforcement operations. This subpart will discuss each in turn. First, domain names are not physically movable, even though the content they make accessible is. Unlike the yacht at issue in *Calero-Toledo*, a domain name cannot abscond, so the exigency that justified *ex parte* action by government agents in *Calero-Toledo* does not exist with seizures of domain names. Second, domain names, like cars and other types of facilitation property, are dual-use, meaning that they enable both lawful and unlawful conduct. Unlike cars and other types of physical facilitation property, however, domain names are non-rivalrous and accessible worldwide, so their seizure impacts potentially innocent third parties on a scale not imaginable with seizures of physical facilitation property. Domain names are thus not only dual-use property, they are mass dual-use property. This is especially true in the case of cloud storage services, which can have millions of users. Third, domain names are instrumentalities of speech, both commercial and non-commercial, so their *ex parte* seizure raises First Amendment issues in addition to the due process issues associated with facilitation property more generally.

1. Domain Names as Immovable Property

Although the law recognizes domain names as property, they are, as Greg Lastowka notes, “a somewhat peculiar form of property” not easily equated with physical property.¹⁹¹ For a time in the Internet’s pre-commercial history, the proprietization of domain names was not a foregone conclusion; a number of courts preferred to view rights in domain names not as property rights but as rights arising under the service contracts between domain name registrants

190. See *Bennis v. Michigan*, 516 U.S. 442, 460 (1996) (Stevens, J., dissenting) (“Forfeiture is more problematic for [facilitation] property than for [contraband or proceeds], both because of its potentially far broader sweep, and because the government’s remedial interest in confiscation is less apparent.”).

191. Greg Lastowka, *Decoding Cyberproperty*, 40 IND. L. REV. 23, 49 (2007).

and registrars.¹⁹² Scholars, too, were split on the propertization question.¹⁹³ Under pressure from trademark owners eager to extend their terrestrial rights into cyberspace, Congress more or less ended the debate with the Anti-Cybersquatting Consumer Protection Act of 1999 (ACPA). The ACPA provided for *in rem* jurisdiction over domain names containing trademarked words or phrases in cases where the registrants, accused cyber-squatters, were not subject to personal jurisdiction in U.S. courts.¹⁹⁴ By importing the *in rem* fiction into cyberspace and merging evolving rights in domain names with established rights in trademarks, Congress blessed the property paradigm.¹⁹⁵

At the end of the day, domain names became property not because they obviously *are* property, but because it is arguably more efficient and convenient to treat them as property than to treat them as the subject matter of executory contracts. Affixing a label, however, goes only so far. Congress can (and did) decide that a domain name is “located” for legal purposes where the entity that registered it has its primary place of business, but that is location by fiat, not location in the ordinary sense of physical presence.¹⁹⁶ “Even if we decide that ‘cyberproperty’ should be treated like a form of

192. See Daniel Hancock, *You Can Have It, But Can You Hold It?: Treating Domain Names as Tangible Property*, 99 KY. L.J. 185, 191 (2011) (discussing a split in the case law over whether rights in domain names are grounded in contract (the minority view) or property (the majority view)).

193. See Anupam Chander, *The New, New Property*, 81 TEX. L. REV. 715, 778–79 (2003) (summarizing arguments for and against propertization of domain names). Compare, e.g., Margaret Jane Radin, *Incomplete Commodification in the Computerized World*, in THE COMMODIFICATION OF INFORMATION 3, 7 (Niva Elkin-Koren & Neil Weinstock Netanel eds., 2002) (arguing that the propertization of information in cyberspace is dystopic), with Eli Noam, *Two Cheers for the Commodification of Information*, in THE COMMODIFICATION OF INFORMATION 43, 43 (Niva Elkin-Koren & Neil Weinstock Netanel eds., 2002) (arguing that propertization in cyberspace is beneficial because it aids in the creation, flow, and distribution of information).

194. See 15 U.S.C. § 1125(d)(2)(A) (2012) (“The owner of a mark may file an *in rem* civil action against a domain name . . . if . . . the domain name violates any right of the owner of a mark . . . and the court finds that the owner is not able to obtain *in personam* jurisdiction over [the domain name registrant].”).

195. Lastowka, *supra* note 191, at 51 (asserting that the ACPA “legislatively reif[ied] the notion that domain names were a form of virtual property”); see also Alexis Freeman, *Internet Domain Name Security Interests: Why Debtors Can Grant Them and Lenders Can Take Them in This New Type of Hybrid Property*, 10 AM. BANKR. INST. L. REV. 853, 877 (2002) (“By providing for *in rem* jurisdiction . . . the ACPA [leads to the conclusion] that a domain name is property that can be attached.”).

196. See 15 U.S.C. § 1125 (providing that an *in rem* action against a domain name may be filed “in the judicial district in which the domain name registrar, domain name registry, or other domain name authority that registered or assigned the domain name is located”); *Caesars World, Inc. v. Caesars-Palace.com*, 112 F. Supp. 2d 502, 504 (E.D. Va. 2000) (discussing the ACPA and concluding that “[e]ven if a domain name is no more than data, Congress can make data property and assign its place of registration as its situs”).

property,” Lastowka cautions, “this does not mean that the traditional property rules . . . work in this context. If we wish to call the ones and zeros flowing through networks a form of property, we need an approach that is sensitive to the obvious differences between the way bits and land behave.”¹⁹⁷ Procedures for civilly forfeiting domain names should respect this principle of difference, but they do not.¹⁹⁸

Unlike a pirated DVD or a fake designer bag, domain names have no corporeal presence. The law treats them as personal property, but they’re not movable like chattels, and that fact impacts what process is due when the government civilly forfeits them.¹⁹⁹ Unlike the owner of a yacht, the owner of a domain name cannot move it to conceal it from government agents or to defeat the jurisdiction of a federal court. In light of the Supreme Court’s reasoning in *Calero-Toledo*, this distinction compels the conclusion that there is no exigency to justify *ex parte* seizures of domain names. Under *Calero-Toledo*, as discussed in Part III.B above, due process requires pre-seizure notice and an opportunity to be heard in all cases unless there is “a special need for very prompt action,” as where the property to be seized is movable.²⁰⁰ If the property to be forfeited is immovable, as both real property and domain names are, there is time for adversary process.

A technical explanation of what domain names are and how they work²⁰¹ makes it clear that they are not movable property, even though the content they make available can very easily be moved.²⁰² A domain name is a string of letters (e.g., Amazon.com) that corresponds to a string of numbers called an Internet Protocol (IP) address (e.g., 205.251.242.54).²⁰³ Every piece of hardware connected to the Internet, including every server that acts as a website host, has a unique IP address.²⁰⁴ IP addresses are hard to remember, but domain names are not. The Domain Name System (DNS) was created to relieve people of the burden of having to keep track of long lists of IP

197. Lastowka, *supra* note 191, at 47.

198. Margaret Jane Radin has argued that the propertization of cyberspace is destined to be both contested and incomplete in light of the fact that information resists commodification. *See* Radin, *supra* note 193, at 4.

199. *See* United States v. James Daniel Good Real Prop., 510 U.S. 43, 52 (1993) (explaining that the movability of the property in *Calero-Toledo* was an exigency that justified a due process exception).

200. *Calero-Toledo v. Pearson Yacht Co.*, 416 U.S. 663, 678 (1974).

201. *See* Office Depot Inc. v. DS Holdings, L.L.C., 596 F.3d 696, 698–99 (9th Cir. 2010) (explaining how the Domain Name System works and how registrants register domain names).

202. *Id.* at 699.

203. *Id.* at 698.

204. *Id.*

addresses and the websites to which they correspond.²⁰⁵ The DNS accomplishes this by means of a collection of databases called domain name registries.²⁰⁶ For each of the Internet's top-level domains (e.g., .com, .org, and .gov), there is a separate registry.²⁰⁷ Each registry is administered and controlled by a registry operator.²⁰⁸ For every domain name in a given top-level domain, there is an entry in the registry that links the domain name to its corresponding IP address.²⁰⁹ When a user enters the domain name of a website into the address bar of her web browser, the browser spontaneously queries the appropriate registry to find the associated IP address and then directs the browser to that IP address.²¹⁰ This process is called resolving a domain name.²¹¹

When the government seizes a domain name, it doesn't take physical custody of anything; rather, it presents the relevant registry operator with a court order directing the operator to alter the database entry for that domain name so that it no longer resolves to the IP address designated by the owner/registrant.²¹² The seized domain name is made to resolve instead to a government-controlled IP address. When the database entry is altered, nothing actually happens to the underlying website's content. The content remains under the control of the original owner/registrant and is still accessible on the open Web to anyone who actually knows the IP address—which no one, as a practical matter, does.²¹³ For this reason, it is misleading to speak, as ICE representatives often do, of “seizing a website.”²¹⁴ The

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* at 698–99.

212. See *Seizure Warrant*, *supra* note 185, at 71–72; see also *Palacio Del Mar Homeowners Ass'n v. McMahon*, 95 Cal. Rptr. 3d 445, 449 (Cal. Ct. App. 2009) (“Domain name registration supplies the intangible contractual right to use a unique domain name for a specified period of time. Even if this right constitutes property, [a domain name] cannot be taken into custody.”) (internal quotation and citation omitted).

213. The fact that the content technically remains accessible following the seizure could be cited to support the argument that *ex parte* domain name seizures are not a prior restraint on speech. There is an important distinction to be made, however, between speech that is accessible in theory and speech that is accessible in practice. Given the way the DNS works, breaking the link between a domain name and its corresponding IP address effectively takes the underlying content out of circulation.

214. See, e.g., News Release, *ICE-Led IPR Center Seizes 70 Websites Duping Consumers into Buying Counterfeit Merchandise*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT (July 12, 2012) (<https://www.ice.gov/news/releases/1207/120712washington.htm>).

structure of the DNS is such that the registry operator, which is wholly independent of individual domain name registrants, fully controls the registry and all of its constituent database entries. A registrant can change the IP address to which her domain name corresponds and can cancel or decline to renew the registration, but she has no direct control over any entry in the registry and no ability to delete a domain name from it. A registrant's dominion over a domain name is thus completely mediated by the registry operator.²¹⁵ To understand this point is to understand that seizing a domain name does not present "a special need for very prompt action," as is required by *Calero-Toledo* and *James Daniel Good Real Property*.²¹⁶ The content underlying a domain name can abscond, but seizing the domain name does nothing to prevent that, because the content displayed at a website is physically separate from the domain name.

When Congress amended CAFRA to preclude *ex parte* seizures of real property, it too narrowly applied the Supreme Court's teaching about due process requirements for civil forfeitures. As the Court emphasized in *James Daniel Good Real Property*, "[t]he right to prior notice and a hearing is central to the Constitution's command of due process," with exceptions reserved for "extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event."²¹⁷ Where the property to be seized is easily moved to evade the court's jurisdiction or to defeat the government's effort to take custody, an exception is warranted. Where, as with domain names, the property is under the control of a disinterested intermediary, there is no prejudice to the government in delaying the seizure until an adversary hearing can be held.²¹⁸

215. See *Office Depot*, 596 F.3d at 699 ("Registrants interact with the registrars, who in turn interact with the registries.").

216. *Calero-Toledo v. Pearson Yacht Co.*, 416 U.S. 663, 678 (1974).

217. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993) (internal citation and quotations omitted).

218. If the government were seizing servers on which allegedly infringing content is stored, a case for an exigency exception would be more persuasive. Servers can easily be physically moved, and their contents can be instantaneously deleted. Servers, however, are not what ICE has been seizing in IOS. Many, if not most, of the servers that host the websites to which domain names seized in IOS provide access are located abroad and are therefore beyond the government's reach. Seizing the domain names in lieu of the servers is a way of giving U.S. criminal IP law extraterritorial reach. See Jack Mellyn, "Reach Out and Touch Someone": *The Growing Use of Domain Name Seizure as a Vehicle for the Extraterritorial Enforcement of U.S. Law*, 42 GEO. J. INT'L L. 1241, 1242 (2011).

2. Domain Names as Mass Dual-Use Property

The Megaupload case provides an example of both the dual-use nature of facilitation cyberproperty and the mass third-party impact of domain name seizures impacting cyberlocker services.²¹⁹ In January of 2012, with IOS well underway, federal prosecutors indicted Kim Dotcom, the New Zealand-based operator of the cyberlocker Megaupload, for criminal copyright infringement and conspiracy to commit criminal copyright infringement.²²⁰ When the sealed indictment was issued, the government seized (as a prelude to civilly forfeiting) ten domain names associated with Megaupload.²²¹ Users of the service who attempted to access the site after its domain names were seized found a DOJ/IPR Center seizure banner in place of Megaupload's home page.²²² The banner was silent concerning whether or how users could claim their files.²²³ The files—totaling 25 million gigabytes on over 1,100 hard drives—were stranded in storage with Megaupload's hosting service, Virginia-based Carpathia Hosting.²²⁴

Legitimate users among the site's 60 million were left without recourse following the seizure.²²⁵ Even if as many as 95% of Megaupload's users were

219. The application for a seizure warrant in the Megaupload case asserted that the domain names were forfeitable under multiple provisions of the criminal code, including the PRO-IP Act, 18 U.S.C. § 2323 (civil forfeiture), and RICO, 18 U.S.C. § 1963 (criminal forfeiture). *See* Application for a Warrant to Seize Prop. Subject to Forfeiture at 1, In the Matter of the Seizure of the Domain Name Megaupload.com and Nine Associated Domain Names, No. 1:12-cr-00003-LO (E.D. Va. Jan. 13, 2012), ECF No. 145 (citing as authority 18 U.S.C. §§ 981(a)(1)(C), 982(a)(1), 1963(a), and 2323).

220. *See* Press Release, Dep't of Justice, Justice Department Charges Leaders of Megaupload with Widespread Online Copyright Infringement (Jan. 19, 2012), *available at* <https://www.fbi.gov/news/pressrel/press-releases/justice-department-charges-leaders-of-megaupload-with-widespread-online-copyright-infringement> (stating that Dotcom and Megaupload were charged with engaging in a racketeering conspiracy, conspiring to commit copyright infringement, conspiring to commit money laundering, and two substantive counts of criminal copyright infringement).

221. *See id.* (describing the indictment and alleging “the misuse of a public content storage and distribution site to commit and facilitate intellectual property crime”).

222. Lena Mualla, Recent Development, *With Its Recent Megaupload Indictment, the Government Gets Aggressive in Its Efforts to Curtail Copyright Infringement*, WAKE FOREST J. BUS. & INTELL. PROP. L. (Apr. 7, 2012), <http://ipjournal.law.wfu.edu/2012/04/with-its-recent-megaupload-indictment-the-government-gets-aggressive-in-its-efforts-to-curtail-copyright-infringement/> (reproducing a copy of the seizure banner).

223. *Id.*

224. *See* David Kravets, *Feds Say No Dice in Retrieving Your Data Seized in Megaupload Case*, WIRED (Oct. 31, 2012, 5:17 PM), <http://www.wired.com/threatlevel/2012/10/no-dice-megaupload-data/> (reporting on the number of users and the amount of data impacted by the seizures).

225. *See id.*

inveterate infringers, the seizure left the digital property of at least three million non-infringers in legal limbo. Among them was an Ohio man named Kyle Goodwin, whose business, OhioSportsNet, makes and distributes videos of local high school sporting events.²²⁶ Goodwin filed a motion with the court to claim his data.²²⁷ Government lawyers opposed the motion, asserting to the judge that five separate factors had to be considered before the court could determine whether to order the data returned: (1) whether Goodwin had clean hands; (2) the cost and technical feasibility of finding a single user's data; (3) the number of other similarly situated parties; (4) how, if at all, the government could prevent returning infringing data along with non-infringing data; and (5) whether other, cheaper remedies existed for Goodwin.²²⁸ Although Goodwin stood accused of no crime, the government's seizure of the Megaupload domain names effectively deprived him of his property rights in the videos he lawfully stored with Megaupload on Carpathia's servers.²²⁹ The burden was on him to retain counsel and figure out how to get his data back.²³⁰ When Goodwin filed a motion for the return of his property, asking the court to exercise its equitable jurisdiction, the government asked the court to weigh in its favor the hassle of finding Goodwin's property among the petabytes of data stranded by the seizures.²³¹ It argued further that it should have no obligation to locate Goodwin's property, because it didn't seize the actual servers on which Goodwin's data were stored.²³² Goodwin's files got caught in the digital driftnet of the Megaupload forfeiture, and the government had no interest in disentangling them.

226. See Brief of Kyle Goodwin in Support of His Motion for the Return of Property Pursuant to 18 U.S.C. § 1963 and/or Federal Rule of Criminal Procedure 41(g) at 1, 4, *United States v. Dotcom*, No. 1:12-cr-00003-LO (E.D. Va. May 25, 2012), ECF No. 91 (setting forth the facts relevant to Goodwin's motion).

227. *Id.*

228. See Kravets, *supra* note 224 (quoting from the government's brief in opposition to Goodwin's motion).

229. See *id.* The Megaupload data are in legal limbo. When Megaupload's assets were frozen, Carpathia stopped being paid for its hosting services. See *id.*

230. *Id.*

231. See Response of the United States to Non-Party Kyle Goodwin's Motion for the Return of Property Pursuant to 18 U.S.C. § 1963 or Federal Rule of Criminal Procedure 41(g) at 3, *United States v. Dotcom*, No. 1:12-cr-00003 (E.D. Va. June 6, 2012), ECF No. 99 [hereinafter Response of the United States] (stating that "the issue is that the process of identifying, copying, and returning Mr. Goodwin's data will be inordinately expensive").

232. *Id.* at 4 (stating that "[t]he Carpathia servers were not seized by the United States . . . and the government has not indicated any intent to commence a forfeiture proceeding against Carpathia's property").

The civil law of copyrights has been protective of dual-use property since the Supreme Court's landmark decision in *Sony v. Universal*.²³³ In *Sony*, owners of copyrights in broadcast television programming sued Sony for contributory and vicarious copyright infringement arising from the act of selling VCRs to U.S. consumers.²³⁴ The remedy Universal sought was an injunction prohibiting the sale of VCRs and denying consumers access to the offending technology.²³⁵ Relying on the staple article of commerce doctrine from patent law, the Court held that where a copying device is capable of substantial non-infringing uses, its distribution will not be enjoined by a court on the theory that the distributor *must* know that some users will use the device to infringe.²³⁶ Conversely, where the sole purpose of a device is to infringe copyrights, the device is effectively contraband, and its unauthorized distribution will be enjoined by the Court.²³⁷ In a very practical sense, the VCR itself was on trial in *Sony* for facilitating infringement, and the Court found the VCR not guilty. The safe harbor for device distributors that was created in *Sony* limits the scope of the copyright monopoly in order to protect technological innovation and public access to innovation.²³⁸ There was no doubt when *Sony* was decided that some buyers of VCRs would use them to infringe copyrights, but there was also no doubt that legions of people would put them to lawful use. Weighing the interests of copyright owners against the public's interest in access to innovative, dual-use technology, the Court declined to send the baby down the drain with the bathwater.

Sony recognized the intolerable risk to the public of allowing copyright owners to control the fate of dual-use technologies.²³⁹ The lesson is no less applicable in the quasi-criminal context of civil forfeiture. Domain names can be a gateway to infringing content and a means of unlawful distribution for copyright criminals. The very same domain names, at the very same time,

233. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

234. *Id.* at 419–20.

235. *Id.* at 420.

236. *See id.* at 442 (“Accordingly, the sale of copying equipment . . . does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses.”).

237. *See Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 932 (2005) (“[W]here an article is ‘good for nothing else’ but infringement, there is no legitimate public interest in its unlicensed availability.”) (internal citations omitted).

238. *See Sony*, 464 U.S. at 429 (stating that the law of copyright must strike “a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society’s competing interest in the free flow of ideas, information, and commerce on the other hand”).

239. *See Grokster*, 545 U.S. at 932–33 (stating that *Sony*’s safe harbor for dual-use devices “leaves breathing room for innovation and a vigorous commerce”).

can provide access to cloud-based storage for millions of legitimate users like Kyle Goodwin. Goodwin's ability to access his property depended completely on Megaupload's property rights in its domain names, yet Goodwin got no advance notice that those domain names were subject to seizure. Even if the government ultimately proves that Megaupload's domain names were tainted by Kim Dotcom's alleged copyright crimes, Kyle Goodwin's sports videos were not. The seeming futility of Goodwin's legal effort to get his data back proves that CAFRA's innocent owner defense is an inadequate post-seizure remedy in cases involving cyberlockers. As a threshold matter, users in Goodwin's shoes probably lack standing to raise the defense, given that *their* property was not the subject of the forfeiture; they have no direct interest in Megaupload's domain names.²⁴⁰ Moreover, the government's argument to the court about the high cost and technical infeasibility of locating Goodwin's files makes it clear that, even if the innocent owner defense were available to expropriated cyberlocker users, it cannot scale when 25 million gigabytes of data are at issue.²⁴¹ In the government's view, Goodwin was merely "collaterally aggrieved" by the forfeiture, so the government owed him no duty with respect to his lost property.²⁴²

Because domain name seizures can foreclose substantial non-infringing uses of associated services and can impact a great deal of property remote from any alleged crime, they should not be permitted without pre-seizure notice reasonably calculated to reach both the domain name owner and any third-party users whose property will be directly affected by the seizure. Following notice, users should be given an opportunity to claim their non-infringing property before access to service is terminated. *Sony's* embrace of the staple article of commerce doctrine is most often viewed as a limitation on secondary liability for infringement, but it should also be understood as a limitation on the power of copyright owners, or the government acting on their behalf, to control public access to dual-use technologies. There is no

240. Under CAFRA, an owner is defined as "a person with an ownership interest in *the specific property sought to be forfeited*." 18 U.S.C. § 983(d)(6)(A) (2012) (emphasis added). Similarly, under RICO, a third-party may petition for the return of forfeited property, but she must prove that she has "a legal right, title, or interest in *the property*." 18 U.S.C. § 1963(l)(6)(A) (2012) (emphasis added). When Goodwin moved to recover his property under RICO, the government argued that he had no standing because he had no interest in the forfeited property (i.e., Megaupload's domain names). See Response of the United States, *supra* note 231, at 5.

241. Kravets, *supra* note 224 (reporting the volume of data that Megaupload's web host, Carpathia, was storing); cf. Annemarie Bridy, *Is Online Copyright Enforcement Scalable?*, 13 VAND. J. ENT. & TECH. L. 695 (arguing that efforts to fairly enforce copyrights online face daunting problems of scale).

242. Response of the United States, *supra* note 231, at 11.

good reason why *Sony's* limitation should not extend to seizures of facilitation property allegedly tainted by online copyright crime. The underlying public policy—the protection of lawful users and uses—is the same regardless of the nature of the case.

3. Domain Names as Instrumentalities of Speech

Domain names are dual-use not only as gateways to vast repositories of digital property but also (and relatedly) as instrumentalities of speech. Domain name seizures raise First Amendment concerns because a single domain name allegedly tainted by criminal infringement may provide access to a mix of infringing and non-infringing speech. While infringing speech falls outside the scope of the First Amendment, most non-infringing speech is constitutionally protected.²⁴³ Telling the difference between the two can be challenging for judges even after the benefit of full discovery. When a domain name is seized in IOS, access to all of the speech displayed and stored at that domain is blocked without First Amendment scrutiny and without any proof beyond probable cause that any of the blocked speech is actually criminally infringing.²⁴⁴ Once the domain name is under the government's control, the site's former operators are barred from further dissemination of speech at that domain, a restriction on future expression that implicates the First Amendment's prior restraint doctrine.²⁴⁵ Although a site operator can associate the underlying content with a new domain name, the seized domain name no longer functions as an instrumentality of speech for the site's operator or its users. The seizure transforms it into an instrumentality of speech for the government.

Paul Owens has argued with respect to the Copyright Act's impoundment procedures that the most rigorous constitutional safeguards should apply to

243. See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 574–75 (1977) (holding that the First Amendment does not immunize acts of copyright infringement); *Universal City Studios, Inc. v. Reimerdes*, 82 F. Supp. 2d 211, 220 (S.D.N.Y. 2000) (asserting that “the Supreme Court . . . has made it unmistakably clear that the First Amendment does not shield copyright infringement”).

244. See *Seizure Warrant*, *supra* note 185 (explaining the effect of a domain name seizure).

245. See Brief of Amici Curiae Electronic Frontier Foundation, Center for Democracy and Technology, & Public Knowledge in Support of Puerto 80's Petition for Release of Seized Property at 1, *Puerto 80 Projects, S.L.U. v. United States*, No. 11-03983 (S.D.N.Y. June 20, 2011) (arguing that IOS seizures violate the constitutional prohibition on prior restraints); cf. Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 169 (1998) (pointing out that “injunctions against distributing a supposedly infringing work are injunctions restraining speech; and preliminary injunctions restraining speech are generally considered unconstitutional ‘prior restraints’”).

pre-trial seizures of property that embodies First Amendment values, especially when that property is not itself allegedly infringing.²⁴⁶ His position is supported by the Supreme Court's jurisprudence on pre-trial seizures of property allegedly implicated in the production and distribution of obscene adult books and films.²⁴⁷ In *Fort Wayne Books v. Indiana*,²⁴⁸ a state trial court issued an *ex parte* seizure order under Indiana's racketeering/civil forfeiture statute directing police to immediately seize all of the real estate, inventory, and other forfeitable personal property belonging to the plaintiff bookstore owner.²⁴⁹ County sheriffs promptly padlocked the bookstore's three locations, and a few days later packed up and hauled off the stores' complete inventory.²⁵⁰ No trial date on the civil forfeiture complaint was ever set.²⁵¹ The Indiana appellate court held that the seizure violated the First Amendment, but the Indiana Supreme Court disagreed.²⁵² The United States Supreme Court granted certiorari and reversed.²⁵³ Citing its earlier decision in *Heller v. New York*, the Supreme Court held that a showing of probable cause is constitutionally insufficient when First Amendment property is the target of civil forfeiture and the government's goal in seizing the property is to remove it from circulation.²⁵⁴ Without an adversary hearing prior to the seizure, the court said, the risk of prior restraint is too great.²⁵⁵ By contrast, as the Court later held in *Alexander v. United States*,²⁵⁶ the risk of prior restraint is not present in cases involving criminal forfeiture, because a criminal trial on the merits of the underlying offense affords adequate

246. Owens, *supra* note 14, at 247–48.

247. See generally *Alexander v. United States*, 509 U.S. 544 (1993) (involving federal RICO criminal forfeiture of real property and other assets of the petitioner's "hard core" adult entertainment businesses); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989) (involving state RICO civil forfeiture and pre-trial seizure of petitioner's adult bookstore and all of its contents).

248. 489 U.S. 46 (1989).

249. *Id.* at 52.

250. *Id.*

251. *Id.*

252. *Id.* at 52–53.

253. *Id.* at 62.

254. *Id.* at 63 ("While a single copy of a book or film may be seized and retained for evidentiary purposes based on a finding of probable cause, the publication may not be taken out of circulation completely until there has been a determination of obscenity after an adversary hearing.").

255. *Id.* at 63–64 ("It is the risk of prior restraint, which is the underlying basis for the special Fourth Amendment protections accorded searches for and seizure of First Amendment materials, that motivates this rule.") (citations omitted) (internal quotation marks omitted).

256. 509 U.S. 544, 552 (1993) (distinguishing *Fort Wayne Books* on the basis that "[h]ere, . . . the seizure was not premature, because the Government established beyond a reasonable doubt the basis for the forfeiture").

procedural safeguards to avoid the premature forfeiture of protected expressive property.²⁵⁷ These rulings strongly suggest that IOS domain name seizures, which occur *ex parte* and which are intended to cut off access to expressive content, do not provide adequate protections to withstand First Amendment scrutiny.

ICE officials have responded to the First Amendment critique of domain name seizures by assuring policy makers and the public that IOS is “not targeting lawful businesses, blogs, or discussion boards,” and that the targeted domain names “are commercial and have engaged in repeated and significant violation of the law.”²⁵⁸ The truth, however, is more nuanced than that. Most of the domain names seized in the early phases of IOS *were* gateways to online storefronts dedicated to the sale of blatantly counterfeit hard goods.²⁵⁹ Domain names incorporating trademarked brand names—for example, “cheap-louisvuitton-replica.com” and “buyviagrabrand.com”—more or less self-identify as instrumentalities of infringement for commercial gain. Some of the domain names first targeted in IOS, however, were gateways to a wider and more diverse collection of content. Dajaz1.com, which was seized in November 2010, and Rojadirecta.com and .org, which were seized in January 2011, are well-documented examples.²⁶⁰ Dajaz1 provided news and commentary on hip-hop culture along with links to pre-release music files that could be streamed or downloaded.²⁶¹ Rojadirecta indexed links to live streams of sporting events and hosted discussion forums

257. *Id.* at 552.

258. *Promoting Investment and Protecting Commerce Online: Legitimate Sites v. Parasites (Part I & II): Hearing Before the Subcomm. On Intellectual Prop., Competition, & the Internet of the H. Comm. on the Judiciary*, 112th Cong. 164 (2011) (statement of John Morton, Director, Immigration and Customs Enforcement).

259. *Fact Sheet: Websites seized during the eighth phase of Operation In Our Sites*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT (Nov. 8, 2011), <https://www.ice.gov/doclib/news/releases/2011/111128washingtondc.pdf> (listing 150 seized domain names).

260. Ben Sisario, *Hip-Hop Copyright Case Had Little Explanation*, N.Y. TIMES (May 6, 2012), http://www.nytimes.com/2012/05/07/business/media/hip-hop-site-dajaz1s-copyright-case-ends-in-confusion.html?_r=0 (reporting on the Dajaz1 seizure); News Releases, *New York investigators seize 10 websites that illegally streamed copyrighted sporting and pay-per-view events*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT (Feb. 2, 2011), <http://www.ice.gov/news/releases/1102/110202newyork.htm> (reporting on the Rojadirecta seizures).

261. David Kravets, *Senator Wants Answers from DHS Over Domain Name Seizures*, WIRED (Dec. 9, 2011), <http://www.wired.com/threatlevel/2011/12/wyden-domain-seizure/> (reporting on the Dajaz1 seizure).

for sports fans.²⁶² Both Dajaz1 and Rojadirecta were seized for facilitating criminal copyright infringement by linking to sites that displayed, performed, or distributed copyrighted works.²⁶³ The government did not allege that either site sold any infringing goods.²⁶⁴ Dajaz1, according to the government's own affidavit, had not even earned revenue from displaying advertisements.²⁶⁵ To label these sites "commercial" and their operators obvious IP criminals is at best a stretch.

In both cases, the sites' operators filed claims for return of the seized domain names, and in both cases, the government relented before its evidence could be tested against a standard more stringent than probable cause.²⁶⁶ In the Dajaz1 case, no complaint for civil forfeiture was ever filed, despite the court's giving the government three extensions of time to file, adding up to a six-month delay.²⁶⁷ In the Rojadirecta case, the government voluntarily dismissed its civil forfeiture complaint over a year and a half after gaining control of the two domain names.²⁶⁸ In its request to vacate the Rojadirecta seizure warrant, the government referred elliptically to "certain recent judicial authority" germane to the case.²⁶⁹ Given the timing of the request, that unnamed authority is most likely *Flava Works, Inc. v. Gunter*, a Seventh Circuit decision that found no civil copyright infringement on the part of a social-bookmarking site for embedding video that could be streamed by the site's users from another site's server.²⁷⁰ Following *Flava Works*, the

262. Ryan Singel, *Oops! Copyright Cops Return Seized RojaDirecta Domain Names—19 Months Later*, WIRED (Aug. 29, 2012), <http://www.wired.com/threatlevel/2012/08/domain-names-returned/> (reporting on the Rojadirecta seizures).

263. See Application and Affidavit for Seizure Warrant at 53, In the Matter of the Seizure of Rapgodfathers.com, No. 10-2822M (C.D. Cal. Nov. 30, 2010); Complaint at 8, United States v. Rojadirecta.org, No. 1:11-cv-04139-PAC (S.D.N.Y. June 17, 2011).

264. See Application and Affidavit for Seizure Warrant, *supra* note 263; Complaint, *supra* note 263.

265. See Application and Affidavit for Seizure Warrant, *supra* note 263, at 57.

266. The owner of the Rojadirecta domain names, Puerto 80 Projects, raised the First Amendment issue in a petition for release of property under 18 U.S.C. § 983(f). See Order Denying Petition, United States v. Rojadirecta.org, *supra* note 263, ECF No. 15. Without addressing the merits of the First Amendment argument, the court held that "the First Amendment considerations [raised by Puerto 80] certainly do not establish the kind of substantial hardship required to prevail on this petition." *Id.* at 4.

267. See In the Matter of the Seizure of the Internet Domain Name Dajaz1.com, No. 2:11-cm-00110-UA-1 (C.D. Cal. May 9, 2011), ECF Nos. 2, 5, 8. All filings in the case were sealed until April 2012. See *id.* at ECF No. 11.

268. See Notice of Voluntary Dismissal, United States v. Rojadirecta.org, No. 1:11-cv-04139-PAC, ECF No. 55. (S.D.N.Y. June 17, 2011).

269. Letter to Judge Paul A. Crotty from Christopher D. Frey dated Aug. 29, 2012, United States v. Rojadirecta.org, No. 1:11-cv-04139-PAC, ECF No. 56 (S.D.N.Y. June 17, 2011).

270. 689 F.3d 754, 760 (7th Cir. 2012).

government appears to have lost the courage of its conviction that linking to infringing video streams or cyberlockers that host infringing content constitutes facilitation of criminal infringement.²⁷¹

As the government correctly asserts, speech accessible at an obviously trademark-infringing domain name that proposes the sale of blatantly counterfeit hard goods does not present a close case for First Amendment analysis. Such obviously unprotected speech, however, was not the kind of speech accessible at either *Rojadirecta* or *Dajaz1*. By the government's own tacit admission, the operators of those sites, upon closer consideration, were not blatant lawbreakers. The danger in allowing *ex parte* seizure of domain names is that closer consideration of the government's action may never actually occur. Lack of an adversary process gives ambitious law enforcement agents license to play fast and loose with the First Amendment when it comes to online copyright enforcement. Sites like *Rojadirecta* and *Dajaz1* are tarred with the same brush as sites like *cheap-louisvuitton-replica.com*, even though they are very different kinds of sites. In the brick-and-mortar world, *Fort Wayne Books* prevents that from happening. The same should be true in cyberspace, because seizing a domain name for alleged facilitation of copyright crime is the twenty-first-century equivalent of padlocking a bookstore.

CONCLUSION

The history of civil forfeiture in the war on drugs is not a proud one for a legal system designed to respect due process of law and the rights of the accused. When Congress enacted CAFRA in 2000, it attempted to address legitimate criticisms of a statutory regime that federal courts spent the better part of the 1990s trying to reconcile with the Bill of Rights. As compromise legislation, however, CAFRA only partially remediated the system's inherent unfairness, ultimately preserving the potent legal fictions on which it relies.

Recent developments in the escalating war on online IP piracy provide strong proof that CAFRA did not go far enough to protect the rights of property owners and innocent third parties impacted by civil forfeiture. The constitutional problems that remain are most acute with respect to the *ex parte* seizure of facilitation property. Within that category, domain names alleged to be tainted by copyright crime present unique problems. "Property" is the pigeon hole into which domain names have been stuffed, but they are

271. Legislation to make the unauthorized delivery of copyrighted content streams a felony was introduced in the Senate in 2011 but did not come up for a vote. *See* S. 978, 112th Cong. (2011) (proposing to amend 17 U.S.C. § 506(a) to make unauthorized public performance a felony).

different from physical property in ways for which civil forfeiture law should account. Under a straightforward application of existing Supreme Court precedents, their *ex parte* seizure in IOS and related enforcement operations offends both due process and the First Amendment. To achieve deterrent effects that are transitory at best, the *ex parte* seizure and civil forfeiture of domain names exacts disproportionately high constitutional costs and undermines the legitimacy and accountability of law enforcement.