



1980

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## Recommended Citation

Kenneth Kandaras, *Due Process and Federal Property Forfeiture Statutes: The Need for Immediate Post-Seizure Hearing*, 34 Sw L.J. 925 (1980)

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# DUE PROCESS AND FEDERAL PROPERTY FORFEITURE STATUTES: THE NEED FOR IMMEDIATE POST-SEIZURE HEARING

by  
*Kenneth Kandaras\**

THE forfeiture of property constitutes a significant and integral part of the federal government's law enforcement effort. Generally, forfeitures are intended either to penalize or deter the commission of crimes.<sup>1</sup> Since early stages of the nation's development,<sup>2</sup> the government has secured the forfeiture of property used in the violation of various laws, including smuggling undeclared goods,<sup>3</sup> transporting tax-unpaid liquor,<sup>4</sup> trafficking in narcotics,<sup>5</sup> and violating wildlife conservation measures.<sup>6</sup> The property forfeited may vary from a vehicle or vessel used to facilitate the commission of a crime<sup>7</sup> to a controlled substance<sup>8</sup> or personal property upon

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1. "Forfeiture of conveyances that have been used—and may be used again—in violation of the narcotics laws fosters the purposes served by the underlying criminal statutes, both by preventing further illicit use of the conveyance and by imposing an economic penalty, thereby rendering illegal behavior unprofitable." *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 686-87 (1974); *accord*, *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700 (1965) (the object of a forfeiture proceeding is to act as a penalty for the commission of an offense and is quasi-criminal in character); *Various Items v. United States*, 282 U.S. 568, 581 (1930) (the offense is attached to the distillery without regard to the personal misconduct of the owner); *Van Oster v. Kansas*, 272 U.S. 465, 467-68 (1926) (the forfeiture of property is a secondary defense against the commission of offenses and dispenses with the need to prove collusion between the wrongdoer and the alleged innocent owner); *Goldsmith-Grant Co. v. United States*, 254 U.S. 505, 511 (1921) (the forfeiture of property is fixed in this country's punitive and remedial jurisprudence).

2. *Embargo Act*, 2 Stat. 453 (1808).

3. 19 U.S.C. §§ 1594, 1595a (1976) (vessels and vehicles used to violate customs-revenue laws).

4. 26 U.S.C. §§ 7301-7303 (1976) (property intended for use in violating the provisions of the internal revenue laws).

5. 21 U.S.C. § 881(a)(3) (1976) (any containers or conveyances used to traffic in controlled substances); 49 U.S.C. § 782 (1976) (any vehicle, vessel, or craft used to transport contraband narcotics, firearms, or counterfeit money). *See generally* Note, *Operation of Federal Provisions Governing Forfeiture of Vehicles Used in Violating Federal Laws*, 27 NOTRE DAME LAW. 433 (1952).

6. 16 U.S.C. § 1860(a) (1976) (Fishery Conservation and Management Act of 1976). *See generally* Fidell, *Enforcement of the Fishery Conservation and Management Act of 1976: The Policeman's Lot*, 52 WASH. L. REV. 513 (1977).

7. *Goldsmith-Grant Co. v. United States*, 254 U.S. 505 (1921) (automobile used to conceal tax-unpaid liquor); *Harmony v. United States*, 43 U.S. 210 (1844) (pirate ship); *United States v. One 1974 Cadillac Eldorado Sedan*, 548 F.2d 421 (2d Cir. 1977) (automobile used to transport the seller of cocaine to and from bargaining sessions, although no cocaine was transported in the automobile); *United States v. One 1970 Pontiac GTO*, 2-

which the tax has not been paid.<sup>9</sup>

Forfeitures are statutorily established and may be criminal or civil in nature.<sup>10</sup> In the case of civil forfeitures, the principal question is whether the property was used in an unlawful manner. Normally, the property owner's innocence is no defense to a civil forfeiture suit,<sup>11</sup> because the property's unlawful use rather than the property owner's criminal culpability results in its forfeiture. This Article focuses on civil forfeiture statutes and the procedural due process rights of a property owner whose property has been seized and is threatened with forfeiture.

Forfeiture statutes generally provide that the government, upon probable cause to believe that the property is subject to forfeiture, may seize and retain the property pending a judicial determination of its forfeiture.<sup>12</sup> Significantly, the statutory procedure following the property's seizure does not normally provide the owner an opportunity to challenge the propriety of the government's seizure prior to a judicial forfeiture proceeding. Furthermore, forfeiture statutes generally do not oblige the government to initiate judicial proceedings within a prescribed period of time. If the government mistakenly seizes the property or unreasonably delays the filing of the lawsuit, the property owner experiences a needless deprivation of property. Ordinarily, the owner's sole statutory remedy is to await the outcome of judicial forfeiture proceedings. The fact that most forfeiture statutes fail to provide for the maintenance of post-seizure hearings and lack specific temporal requirements for the initiation of judicial forfeiture proceedings creates the potential for government abuse and implicates serious questions of due process.

In *Calero-Toledo v. Pearson Yacht Leasing Co.*<sup>13</sup> the United States Supreme Court held that a property owner is not entitled to a hearing before the government seizes his property pursuant to forfeiture statutes.<sup>14</sup> The thesis of this Article is that, consistent with the holding in *Calero-Toledo*, the due process clause entitles the owner of property seized pursuant to a forfeiture statute to an immediate post-seizure hearing to determine whether probable cause exists to believe the property is subject to forfeiture. For illustration, and because many forfeiture statutes merely incorporate customs law by reference,<sup>15</sup> this Article makes liberal refer-

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Door Hardtop, 529 F.2d 65 (9th Cir. 1976) (automobile in which the driver was seated while receiving payment for heroin).

8. 21 U.S.C. § 881(a)(1) (1976) (heroin, marihuana, mescaline, etc.).

9. *United States v. A Quantity of Gold Jewelry*, 379 F. Supp. 283 (C.D. Cal. 1974) (recovery sought of purportedly tax-unpaid jewelry), *aff'd in part, vacated in part, and remanded*, 554 F.2d 1072 (9th Cir. 1977).

10. See Note, *Bane of American Forfeiture Law—Banished at Last?*, 62 CORNELL L. REV. 768, 792-96 (1977). Compare 18 U.S.C. § 1963 (1976) and *United States v. Mandel*, 408 F. Supp. 679 (D. Md. 1976) with 26 U.S.C. § 5872 (1976) and *McKeehan v. United States*, 438 F.2d 739 (6th Cir. 1971).

11. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683-86 (1974).

12. See notes 18-30 *infra* and accompanying text.

13. 416 U.S. 663 (1974).

14. *Id.* at 679-80.

15. 8 U.S.C. § 1324(b)(1) (Supp. III 1979) (applicable to the forfeiture of vessels, vehi-

ence to the customs law. The Article's thesis, however, is applicable to any forfeiture statute that does not provide an immediate post-seizure hearing and that requires the owner to await the outcome of a judicial proceeding for the return of his property.<sup>16</sup>

### I. PROCEDURE UNDER FORFEITURE STATUTES

A common feature in forfeiture statutes is the government's ability to seize and retain the property pending the trial. Customs law, which allows for the forfeiture of unlawfully imported goods and the vehicle, vessel, or aircraft used to facilitate their importation, outlines a detailed procedure for the seizure and subsequent forfeiture of the property.<sup>17</sup> Under the customs law, the government initiates a forfeiture by seizing the property in any manner consistent with the fourth amendment.<sup>18</sup> Therefore, property may be seized if probable cause exists to believe that the property is subject to forfeiture.<sup>19</sup> A customs officer must subsequently notify the owner and all other persons with an interest in the property, either by publication<sup>20</sup> or personal notice,<sup>21</sup> of the property's seizure and the government's intent to forfeit the property.

Customs reporting procedures are dependent upon the value of the seized property. If the property's value exceeds \$10,000, the officer must promptly transmit to the United States attorney a report that must include the results of the officer's investigation into the property's alleged unlawful use.<sup>22</sup> The United States attorney must then evaluate the case and initiate judicial forfeiture proceedings if he determines the forfeiture claim is meritorious.<sup>23</sup> If the property's value does not exceed \$10,000, the customs officer and United States attorney are required to act only if the owner files a

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cles, and aircraft used in bringing in and harboring illegal aliens); 21 U.S.C. § 881(d) (1976) (applicable to the forfeiture of containers or conveyances used to traffic in controlled substances); 22 U.S.C. § 401(b) (1976) (applicable to the forfeiture of any illegally exported war material and the vessels, vehicles, or aircraft used to facilitate the exportation); 49 U.S.C. § 784 (1976) (applicable to the forfeiture of vessels, vehicles, and aircraft used to conceal or transport contraband narcotics, firearms, or counterfeit money).

16. Compare 19 U.S.C. §§ 1602-1625 (1976 & Supp. II 1978) (procedure provided in the customs law) with 26 U.S.C. §§ 7321-7325 (1976) (procedure provided for the forfeiture of property used to violate internal revenue laws).

17. 19 U.S.C. §§ 1602-1625 (1976 & Supp. II 1978). For a discussion of the problems of fines and penalties under the customs law, see Dickey, *Customs: Fines and Forfeitures Under Section 592 of the Tariff Act of 1930—Revisited*, 35 BUS. LAW. 149 (1979).

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

19. *Id.* at 467-68.

20. 19 U.S.C. § 1607 (Supp. II 1978) (notice by publication of government's seizure and intent to forfeit property valued at less than \$10,000). Notice by publication, however, may violate the owner's right to due process if under the circumstances it is not reasonably calculated to provide actual notice of the impending forfeiture. See *Robinson v. Hanrahan*, 409 U.S. 38, 40 (1972) (per curiam) (involving a state forfeiture statute); *Menkarell v. Bureau of Narcotics*, 463 F.2d 88, 94-95 (3d Cir. 1972); *Jaekel v. United States*, 304 F. Supp. 993, 998-99 (S.D.N.Y. 1969). See generally Note, *Forfeiture Proceedings—In Need of Due Process*, 3 FORDHAM URB. L.J. 347, 353-55 (1974-1975).

21. 19 C.F.R. § 162.31 (1979) (written notice to any individual who the facts of record indicate has an interest in the seized property).

22. 19 U.S.C. §§ 1603, 1610 (Supp. II 1978).

23. *Id.* § 1604 (1976).

claim to the property and posts a bond sufficient to insure payment of the government's court costs in the subsequent proceeding.<sup>24</sup> Property in this latter category is summarily forfeited if the claim and bond are not timely filed.<sup>25</sup>

When judicial forfeiture proceedings are initiated, the action proceeds like any civil claim. The parties are entitled to discovery and to a jury trial,<sup>26</sup> and no provision is made for expediting the trial. Pending trial, the appropriate customs officer has the sole right to possess the property.<sup>27</sup> Though he may return the property to any interested person, the officer has the sole discretion to do so.<sup>28</sup> In the absence of a statute granting judicial control over the return of property, courts usually lack authority to enter an order restoring possession to the owner.<sup>29</sup> Therefore, based solely upon the seizing officer's belief that the property is subject to forfeiture, the government maintains exclusive possession of the property from seizure to trial. As a result, the owner may be deprived of his property for a substantial time. The delay between the seizure and the filing of the suit, coupled with the usual delay in bringing a case to trial, may be a matter of months, or even more than a year.<sup>30</sup>

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24. *Id.* §§ 1607 (Supp. II 1978), 1608 (1976). The \$10,000 threshold figure, contained in § 1607, is the result of a 1978 amendment that increased the figure from \$2,500 to its present level. Congressional history indicates that the increase was necessary to keep pace with the rising value of automobiles and other merchandise. S. REP. NO. 95-778, 83d Cong., 2d Sess. 21, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 2211, 2232.

25. 19 U.S.C. § 1609 (1976); see *Bramble v. Richardson*, 498 F.2d 968 (10th Cir.), cert. denied, 419 U.S. 1069 (1974); *Jary Leasing Corp. v. United States*, 254 F. Supp. 157 (E.D.N.Y. 1966). The summary forfeiture of property conditioned upon the property's value and the owner's compliance with the bond requirement has raised serious due process questions. Imposing the bond requirement upon a person financially unable to comply deprives the individual of his property without a hearing. *Wiren v. Eide*, 542 F.2d 757, 763 (9th Cir. 1976); *Lee v. Thornton*, 538 F.2d 27, 32 n.3 (2d Cir. 1976); see Note, *supra* note 20.

26. *C.J. Hendry Co. v. Moore*, 318 U.S. 133 (1943); *United States v. One 1976 Mercedes Benz 280S*, 618 F.2d 453 (7th Cir. 1980); *United States v. One (1) Douglas A-26B Aircraft*, 436 F. Supp. 1292 (S.D. Ga. 1977).

27. 19 U.S.C. § 1605 (1976).

28. *United States v. Heckinger*, 163 F.2d 472 (2d Cir. 1947).

29. *Id.*; *United States v. One 1946 Plymouth Sedan*, 73 F. Supp. 88 (E.D.N.Y. 1946); cf. *United States v. Fields*, 425 F.2d 883 (3d Cir. 1970); *United States v. Greenburg*, 334 F. Supp. 364 (W.D. Pa. 1971) (district court entertaining related criminal case may not enter pre-trial orders affecting property subject to civil forfeiture proceedings). *Contra*, *United States v. One 1975 Chevrolet Corvette Coupe*, No. 77 C 1100 (N.D. Ill. Dec. 22, 1977) (district court has authority to enter orders affecting property subsequent to initiation of judicial forfeiture proceeding).

30. Courts have uniformly held that the due process clause requires the government to commence the forfeiture proceeding within a reasonable period after the property's seizure. See *Castleberry v. Alcohol, Tobacco & Firearms Div.*, 530 F.2d 672 (5th Cir. 1976); *States Marine Lines, Inc. v. Shultz*, 498 F.2d 1146 (4th Cir. 1974); *United States v. Eight (8) Rhodesian Stone Statues*, 449 F. Supp. 193 (C.D. Cal. 1978). Considerable disagreement exists, however, as to the remedy to be invoked if the government is guilty of unreasonable delay. The majority of cases treat the government's delay as an affirmative defense that will bar the forfeiture claim. See, e.g., *United States v. Eight (8) Rhodesian Stone Statues*, 449 F. Supp. 193, 204 (C.D. Cal. 1978). The minority of cases conclude that the government is liable for money damages occasioned by the delay, but leave the government's forfeiture claim unabated. See, e.g., *Castleberry v. Alcohol, Tobacco & Firearms Div.*, 530 F.2d 672, 677 (5th Cir. 1976). See also *In re Behrens*, 39 F.2d 561, 564 (2d Cir. 1930).

## II. DUE PROCESS—THE RIGHT TO A POST-SEIZURE HEARING

The government may not deprive an individual of his property except by due process of law.<sup>31</sup> Compliance with this requirement necessitates a two-pronged inquiry. First, one must determine whether the individual has a protected interest in the property so as to entitle him to due process of law.<sup>32</sup> Secondly, if the individual has a sufficient interest in the property, one must decide what process is due under the circumstances.<sup>33</sup>

### A. *The Protected Interest*

In forfeiture cases, whether a property owner has a protected interest in property depends upon the nature of the property itself. Property subject to forfeiture is classified as either derivative contraband or contraband per se. The latter category is limited to "objects the possession of which, without more, constitutes a crime."<sup>34</sup> The owner of property thus categorized has no protected interest, and the government can seize and destroy the property at will.<sup>35</sup> Thus, illegally imported narcotics<sup>36</sup> or an unregistered still and alcohol<sup>37</sup> are deemed contraband per se and may be taken from the owner without question. The opposite is true for property deemed derivative contraband, property subject to forfeiture because of its illegal use

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The following cases illustrate the actual delay experienced by an owner after seizure of his property. Appropriate reference is made to those cases wherein the court held the delay unconstitutional, and unless otherwise indicated the time reflects the period from the property's seizure to commencement of judicial forfeiture proceedings. *United States v. One 1970 Ford Pickup*, 564 F.2d 864 (9th Cir. 1977) (11 months held unconstitutional); *United States v. One 1973 Buick Riviera Auto.*, 560 F.2d 897 (8th Cir. 1977) (5 months); *United States v. One 1972 Mercedes-Benz 250*, 545 F.2d 1233 (9th Cir. 1976) (13½ months from the automobile's seizure to the close of the pleadings); *United States v. One Motor Yacht Named Mercury*, 527 F.2d 1112 (1st Cir. 1975) (12½ months); *United States v. One (1) 1972 Wood*, 19 Foot Custom Boat, 501 F.2d 1327 (5th Cir. 1974) (10 months); *States Marine Lines, Inc. v. Shultz*, 498 F.2d 1146 (4th Cir. 1974) (16½ months from seizure of cargo from a commercial vessel to claimant's suit seeking its return); *Sarkisian v. United States*, 472 F.2d 468 (10th Cir.) (14 months held unconstitutional in seizure of jewelry), *cert. denied*, 414 U.S. 976 (1973); *In re Behrens*, 39 F.2d 561 (2d Cir. 1930) (12½ months from seizure of utensils used in brewery to claimant's suit for return); *United States v. Eight (8) Rhodesian Stone Statues*, 449 F. Supp. 193 (C.D. Cal. 1978) (16 months held unconstitutional); *United States v. One (1) Douglas A-26B Aircraft*, 436 F. Supp. 1292 (S.D. Ga. 1977) (11 months held unconstitutional); *United States v. One (1) 1973 Ford LTD*, 409 F. Supp. 741 (D. Nev. 1976) (14 months); *United States v. One (1) 43 Foot Sailing Vessel Winds Will*, 405 F. Supp. 879 (S.D. Fla. 1975) (at least 11 months), *aff'd*, 538 F.2d 694 (5th Cir. 1976); *United States v. One 1971 Volvo 2-Door Sedan*, 393 F. Supp. 843 (C.D. Cal. 1975) (2 months); *United States v. A Quantity of Gold Jewelry*, 379 F. Supp. 283 (C.D. Cal. 1974) (22 months held unconstitutional), *aff'd in part, vacated in part, and remanded*, 554 F.2d 1072 (9th Cir. 1977); *United States v. One 1970 Buick Riviera*, 374 F. Supp. 277 (D. Minn. 1973) (20 months from the automobile's seizure to trial); *United States v. One 1971 Opel G. T.*, 360 F. Supp. 638 (C.D. Cal. 1973) (13½ months held unconstitutional).

31. U.S. CONST. amends. V, XIV.

32. *Board of Regents v. Roth*, 408 U.S. 564, 576-78 (1972).

33. *Mackey v. Montrym*, 443 U.S. 1, 10-11 (1979); *Mathews v. Eldridge*, 424 U.S. 319, 332-35 (1976); *Fuentes v. Shevin*, 407 U.S. 67, 84-86 (1972).

34. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699 (1965).

35. *Id.* at 698-99.

36. *United States v. Jeffers*, 342 U.S. 48, 52-54 (1951).

37. *United States v. Trupiano*, 334 U.S. 699, 710 (1948).

rather than its illegal nature. In *One 1958 Plymouth Sedan v. Pennsylvania*<sup>38</sup> the Supreme Court stated that the owner of property, the possession of which is not per se unlawful, has a sufficient interest in the property to challenge the constitutionality of its seizure.<sup>39</sup> Although not explicitly ruling on this point, in *Calero-Toledo v. Pearson Yacht Leasing Co.*<sup>40</sup> the Supreme Court implicitly recognized the sufficiency of the derivative contraband owner's interest by entertaining a yacht owner's claim that a forfeiture statute violated his due process rights.

### B. Due Process

The Supreme Court has recognized that in cases involving property disputes the government can deprive a person of his property pending a full and final adjudication of the controversy.<sup>41</sup> Thus, before a final adjudication the government may conclude that a welfare recipient no longer qualifies for benefits and seek to terminate the payments upon notice and opportunity for hearing.<sup>42</sup> Similarly, the government may come to the aid of a secured creditor by deeming the debtor in default and allowing the creditor to gain possession of the wrongfully detained secured property before trial.<sup>43</sup> Though the government has the power to deprive a person of his property pending a final adjudication, such deprivation must comport with due process.<sup>44</sup> The *Mathews v. Eldridge*<sup>45</sup> decision provides a framework for assessing the sufficiency of the process used to seize and retain property.

In *Mathews* the Supreme Court held that the due process clause did not require an opportunity for an evidentiary hearing prior to the termination of social security disability benefits.<sup>46</sup> The Court's analysis indicated that the government's decision to deprive a person of his property pending final adjudication must be reached by a process that guards against an erroneous deprivation.<sup>47</sup> The sufficiency of the process was held to depend upon three factors: the private interests affected; the risk of erroneous deprivation in light of the probable value of alternative proceedings; and the government's interest, including the function involved and the fiscal and administrative burdens that alternative proceedings would entail.<sup>48</sup> The Court noted that no single procedure is mandated by the due process clause<sup>49</sup> and that only a pragmatic analysis of the existing procedure can

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38. 380 U.S. 693 (1965).

39. *Id.* at 701 n.11.

40. 416 U.S. 663 (1974).

41. *Goldberg v. Kelly*, 397 U.S. 254, 266-67 (1969).

42. *See Goldberg v. Kelly*, 397 U.S. 254 (1969).

43. *See Mitchell v. W.T. Grant*, 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972).

44. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

45. 424 U.S. 319 (1976).

46. *Id.* at 349.

47. *Id.* at 334-35.

48. *Id.* at 335.

49. *Id.* at 334.

determine whether the initial deprivation is triggered by a constitutionally sufficient process.<sup>50</sup>

In the area of forfeiture, the due process rights of a property owner have been partially resolved by the Supreme Court's decision in *Calero-Toledo v. Pearson Yacht Leasing Co.*,<sup>51</sup> which held that the owner of property seized pursuant to a forfeiture statute is not entitled to a pre-seizure hearing.<sup>52</sup> The property owner's argument that he was entitled to such a hearing was premised upon the decision in *Fuentes v. Shevin*,<sup>53</sup> which held that in all but the most exceptional circumstances the government must give an owner a hearing before his property is seized.<sup>54</sup> The Court in *Calero-Toledo* held that the government's summary seizure of property in aid of forfeiture statutes was within the *Fuentes* exception.<sup>55</sup> First, the seizure allowed the government to exercise in rem jurisdiction over the property in order to conduct forfeiture proceedings.<sup>56</sup> Secondly, the government was justified in concluding that notice of the government's intent to seize the property could prompt the property's concealment, removal, or destruction, thereby frustrating the forfeiture statute.<sup>57</sup> Thirdly, the initial decision to seize the property was made by a law enforcement officer pursuant to a narrowly drawn statute, and therefore his judgment would likely avoid a wholly unfounded seizure.<sup>58</sup>

In *Calero-Toledo*, however, the only question considered by the Court was whether *Fuentes v. Shevin* mandated a pre-seizure hearing.<sup>59</sup> The Court considered neither the general sufficiency of the statute's post-seizure process nor the specific issue of whether the owner's interest in the property and the risk of an erroneous seizure required an immediate post-seizure hearing. An inquiry into the constitutional sufficiency of post-seizure process requires an assessment of forfeiture statutes in light of the factors enumerated in *Mathews*: (1) the private interests involved, (2) the risk of an erroneous seizure in light of the probable value of a post-seizure hearing, and (3) the government's interest, including the function involved and the fiscal and administrative burdens that alternative proceedings would entail.

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50. *Id.* at 339-49; see *Mackey v. Montrym*, 443 U.S. 1, 10-19 (1979).

51. 416 U.S. 663 (1974).

52. *Id.* at 680.

53. 407 U.S. 67 (1972). In *Fuentes* the Supreme Court invalidated the prejudgment replevin provisions of Florida and Pennsylvania law because they failed to provide for pre-seizure notice and hearing.

54. *Id.* at 82, 92-93. See generally Note, *Criminal Statutory Forfeitures and Puerto Rico—A Re-Affirmation of the Old Order*, 14 COLUM. J. TRANSNAT'L L. 184, 192 (1975).

55. 416 U.S. at 678-80.

56. *Id.* at 679.

57. *Id.*

58. *Id.*

59. *Id.* at 678.

### III. THE MATHEWS ANALYSIS

#### A. *The Private Interest*

The *Mathews* decision requires a qualitative assessment of the private interest affected by the government's action. Viewed as related factors, an increase in the property's significance spawns an increase in the rigor with which the procedure must seek to avoid an erroneous seizure, and in turn the law's willingness to reject statutory procedure in favor of a judicially prescribed process.<sup>60</sup> In the past, the Court has attached great importance to an individual's personal property, such as wages,<sup>61</sup> bank accounts,<sup>62</sup> and consumer goods.<sup>63</sup> In addition, the Supreme Court has recognized that "the possible length of wrongful deprivation . . . is an important factor in assessing the impact of official action on the private interests."<sup>64</sup>

Forfeiture statutes affect significant property rights. The property seized, often automobiles and vessels, may represent a considerable investment. Though the owner may regain the property upon successfully defending the action at trial, the delay in its return is often months, and sometimes over a year.<sup>65</sup> Deprived of the property, the owner may be wholly unable to secure a substitute.<sup>66</sup> In addition to the loss of use, the owner may sustain an economic loss if the property depreciates in value during the pendency of the trial.<sup>67</sup> In light of the forms of property deprivations that presently require pretrial hearings, such as the garnishment of wages<sup>68</sup> or corporate bank accounts,<sup>69</sup> the revocation of a driver's license,<sup>70</sup> or the temporary suspension from public school,<sup>71</sup> the property interest affected by forfeiture statutes is considerable.<sup>72</sup>

#### B. *The Risk of Erroneous Deprivation*

The second factor in the *Mathews* analysis is the risk of erroneous deprivation created by the procedure. The risk of a mistaken seizure of property under the existing procedure is substantial. Forfeiture statutes

60. See *Mackey v. Montrym*, 443 U.S. 1, 11-12 (1979).

61. *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969).

62. *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975).

63. *Mitchell v. W.T. Grant*, 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972). By comparison, the Court has treated governmentally created property rights with less deference than an individual's personal property rights. The process used to terminate the rights in the former category is to some extent limited to that which the legislature has provided. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319 (1976) (termination of federal disability benefits); *Arnett v. Kennedy*, 416 U.S. 134 (1974) (termination of federal employment).

64. *Fusari v. Steinberg*, 419 U.S. 379, 389 (1975).

65. See note 30 *supra*.

66. *Lee v. Thornton*, 538 F.2d 27, 31 (2d Cir. 1976).

67. *United States v. One 1970 Ford Pickup*, 564 F.2d 864, 866 (9th Cir. 1977).

68. *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969).

69. *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975).

70. *Mackey v. Montrym*, 443 U.S. 1 (1979); *Bell v. Burson*, 402 U.S. 535 (1971). *But see* *Dixon v. Love*, 431 U.S. 431 (1977).

71. *Goss v. Lopez*, 419 U.S. 565 (1975).

72. See generally Note, *Mathews v. Eldridge Reviewed: A Fair Test on Balance*, 67 GEO. L.J. 1407, 1416-17 (1979).

authorize the seizure of property based solely upon the officer's belief that the property is contraband.<sup>73</sup> Consequently, the accuracy of the seizure process depends upon the accuracy of both the officer's judgment and the facts supporting that judgment. Without an assessment of the information that the owner can provide, however, the officer's judgment necessarily reflects only a limited view of the facts.

In analogous situations the Supreme Court has recognized that the decision to deprive a person of his property pending the final adjudication of a dispute should be made by an impartial decision-maker<sup>74</sup> and only after the property owner has had an opportunity to introduce evidence in his own behalf.<sup>75</sup> The imposition of this requirement recognizes the need for the owner's perspective, as well as the fact that the seizing officer, though conscientious in his duties, is not always able to examine dispassionately the evidence contrary to his original decision.<sup>76</sup> The *Mackey v. Montrym*<sup>77</sup> decision illustrates the importance of the factfinding process in the avoidance of an erroneous property deprivation. In *Mackey* the United States Supreme Court stated that the risk of an erroneous decision is minimized when the decision is based upon "objective facts either within the personal knowledge of an impartial government official or readily ascertainable by him."<sup>78</sup> Though the *Mackey* decision considered the need for a hearing before the government suspended an individual's driver's license, the Court's analysis demonstrated the significance of objective facts in the decision-making process. In *Mackey* a state statute provided for the immediate suspension of an individual's driver's license based solely upon the arresting officer's report that the driver refused to undergo a required breath-analysis examination. In discounting the need for a pre-suspension hearing, the Court concluded that since the arresting officer would invariably witness the driver's refusal, there was little likelihood that the officer would mistakenly trigger suspension of the license.<sup>79</sup> This fact, coupled with the statute's provision for a prompt post-suspension hearing, satisfied the driver's due process rights.<sup>80</sup>

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73. Forfeiture statutes may provide for the issuance of judicial process authorizing seizure of the property but invariably, as an exception, allow for the property's seizure if the seizure is reasonable under the fourth amendment. As the decision in *United States v. One 1972 Chevrolet Nova*, 560 F.2d 464, 469 (1st Cir. 1977), illustrates, property may be seized without a warrant if there was a reasonable likelihood that property would be moved within a short period after the discovery of probable cause. *Id.* at 467-68.

74. *Goldberg v. Kelly*, 397 U.S. 254 (1969).

75. See generally *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Goss v. Lopez*, 419 U.S. 565 (1975); *Bell v. Burson*, 402 U.S. 535 (1971). See also *Stypmann v. City & County of San Francisco*, 557 F.2d 1338, 1344 (9th Cir. 1977).

76. *Morrissey v. Brewer*, 408 U.S. 471, 486 (1972); see *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970). See also *Simet, The Right to a Pre-Deprivation Hearing Under the Due Process Clause—Constitutional Priorities and a Suggested Method for Making Decisions*, 11 CREIGHTON L. REV. 1201, 1223 (1977-1978).

77. 443 U.S. 1 (1979).

78. *Id.* at 13.

79. *Id.* at 14.

80. *Id.* at 15. In *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 (1974), the Court noted several cases in which the government was not required to hold a hearing attendant to the initial deprivation of property. The circumstances encompassed by these

The facts supporting the seizure of property under forfeiture statutes share none of the objectivity found in *Mackey*. Typically, property is subject to forfeiture if it is used to commit or facilitate the commission of a particular offense.<sup>81</sup> Unlike the limited situation examined in *Mackey*, law enforcement officers do not invariably witness the property's unlawful use. From a law enforcement perspective the violation of a forfeiture statute is much like the commission of many criminal offenses; the offense may occur at a time and place far removed from the officer's personal view. Indeed, property has been seized and forfeited based upon circumstantial evidence of the property's unlawful use.<sup>82</sup> Therefore, forfeiture statutes cannot ensure that a law enforcement officer will have personal knowledge of the property's unlawful use. An additional problem is posed by property stolen from the owner or otherwise unlawfully used without his consent. Property thus characterized is exempt from forfeiture.<sup>83</sup> The seizing officer, however, may lack any factual basis to conclude that the property was not stolen. Under either of the preceding circumstances, absent the owner's perspective the seizing officer cannot form a well-informed and balanced opinion. Without a procedure that requires consideration of the

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cases reflect situations in which the government has an extraordinary need to act summarily and in which its initial decision is likely correct, either being based upon documentary evidence or a government officer's personal knowledge. See *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950) (to protect the public from misbranded drugs—documentary evidence and government officer's personal knowledge); *Phillips v. Commissioner*, 283 U.S. 589 (1931) (to aid the collection of tax revenues—documentary evidence); *Coffin Bros. v. Bennett*, 277 U.S. 29 (1928) (to protect depositors from bank failure—documentary evidence); *United States v. Pfitsch*, 256 U.S. 547 (1921) (to aid the war effort—government officer's personal knowledge); *North American Cold Storage Co. v. City of Chicago*, 211 U.S. 306 (1908) (to protect the public from putrid food—government officer's personal knowledge). See generally Freedman, *Summary Action by Administrative Agencies*, 40 U. CHI. L. REV. 1, 5-20 (1972).

81. See notes 3-6 *supra*.

82. *Lee v. Thornton*, 538 F.2d 27 (2d Cir. 1976); *Bush v. United States*, 389 F.2d 485 (5th Cir. 1968); *Ted's Motors, Inc. v. United States*, 217 F.2d 777 (8th Cir. 1954); *United States v. One 1971 Volvo 2-Door Sedan*, 393 F. Supp. 843 (C.D. Cal. 1975); *United States v. A Quantity of Gold Jewelry*, 379 F. Supp. 283 (C.D. Cal. 1974), *aff'd in part, vacated in part, and remanded*, 554 F.2d 1072 (9th Cir. 1977); *United States v. One 1973 Volvo*, 377 F. Supp. 810 (W.D. Tex. 1974); *United States v. One 1970 Buick Riviera*, 374 F. Supp. 277 (D. Minn. 1973).

83. See 21 U.S.C. § 881(a)(4)(B) (1976) (conveyances used to traffic in controlled substances); 49 U.S.C. § 782 (1976) (vessels, vehicles, or aircraft used to transport contraband narcotics, firearms, or counterfeit money). The Court in *Calero-Toledo v. Pearson Yacht Leasing Co.* stated:

It therefore has been implied that it would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent. . . . Similarly, the same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property; for, in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive.

416 U.S. at 689-90 (citations omitted); see *United States v. One 1969 Plymouth Fury Auto.*, 509 F.2d 1324, 1324 (5th Cir. 1975) (Wisdom, J., dissenting) (per curiam), *cert. denied*, 423 U.S. 838 (1975).

owner's facts and perspective, the government is free to ignore facts that militate against the seizure of property.

If the process thus risks the mistaken seizure of property, the correlative proposition is that a post-seizure hearing before an impartial decision-maker could well avoid any possible error, or at least radically curtail any period of wrongful deprivation. The Supreme Court's decision in *Mitchell v. W.T. Grant*<sup>84</sup> illustrates the value of such a hearing. In *Mitchell* the Court upheld a state's sequestration of property upon the ex parte application of the creditor, even though the debtor was not afforded notice and an opportunity for a hearing prior to the sequestration. The Court based its decision upon two propositions. First, the initial seizure of the property was based upon the trial court's conclusion that the creditor, in an ex parte hearing, had proved a right to the property and the need to seize the property without prior notice to the debtor.<sup>85</sup> Secondly, immediately after the seizure the debtor was entitled to a hearing in which the creditor had the burden of proving his right to possess the property pending the trial.<sup>86</sup>

The result in the *Mitchell* decision should be compared with the treatment of forfeiture statutes in *Calero-Toledo*. In both situations the government was justified in seizing a person's property without alerting the owner. The facts in each decision reflect a process that attempted to avoid an erroneous seizure. In *Mitchell* the seizure occurred pursuant to a judicial order based upon the creditor's proof of his claim, and in *Calero-Toledo* an impartial law enforcement officer acted pursuant to a narrowly drawn forfeiture statute. What is obviously lacking in the comparison, however, is a corresponding post-seizure hearing in forfeiture statutes. This glaring omission is justified by neither the type of facts involved nor the nature of the parties' dispute.

In addition to reducing the risk of erroneous deprivation, a post-seizure hearing might ameliorate the unfair negotiating position that forfeiture statutes create. Customs law, for example, allows the government to compromise claims.<sup>87</sup> The present system handicaps the individual because an owner interested in the property's immediate return may forego his judicial remedies and accept an offer of compromise. In *Sniadach v. Family Finance Corp.*<sup>88</sup> the Court ruled unconstitutional a state law that permitted a creditor to garnish the debtor's wages without prior notice and a hearing. The Court, in part, based its decision upon the imbalance in the respective negotiating positions and the likelihood that the debtor would accept an unfair settlement offer and abandon his defense on the merits simply to terminate the garnishment.<sup>89</sup> Unfortunately, because forfeiture statutes do not allow the owner to challenge the seizure before trial, they similarly encourage the owner to abandon his defense rather than await the lengthy

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84. 416 U.S. 600 (1974).

85. *Id.* at 602.

86. *Id.* at 606-07, 609-10.

87. 19 U.S.C. § 1617 (1976).

88. 395 U.S. 337 (1969).

89. *Id.* at 341.

delay until trial.<sup>90</sup>

### C. *The Fiscal and Administrative Burden*

The type of post-seizure hearing eventually required may well resolve the final factor in *Mathews*, the fiscal and administrative burden. A hearing before an impartial and independent government officer need not present an undue burden for the government. The hearing requirement could simply demand that the owner be given adequate notice of the charges against the property, as already set out in customs law,<sup>91</sup> and of the facts to be adduced at the hearing. At the hearing, the owner would be allowed to be represented by counsel, to introduce evidence on his own behalf, and to refute the evidence offered by the government. Similar requirements are commonplace in a wide spectrum of government activities.<sup>92</sup>

Beyond the relatively slight administrative and fiscal burden posed by the hearing process itself, the requirement of an immediate post-seizure hearing would not significantly affect the government's law enforcement effort. The summary seizure of property, as the Court in *Calero-Toledo* stated,<sup>93</sup> is essential to the enforcement of forfeiture statutes. Once the property is seized, however, no legitimate purpose is served by denying the owner a hearing. If probable cause exists to believe the property is subject to forfeiture, the government should have no difficulty proving that fact. Without such proof the government would be remiss to retain the property. The Constitution does not allow seizure and retention of property without probable cause.<sup>94</sup>

## IV. LEE V. THORNTON

Despite the need for an immediate post-seizure hearing, forfeiture litigation has failed to establish that such a hearing is constitutionally mandated. The Second Circuit addressed the issue in *Lee v. Thornton*,<sup>95</sup> and held that an owner is entitled to a post-seizure hearing, but unfortunately conditioned the hearing upon the completion of a time-consuming and problematic administrative procedure.<sup>96</sup> An understanding of that procedure is necessary to appreciate its significance in the case.

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90. *United States v. A Quantity of Gold Jewelry*, 379 F. Supp. 283, 288 (C.D. Cal. 1974), *aff'd in part, vacated in part, and remanded*, 554 F.2d 1072 (9th Cir. 1977).

91. 19 C.F.R. § 162.31 (1979).

92. *E.g.*, *Stypmann v. City & County of San Francisco*, 557 F.2d 1338, 1344 (9th Cir. 1977) (seizure of vehicles from streets and highways); *Kennedy v. Robb*, 547 F.2d 408, 414-15 (8th Cir. 1976) (continued state employment), *cert. denied*, 431 U.S. 959 (1977); *Atwater v. Roudebush*, 452 F. Supp. 622, 630-31 (N.D. Ill. 1976) (withholding federal employee's back wages and retirement benefits); *Gonzales v. Calero*, 440 F. Supp. 989, 998-99 (D.P.R. 1977) (continued government employment); *Sockwell v. Maloney*, 431 F. Supp. 1006, 1012-13 (D. Conn. 1976) (continued receipt of foster care benefits), *aff'd per curiam*, 554 F.2d 1236 (2d Cir. 1977).

93. *See* text accompanying notes 51-58 *supra*.

94. U.S. CONST. amend. IV.

95. 538 F.2d 27 (2d Cir. 1976).

96. *Id.* at 33.

Generally, forfeiture statutes allow the government, upon good cause, either to impose a penalty short of the property's forfeiture or to return the property outright.<sup>97</sup> This procedure, referred to as mitigation and remission, allows the Secretary of the Treasury discretion to relieve the harshness of property forfeiture without judicial proceedings. The mitigation and remission process operates upon the assumption that the property is contraband and subject to forfeiture. While mitigation and remission afford the government discretion to correct an unjust seizure,<sup>98</sup> the procedure does not provide for an assessment of whether the government has probable cause to believe that the property is subject to forfeiture. Instead, mitigation and remission focus on the petitioner's innocence or some similar justification for avoidance of the forfeiture.<sup>99</sup>

In *Lee v. Thornton* the court noted that forfeiture proceedings are time-consuming consequently causing a serious deprivation of property.<sup>100</sup> Relying on *Mathews*, the court held that the government was obliged to convene a post-seizure hearing if the owner's petition for mitigation or remission was not granted in full.<sup>101</sup> Apparently as a means to expedite the procedure, the court ruled that the government had to decide the petition within twenty-four hours of its submission.<sup>102</sup> Thus, completion of the mitigation and remission process was made a precondition to the post-seizure hearing. Unfortunately, this requirement serves no valid purpose.

The mitigation and remission procedure represents a potentially time-consuming activity. The owner's petition must state facts that justify the government's forbearance.<sup>103</sup> Thus, the owner must thoroughly investigate the facts surrounding the seizure, and perhaps secure the advice of counsel prior to submitting the petition. Federal regulations apparently recognize the time involved in investigation because they allow petitions to be filed as late as sixty days from the date on which notice of the forfeiture is mailed.<sup>104</sup> If the petitioner requires additional time, an extension may be granted.<sup>105</sup> Thus, the filing of the petition for mitigation or remission may occur long after the seizure. During this period of time, though the government's seizure may be wholly erroneous, the owner loses the enjoyment of his property.

The problem is compounded by requiring the government to determine

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97. 19 U.S.C. § 1618 (1976); 19 C.F.R. § 171.21 (1979).

98. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689-90 n.27 (1974). See generally Smith, *Modern Forfeiture Law and Policy: A Proposal for Reform*, 19 WM. & MARY L. REV. 661, 671 (1978); Note, *Forfeiture Remission: A Comparative Study of British, Canadian and United States Policy*, 8 CAL. W. INT'L L.J. 586 (1978).

99. 19 C.F.R. §§ 171.11, .13 (1979); see *United States v. One 1961 Cadillac Hardtop Auto.*, 207 F. Supp. 693, 699 (E.D. Tenn. 1962); cf. *Doherty v. United States*, 500 F.2d 540 (Ct. Cl. 1974) (failure to file petition for remission or mitigation gives rise to inference that the owner is guilty of wrongful conduct).

100. 538 F.2d at 32-33.

101. *Id.*

102. *Id.*

103. 19 C.F.R. § 171.11(c)(3) (1979).

104. *Id.* § 171.12(b).

105. *Id.* § 162.32(a).

the merits of the petition within twenty-four hours of its submission. Each petition seeks the government's forbearance on the grounds either that the petitioner is innocent or that he is guilty only of some permissible neglect.<sup>106</sup> Both a determination of what the petitioner knew, or should have known, about the property's use and an assessment of the petitioner's credibility are crucial to the government's decision.<sup>107</sup> In numerous cases the government has argued that a reasonable investigation into the merits of a petition may take weeks, or even months, depending upon the complexity of the case.<sup>108</sup> The approach adopted in *Lee* makes no accommodation for cases requiring even modest investigation. After a delay sufficient for the owner to prepare the petition, the government is artificially constrained to decide the merits of the petition almost immediately. Under these circumstances it is unreasonable to assume that the petition will be granted anything but cursory treatment.<sup>109</sup>

A potentially more vexing problem is the *Lee* decision's impact upon the owner's constitutional right to a timely hearing on the merits of the property's forfeiture. The government must initiate judicial forfeiture proceedings within a reasonable period after the property is seized.<sup>110</sup> In order to avoid the effect of judicial decisions that required the government simultaneously to initiate judicial proceedings and entertain the owner's petition for mitigation or remission, the customs regulations were amended.<sup>111</sup> The amendment provides that the petitioner be notified that upon the filing of the petition he must file an express agreement to defer institution of judicial proceedings until the completion of the petition procedure.<sup>112</sup> As a result, the owner confronts a dilemma: he is given a post-seizure hearing only if he waives his right to a timely judicial hearing, or he may insist on a timely hearing and forego his right to a post-seizure hearing. This unfortunate and probably unforeseen consequence of the Second Cir-

106. *Id.* §§ 171.13, .21.

107. *United States v. One 1972 Mercedes-Benz 250*, 545 F.2d 1233, 1236 n.2 (9th Cir. 1976); *United States v. One 1967 Ford Mustang*, 457 F.2d 931 (9th Cir.), *cert. denied*, 409 U.S. 850 (1972); *Jary Leasing Corp. v. United States*, 254 F. Supp. 157, 158 (E.D.N.Y. 1966).

108. *United States v. One (1) Douglas A-26B Aircraft*, 436 F. Supp. 1292 (S.D. Ga. 1977) (9½ months); *Ivers v. United States*, 413 F. Supp. 394 (N.D. Cal. 1975) (11½ months); *United States v. A Quantity of Gold Jewelry*, 379 F. Supp. 283 (C.D. Cal. 1974) (10 months), *aff'd in part, vacated in part, and remanded*, 554 F.2d 1072 (9th Cir. 1977); *United States v. One 1971 Opel G.T.*, 360 F. Supp. 638 (C.D. Cal. 1973) (10½ months).

109. The prospect of a cursory examination of the petition is real. The general agreement is that the government's disposition of the petition is not subject to judicial review. Consequently, the government has unrestrained discretion to deny petitions for mitigation or remission. *United States v. One 1970 Buick Riviera*, 463 F.2d 1168 (5th Cir.), *cert. denied*, 409 U.S. 980 (1972); *Jary Leasing Corp. v. United States*, 254 F. Supp. 157 (E.D.N.Y. 1966); *Pullman Trust & Sav. Bank v. United States*, 225 F. Supp. 860 (N.D. Ill. 1964). *Contra*, *United States v. One 1974 Mercury Cougar XR-7*, 397 F. Supp. 1325 (C.D. Cal. 1975) (government's failure to remit the vehicle violated the owner's due process rights). *See generally* Note, *supra* note 97, at 600.

110. *See* note 30 *supra*.

111. 44 Fed. Reg. 31,950, 31,954 (1979) (to be codified in 19 C.F.R. § 162.31(2)(a)). *Compare* *Ivers v. United States*, 581 F.2d 1362 (9th Cir. 1978) *with* *United States v. One (1) Douglas A-26B Aircraft*, 436 F. Supp. 1292, 1297-98 (S.D. Ga. 1977).

112. 44 Fed. Reg. 31,950, 31,956-57 (1979) (to be codified in 19 C.F.R. § 162.31(2)(a)).

cuit's decision militates strongly against future embracement of the *Lee* approach.

#### V. CONCLUSION

An analysis of forfeiture procedure under the guidelines set forth in *Mathews* demonstrates that due process demands that an owner of derivative contraband be entitled to an immediate post-seizure hearing. The property owner's interest in the possession of his property is substantial; the fiscal and administrative burden on the government would be slight. Since seizures are not based upon objective facts within the law enforcement officer's personal knowledge, the risk of erroneous deprivation is great. Although the Supreme Court has decided that a pre-seizure hearing is not mandatory because of the government's sizable interest in securing initial possession and jurisdiction over potential contraband, once possession and jurisdiction have been secured no legitimate justification remains for refusing a preliminary hearing that might prevent an extended period of wrongful deprivation. As illustrated by *Mitchell v. W.T. Grant*, an immediate post-seizure hearing is the most acceptable means to accommodate the government's need to seize property without notice with the owner's right to avoid the mistaken seizure of his property.

Although the Second Circuit's decision in *Lee v. Thornton* recognized the need for a post-seizure hearing, the approach adopted by that court mistakenly delayed and conditioned the government's obligation to convene such a hearing. Under the *Lee* approach, the property owner's right to a post-seizure hearing is made contingent upon the unsuccessful petition for mitigation and remission, a time-consuming procedure that may require the property owner to waive his right to a timely judicial forfeiture proceeding. While the *Lee* decision is well-intentioned, the probable consequences of the Second Circuit's unique resolution illustrate the need for a post-seizure hearing that is both immediate and unconditional.

