

SHAPING TODAY'S FORFEITURE LAW: A CONVERSATION WITH SENATOR McCLELLAN

Professor G. Robert Blakey

PROFESSOR GURULÉ: I would now like to introduce our first speaker, Notre Dame's Professor [G.] Robert Blakey. Professor Blakey has been a member of the Notre Dame faculty from 1964 to 1969. He took a short leave to go to another law school, which I won't mention. He returned to Notre Dame in 1980 and has been with us since. He has served as Special Attorney for the Organized Crime and Racketeering Section of the U.S. Department of Justice. As Chief Counsel for the Subcommittee on Criminal Laws and Procedures in the United States Senate, he has contributed to drafting the RICO statute. From 1977-78 he was Chief Counsel and Staff Director of the Select Committee on Assassinations of the U.S. House of Representatives that was investigating the President Kennedy assassination. He has also consulted on a number of government committees including the National Commission on Reform of Federal Criminal Laws. Professor Blakey is going to speak on criminal and civil forfeiture since RICO. Since RICO was enacted in 1970, it did contain at that time a criminal forfeiture provision and Professor Blakey is also going to speak to recent trends in forfeiture law. With that, I give you the esteemed Professor Blakey.

PROFESSOR BLAKEY: Let me also extend my welcome to both our panelists and our students for showing up on a Saturday morning this early. The topic of forfeiture, at least in my judgment, is terribly important. In any society, the government's ability to interfere with life, liberty or property is always open for full discussion. What we are talking about today is not life or liberty, but we are talking about property. We are also not talking about a little bit of property; we are talking about a great deal of property. Since the asset forfeiture fund was created in 1985, approximately 3.5 billion dollars has accumulated in the fund. We sometimes easily fail to notice the difference between a billion and a million. It's like Senator [Everett M.] Dirksen said, "A million here a million there and the next thing you know, it adds up to real money." The difference between a million and a billion can be described this way. If you took a thousand dollar bill—and I've never had a thousand dollar bill—but if you put 4 inches of them on the table, that would be a million. If you wanted a billion, you would have to have a stack of 333 feet, which is well over half the Washington monument. So we're talking about a lot of money, if we're talking about 3.5 billion. Holmes once said of a subject that a page in history was worth a volume of logic. Jimmy [Gurulé] has traced a little of that history for you. I want to go back and talk a little bit more about it, and then I want to tell you a story that frames nicely our discussion here today; it is a story about Senator [John] McClellan.

Go back to the word "felon." "Fe" means "property," and "lon" is Anglo-Saxon for "price." So we talk about "the price of a felony" being the loss of your property. The word "fealty" is related to the word "felony." All properties were thought to be held by the king, so that when you breached your "fealty" to the king, you lost your

ability to hold property, and it went to the lord or the king. So, that when we talk about a property sanction being related to, in some sense, the “felon,” we are dealing with our deepest and oldest traditions.

When I was working for Senator McClellan, and we were drafting the Organized Crime Control Act, we were sitting and thinking about what to do on a wide range of issues. How we would gather evidence? We worried about grand juries, immunity, contempt, perjury and surveillance. How do we try major organized crime groups? And we didn’t mean just the Mafia; we were thinking about drug operations and white-collar crimes, and we were also thinking about sanctions. We were not thinking about deterrence because the people involved in organized crimes cannot be deterred. Basically, we were thinking about incapacitation for the worst sort of criminals. Let’s see if we can’t get sentences long enough to keep them in, not for all their natural lives, but for their entire criminal careers. We did some studies to see how long that would be. Basically, if you get someone in for an authorized 20 years—and keep him in for 3/4 of that—that is his criminal career. Because after you pick him up around 20, and you keep him in for 15 years, life is over as a practical matter. People who are 45 or older do not go in banks, jump over the counter, and run out with the money. There is a kind of “criminal menopause.” This notion of “three strikes and your out” is silly. Old people just don’t commit crimes. What you should do with them is let them out; you should take young people and lock them up. But you don’t have to do it for life.

So, then the Senator and I turned to the question: why were people doing these sorts of crimes? In the end, it turned out that property was what it was all about. In the 19th century, we thought it was terribly important to take away the most important thing from a criminal, and we thought that one thing was liberty. But if you think about it, most people who are engaging in organized crime or white-collar crime have already discounted the issue of liberty. They are not engaging in this crime because of poverty or mental disease; this is rational crime. They have already decided to do it, whatever the criminal behavior is, risking their liberty. For what? We figured two things: money or power. Indeed, maybe one is a surrogate for the other. With money you’ve got power or with power you can get money. When we turned and looked at the criminal justice system, we said to ourselves, “How do we affect this kind of criminal decision?” With the threat of imprisonment? Well, that, in fact, does not work. What about fines? Well, we looked at fines, and there were two aspects to them. One, they were flexible in application; the judge can give it or not. The next was that they were inflexible in amount; so you go in to a major drug transaction, you’re going to make a million dollars, and what was the threat? “Don’t do that or we’ll fine you \$10,000.” It just didn’t make sense. So we looked at the Department of Justice, and it never went out to collect fines. It was neat to go and get a criminal conviction, but what assistant prosecutor wanted to be a fine collector? It just wasn’t where the glory was. So we sat down, and Senator McClellan said, “Tell me what my options are.” And I said, “We could go back to forfeitures. We could make them inflexible in application and flexible in amount: flip it around.” So we figured we would have to make them all mandatory: no discretion in applying forfeitures. We would enact two kinds of forfeiture, basically.

I should back up a little bit. I explained to the Senator what the common law forfeitures were. You take the person’s estate, and then you corrupt his blood, so that no property can pass through him to his heirs. Senator McClellan is a hard man, but he

thought that went a little too far. Senator McClellan was also a fair man. He said, "We can't go back to corruption of estate; forfeiture of estate and corruption of the blood is a little medieval." So I said, "Okay, let's talk about forfeitures that are related to the activity of the offender. Let's take the profit out of crime. Let's take the instruments of crime from them, and take the profit out of the crimes themselves." Then the instruments would be anything used in the commission of the offense; that would be corporations, airplanes, property of any kind, and anything obtained through the offense—that is, proceeds. We could seize those, and make it mandatory that they be taken. Whatever the instrument used is, it will be taken, and whatever the proceeds—and we didn't mean profits. We didn't mean profits because we didn't want to do cost accounting for crooks. We would take the gross amount.

The other question was, "How would we do it?" Again the Senator asked for his options, and I told him. "Well, we could go back and have criminal forfeiture." Criminal forfeiture would be an *in personam* sanction. We would have to have it like they did at common law—and, indeed, did for a while in the colonies. For a very little while, we had criminal forfeiture in the colonies. But one of the experiences in the colonies was that, since the forfeiture went to the king—and the colonials were very pragmatic people—if you forfeited the person's estates and goods, you typically put him on welfare. And that meant that the jury which gave a man's personal and real property to the king—which went to England—then had to pay for the man's wife, or the spouse of the person, with welfare. So colonial juries would typically find him guilty, but without property, personal or real. They did this despite the obvious fact that he did have property, because they knew that if they took the property away from him, they would have to pay the welfare costs. So reviving criminal forfeiture meant that you had to have the forfeitures within the context of criminal proceedings. And, of course, that meant a whole range of protections: indictment by grand jury, the requirement that the indictment be shown by proof beyond reasonable doubt, confrontation, cross examination, double jeopardy (because you couldn't appeal it if you lost), and a jury verdict. That would be criminal forfeiture. That would not be a forfeiture of estate; it would have whatever scope we gave it.

He said, "Well, that sounds fair, you give a guy due process. What's the other option?" I said, "Well, you could go civil forfeiture." He said, "I could understand that, if you're talking about bootlegging, taking the hooch or the car or property." I said, "It's more than that, it's not necessarily limited to that." We had a civil forfeiture coming from the English law; it was principally in the enforcement of the navigation acts. And they had a very practical problem; the person who owned the boat was often in Rotterdam, but the boat with the contents without paid duties would be in England. If you then had the traditional English procedure, beginning with the service of process on the defendant, and then an adversary hearing between the persons, how would you get service on some boat owner in Rotterdam? So, they decided to abandon the typical procedure in the admiralty context. The reason in admiralty that you sue the boat *in rem* is because the owner is somewhere else. This is pragmatic. This has nothing to do with theory. We carried civil forfeiture into the admiralty courts in this country as an *in rem* procedure against boats and goods, principally to enforce the tax laws. Were they limited to admiralty? The answer is no, you can still have an *in rem* proceeding in other areas. But you see the point.

And you had a period of time right at the Civil War where the people in the North wanted to forfeit the assets of the people in the South. But there was a little

thing called the Army of Northern Virginia between the people in the North and the people in the South, so you couldn't get service of process on the Confederates. They were in the South and their land was in the North, so you couldn't get service of process. So, Congress enacted the confiscation acts. Lincoln vetoed them at the time; his reason was that they authorized more than a forfeiture of a life estate for treason. He took the position that these *in rem* forfeitures were unconstitutional. They then went back and made it only for a life estate. The confiscation acts were necessary, just like the boat owner at Rotterdam, because the property owner was in Richmond. That made it necessary to move forward with the civil forfeitures. They were sustained by the Supreme Court.

Understand what civil forfeiture is; you start by grabbing the property, it's civil not criminal forfeiture. Since the action is against the property, you do not have to get service of process on the defendant, the real defendant. The real defendant does not get notice, hearing, none of the normal standards of normal due process. It is against the property.

The Supreme Court, post-Civil War, sustained these forfeitures against due process objections. But the Supreme Court that did it was acting in the wake of the discrediting that came after *Dred Scott v. Sandford* [60 U.S. 393 (1857)]. The Supreme Court intervened in an effort to settle slavery and what it contributed to, in a major sense, was civil war. A major facet of our national argument before the Civil War was about the Supreme Court. The Supreme Court was in its lowest ebb of prestige. The radical Congress was at its highest ebb. Recall that this was the time that Johnson was impeached. The power in Washington was with the radicals and reconstructionists. The Court just did not have the will to say that these confiscation acts were unconstitutional. Because they were civil and not criminal and they were punishment. We don't get a rebirth of forfeiture until prohibition. Then we got the use of civil forfeiture in connection with the enforcement of prohibition. The Supreme Court decided a case called *Goldsmith*, in 1921 [*Goldsmith-Grant Co. v. United States*, 254 U.S. 505 (1921)]. You can see that the Supreme Court was struggling with this if you read *Goldsmith* very well, that it was struggling with this thing, that if it was a criminal sanction, you would get all of this constitutional protection. Here is this fiction that was designed to take care of all those admiralty problems, and it had been sustained in the post-Civil War period. What to do? The Court barely sustained it; you can see enormous discomfort in the Court. How to get around where civil in effect, is criminal.

I explained all of this to the Senator and said that we could go civil forfeiture. Understand what we were talking about here. RICO is not limited to taking drug proceeds, and it is not just limited to organized crime. RICO was never limited to just organized crime; it never was from the beginning. You are now looking at taking not only tools of the trade, you are looking at taking corporations. If a guy runs a corporation by fraud and he owns 100% of the corporation, you are planning to take the corporation. The Senator said, "I can't go with civil forfeiture. We've got to restore criminal forfeiture. I think they are entitled to due process." Keep in mind this is Senator John L. McClellan. So we went in [to Congress] with the Organized Crime Control Act, not with civil forfeiture. We reintroduced criminal forfeiture—which had been abolished in 1790—in 1970. It was done by a conservative southern Senator who was concerned about the rights of defendants. This is not part of any public presentation at the time, but was in fact what was going on at the time.

You also have to understand that there were two bills being enacted at one time.

One of them was the Organized Crime Control Act, which is, like CCE, for everybody. We weren't sure if it was going to go through. We had another bill over in Judiciary Committee that was called the Comprehensive Drug Abuse Prevention and Control Act. It was called the Continuing Criminal Enterprise Statute. We thought that only one would go through, because there is really no constituency for drug dealers. But there was a constituency for white-collar people. We put in [the Comprehensive Drug Abuse Prevention Control Act] the continuing criminal enterprise provision. RICO is over here, for everybody—if you want to look at it this way, say, CCE for everybody is called RICO and RICO for drug dealers is called CCE. We were processing both of them, thinking that surely we would get one but not both. And we got both. But if you will notice in [the] CCE [of the Comprehensive Drug Abuse Prevention and Control Act] there are criminal forfeitures, and they are word-for-word parallel to what is in the Organized Crime Control Act. Indeed, the same notion of long-term sentencing is paralleled in the Organized Crime Control Act and [the] CCE [of the Comprehensive Drug Abuse Prevention and Control Act]. Now, what happened is, there has been a tradition of civil forfeiture for cars and boats and cash, as an incident to drug seizures, and, lo and behold, the Bureau of Narcotics sent up drafts [to Congress] that they wanted the old civil forfeiture in as well. Indeed, there is civil forfeiture in [the Comprehensive Drug Abuse Prevention and Control Act]. You will find civil forfeiture in the Organized Crime [Control] Act, too, in Title VII of the statute; there is a limited forfeiture act, in just taking the tools of the trade at the time of the seizure for gambling. But the broader notion of forfeiture as a major tool in dealing with organized crime in the 1970 acts is clearly criminal, and it was intended to be criminal, and it was intended to be criminal with constitutional protections.

Well, the statute—that is, RICO—goes through. And what happens? Nothing. The Department of Justice does not implement it. The problem is that the mindset of the prosecutors has always been: get a conviction. The Department of Justice does not implement the special sentencing provisions [of Title X] because the mindset of the Department of Justice is: get a conviction. Whether the person goes to jail or not is a judicial question, and they never cared about money in forfeitures or fines anyway. So, you had no implementation of criminal forfeiture in RICO or CCE, and [Senator] Joe Biden had to get interested in forfeiture on the Hill. He got interested in forfeiture, and there was an explanation offered as to why the Department of Justice couldn't do it, something about the legislation was not adequate, when, in fact, the legislation was adequate to do it.

When the statute was going through, the first question is, "Do we have a forfeiture sanction?" The answer to that is "Yes." The second question is, "How do you procedurally implement it?" We decided to go with criminal and then we figured, "Well, we won't worry about that, we'll go over and talk to the Rules Committee and we'll get some rule amendments, so that you can have the indictment include a forfeiture count and a verdict spell it out." Indeed, right after the statutes passed, Senator McClellan sent me over to the [Senate] Rules Committee, and we got the rules we wanted. Indictments can now name forfeiture and verdicts can be returned by juries.

What we didn't think through—not because we didn't know about it, but because we did not have time—was what happens when you deal with third-party rights? It's one thing to seize "Blackacre" from the drug dealer when he owns it, and you can have in his case an adjudication that he is guilty, and an adjudication that he owns "Blackacre" as an instrument of the crime, or as even the proceeds of the crime, and

then you take it. That's easy enough.

The analogy is that forfeiture is to crime what damages is to torts. All civil litigators know that they have to do two things: prove liability and prove damages. The problem with criminal litigators is that they only prove liability. Criminal forfeiture now has, in at least some circuits, bifurcated proceedings. You go in the first instance to get the criminal case against him and in the second case to get the forfeiture proceeding. Now there is a third proceeding because it is going to turn out that in this country most property is not held by just one person, it is held by lots of people with various interests and particularly when most property is financed in some way you are going to have banks, finance companies, and insurance companies and third party lenders involved in property. So you now have, theoretically a three part proceeding. A trial, a forfeiture and what is euphemistically known as an "L" hearing.

We did not thoroughly think through the problem of the third-party proceeding. And what I see happening now is that, as long as these forfeitures are not widely implemented, there is not a problem. As long as forfeiture is being implemented against drug dealers, nobody cares. But now that forfeiture is beginning to be implemented beyond . . . [simply] drug dealers—and by drug dealers, I [include] now the boat, the car, the airplane, or the cash at the scene—as the Department has learned to use forfeiture in a more aggressive way (this is both criminal and civil, though most of the forfeiture is clearly civil), it is beginning to tread upon other interests in the community. And the other interests in the community are banks, insurance companies, and a whole variety of people who dealt with this drug dealer.

And if you stop and think about it for a minute, the notion is that what we should do is sterilize the money that was made through the crime, so that there is no incentive on the part of people to want to engage in crime. What do people do with money? They spend it. Do drug dealers exist in our society in isolation? No. They all have bankers, real estate agents, lawyers; they all have stock brokers. We have money so that we can invest it. This means that the drug traffic in this country requires the existence of all these service industries. Now, of course, we're talking about money laundering. But if you follow forfeiture and you follow money into these secondary parties, you are now dealing with people with money. You are talking about bankers, lawyers, insurance companies. These people have representatives in society.

The first controversial impact [of extending forfeiture to secondary parties involves cases where] the drug dealer wants to finance his legal defense with drug money. Now, a lawyer stands up and says, "We are allowed to take a little money here, and here." That [issue] got up to the Supreme Court in a case called *Caplin [& Drysdale, Chartered v. United States*, 491 U.S. 617 (1989)]. And while lawyers complain a lot, no one cares if a lawyer gets paid. So, when it came time to see whether the legal fees were beyond forfeiture, and it got to the Supreme Court, the lawyers had no standing to get money. There is always an alternative. You can always go into the Criminal Justice Act and get a free lawyer. Depriving a lawyer of his fee does not mean that you are depriving a defendant of representation. You are depriving him of good representation. I am not saying that the C.J.S. people do not do good work. But the best representation in the bar is not C.J.S.. O.J. did not go to C.J.S.. I am not sure that he got the best representation, either, but he did not go to C.J.S..

What now happens at the next level is where we are now. We are now going to sit down as a society and find out if we are going to have this flow of money taken away from the bad guys and into the government's hands. If this flow of money is

going to be understood as our society's "damage" by crime, and collected in our criminal proceedings—the damages—are there going to be people who are going to have "collateral damage?" Is there going to be "friendly fire" that takes out third parties? It is very interesting what is going to happen. Just like John McClellan who was Democrat and southern and conservative, who was not willing to buy into civil forfeiture on essentially due process grounds. Look what has happened in the United States Supreme Court. This is a Court that has never met an innocent man. This is a Court which has rolled back the Fourth, the Fifth and the Sixth Amendments.

I used to teach criminal law when for a long time, procedure became so important that I began teaching procedure and not teaching criminal law. Trying the policeman's conduct was the first issue before you got to the guilt or innocence of the defendant. So, the substance got pushed out and procedure became much bigger. It is like a pendulum, because now I teach a Warren Court case, and then the Rehnquist Court case that rolled it back. Now, procedure is shrinking, and the substance is growing again.

When I was a prosecutor, I lost all my cases because of Warren. Now that I am a defense lawyer, from time to time, I lose all of my cases because of Rehnquist; and the only principled thing that I see here is that Blakey loses.

Now I look at what the Supreme Court has done in the last two terms. Let me just walk through them with you. In [*United States v.*] *James Daniel Good Real Property* [114 S. Ct. 492 (1993)], they said no seizure without due process. They had to have a hearing. What the government wanted to do was to take the person's house without giving him notice or a hearing. I can see grabbing a car or cash, but why a house? Where is it going to go? If you take a bad case to the Supreme Court, you are going to get a bad result. The government should never have gone up there and argued that they could take a person's house without notice or hearing. They lost.

Let's take a look at 1992, and [*United States v.*] *Buena Vista* [113 S. Ct. 1126 (1993)] which I mentioned earlier. I was involved in drafting this statute; and maybe the language is not good, but the idea that a drug dealer could give his house to his girlfriend and have her win as a donee, is bizarre. I thought, "Well, that's one. We'll win that one." Well, a clever lawyer can make the language say anything. He couldn't get a majority of the Court to say it, but we now have an innocent owner defense by the donee of a drug dealer's wife, or girlfriend, or whatever. I don't think that she is going to be able to show that she is without knowledge, but she got the opportunity to do it. And now, the doctrine that was good common law about relationship back is not good law any more. At common law, relationship back for real property was complete, and it cut off transferees. The relationship back for personal property protected *bona fide* purchasers and that's the relationship back that was understood by Congress in the enactment of this statute. Relationship back now does not cut off donees; that's a change in the common law position. Stef[an Cassella] can say something contrary to that, but Stef's opinion is not persuasive to those who have read the material.

Take a look at *Republic National Bank [of Miami v. United States]*, 113 S. Ct. 554 (1992). It used to be that the court where the property was had jurisdiction over the property. So in which court did you sue to adjudicate the question of ownership? It was the court that had jurisdiction. So any time the Department wanted to deprive the court of jurisdiction, it would just move the property. [*Republic National Bank* held that] you can't deprive a court with jurisdiction over the *res*, [just] by moving [the *res*], because we are really talking about a legal problem and not a piece of property.

The government lost a technical way it used to have of handling a legal problem. My point is, the government lost.

Let's look at [*Department of Revenue v. Kurth Ranch* [114 S. Ct. 1937 (1994)]. This one now is when you have a subsequent non-remedial penalty after a criminal case. The government lost. I think that one is a very interesting one. We are going to talk a little more about the notion of a criminal case followed by a forfeiture, and the fact that if we conceptualize the forfeiture as a criminal sanction, then we can't have a punitive forfeiture following a punitive trial. What's the flip side of that? If you have a punitive forfeiture first, then maybe you can't have a punitive trial second. My own feeling about that one is, I know what I'm going to do. The next time I represent a drug dealer and the government has this big CCE investigation pending against him, and I know that the government's going to the grand jury, and they seize my property over here, I'm going to go into the forfeiture unit—that's not talking to the criminal unit—and I'm going to concede it's civil forfeiture. And then when I get my CCE dropped on me I am going to say, "No, no, no. That's double jeopardy, and I will gladly give up my Rolls Royce," to get rid of my mandatory 20-year minimum. Now, I don't know if that is a strategy adopted yet by the criminal defense bar, but it's one I would adopt.

But let's talk about a case the Supreme Court is going to take up: [*United States v. Libretti* [38 F.3d 523 (10th Cir. 1994), cert. granted, ___ U.S. ___ (March 27, 1995)]. Libretti comes in and pleads guilty, and says, "Yeah, you can have all my assets related to the forfeiture, related to the drug dealing." But now the question comes up, "What assets are related within that plea?" And the government says, "Everything." Because when he plead, he said he would give up everything related to the drugs. But the question is, "What is 'related to the drugs?' Am I entitled to a jury trial on that issue?" And Supreme Court grants cert[iori]. What do you think's going to happen in that case? Let's see, the government has lost, lost, lost, lost. The government is going to lose. Again. I don't know what the vote is going to be, but the government is going to lose.

Now, when we talk about jury trials—this is a bridge to another issue—we talk about third-party rights and "L" hearings, right? Let me talk to you about not the *Sixth* Amendment jury trial, but the *Seventh* Amendment jury trial. You're going to forfeit my property? You're going to say, in a criminal proceeding, and you have a criminal judgment against "A," and then in an "L" proceeding—which was that third one—you're going to take my property away from me in a proceeding growing out of this criminal sanction? Well, first of all, in due process, you can't take my property without giving me that "L" hearing. And second, *I also have a Seventh Amendment right to a jury trial hearing in that "L."*

Now, it's time for a little bit of history [to support this contention]. In the *Seventh* Amendment [context], you are entitled to a jury trial. There are two kinds of proceedings, one called an "Action in Ejectment," and another called a "Bill of Peace." As it turns out, if the government grabs the property first, and I go in to dispute the government's possession of it, that is an Action in Ejectment. If the government does not seize the property first, but simply moves forward in what amounts to an action to quiet title, it is a Bill of Peace. A Bill of Peace is equitable; an Action in Ejectment is legal. When the government steps into this legal proceeding and gets the verdict and grabs the assets and wants to litigate from the top of the hill, guess what? They started it, and now they will have to give me a *Seventh* Amendment jury trial and an "L"

hearing, and there is going to be a jury between me and the losing of my property. Whereas, if the government wants to litigate this from an even playing field, leaving me in possession of my property, they can remove the cloud from its title [without the right to jury trial]. I do not think that the young Assistant [United States Attorneys] who are bringing these cases have any historical understanding of the difference between Bills of Peace and Actions in Ejectment [and the corresponding right to a jury trial in each case], and they are going to have to learn it in the context of "L" hearings.

I would suggest to you that the issue will be raised in the United States Supreme Court. I don't know if they're going to win it or not, but in BCCI, which is basically a corrupt world-wide bank which collapsed, and then the government went in and put everything aside and gave 50% of what they got to the bankruptcy proceeding, and pocketed the rest. They didn't literally pocket it; they gave it to the FDIC which, in this country, is the same as pocketing it. Well, the money that was in that bank, didn't belong to the bank it belonged to the depositors, so what the government did was to jump over what would normally be the bankruptcy rules. If the government had not seized the property first but had taken their forfeiture judgment into the bankruptcy proceedings and stood in line, they would have been last: fifth. The unsecured creditors would have been fourth. But by starting with the forfeiture, they were able to get priority over everybody. That's something that the "L" hearing should have worked out. And Stef, clever guy that he is, convinced the D.C. Circuit, not only not to recognize the Seventh Amendment [right to jury trial], but to give no hearing at all—on the merits—to depositors in the BCCI litigation. The D.C. Circuit has sustained that [in *United States v. BCCI Holdings, S.A.*, 48 F.3d 551 (D.C. Cir. 1995)], and we're now going to ask [the Supreme Court] if that's a good idea. If I get it in the Supreme Court, then you're going to lose, Stef. And you're not going to lose because I have a good argument, you're going to lose because there is this perception that the government is overreaching.

One last point, and then I will stop. We're debating here today whether there is an innocent owner defense and whether we ought to add one by statute. The Supreme Court has already added one. If you read them real carefully, all you have to do is read the footnotes in *Austin* [*v. United States*, 113 S. Ct. 2801 (1993)]. And I would like to point out a couple places. If you will take a look in *Austin*—and it does not have a U.S. cite, it has only a Supreme Court cite—take a look at page 2809. The Supreme Court is trying to figure out whether civil forfeiture is subject to the Fines Clause. To make it subject to the Eighth Amendment's Fines Clause they have to figure that it is, in some sense, punitive. Incidentally, they made criminal forfeitures subject to the Eighth Amendment's Fines Clause—which obviously they should have—they did that in *Alexander* [*v. United States*, 113 S. Ct. 2766 (1993)]. So there is going to be a proportionality hearing in RICO cases. But watch what happens; the proportionality is going to be big. It is not going to be like, [just] the [predicate] offense. It's going to be the [whole] big thing. So, RICO is alive and well for criminal forfeitures.

The Supreme Court says [in *Austin*, at 2809] that "[i]n none of these cases did the Court apply the guilty-property fiction to justify forfeiture when the owner had done all that reasonably could be expected to prevent the unlawful use of his property [M]ore recent cases have expressly reserved the question whether the fiction could be employed to forfeit the property of a truly innocent owner. See, e.g., *Gold-*

smith-Grant Co., 254 U.S., at 512.” Remember, *Goldsmith* was the case that sustained this stuff at the time of prohibition. They were worried then about taking these confiscation cases in the Civil War period and permitting prohibition forfeiture and they kind of “reserved” due process; they clearly had pointed to “preserving” [due process] in *Austin*. And then there is a footnote here: “[b]ecause the forfeiture provisions at issue here exempt ‘innocent owners,’ we again have no occasion to decide in this case whether it would comport with due process to forfeit the property of a truly innocent owner.” [*Austin*, at 2809].

Do they tell me whether, in fact, this exists? And the answer is, they do. Page 2810, in footnote eleven. All the civil attorneys don’t get the significance of this. This is, like, a civil case. What they do in footnote eleven is, “[i]n the criminal context, we have permitted punishment in the absence of conscious wrongdoing, so long as the defendant was not “powerless” to prevent or correct the violation.” Citation to *United States v. Park* [421 U.S. 658, 673 (1975)]. “There is nothing inconsistent, therefore, in viewing forfeiture as punishment even though the forfeiture is occasioned by the acts of a person other than the owner.” Go read *Park*. *Park* tells you that you can have vicarious and criminal responsibility, but there is a due process affirmative defense of, “I was powerless to pre[v]ent it.” I read *Park* plus *Austin*. I don’t care what Congress does; this Court is going to recognize an innocent owner, due process, affirmative defense to criminal *and* civil forfeiture. It’s as clear as day follows night in the existing cases.

Is there good constitutional history, if you will, to support this? Well, a long time ago, in [1808], no less than Chief Justice Marshall had a case called [*Peisch v.*] *Ware* [8 U.S. 347 (4 Cranch 1808)], and was worried about whether actions in the civil *in rem* admiralty forfeiture—and this is at the time of the Revolution, within the first generation—and the issue arises that, could something cause an owner to lose his property when he was basically innocent, as towards it. The illustration given in the opinion [is, “If, by theft or open robbery, without any fault on his part, his property should be invaded, while in the custody of the officer of the revenue, the law cannot be understood to punish him with the forfeiture of that property . . . [t]he law is not understood to forfeit the property of owners or consignees, on account of the misconduct of mere strangers, over whom such owners or consignees have no control.” *Ware*, at 364]. Basically, what he says is that we will not construe the statute to produce this result. Why not? Because it would be unconstitutional. So, I think that we’ve had the earmarks, the outlines of an “I am powerless to prevent it” defense, from [1809] in the Supreme Court, and most recently—I think—reaffirmed in 1993. And all it’s going to take is to get a case before the Supreme Court, and what’s now going on the civil forfeiture side is not going to be sustained.

If you can’t persuade John McClellan, if you can’t persuade Bill Rehnquist, you can’t win. Because these people start off sympathetic. And it’s going to make no difference whether it comes in Henry Hyde’s bill or John Conyers’ bill or the bill from the guy at the end of Pennsylvania Avenue, either west or east. It’s going to produce precisely the same result. Thank you.

PROFESSOR GURULÉ: Thank you very much, Professor Blakey, for that historical background perspective on criminal forfeiture and RICO. On the one strategy that you identified [the defendant granting his or her property as forfeitable to create a double jeopardy bar], I recall one recent case—in Massachusetts, I think—where that strategy

was employed and the claimant prevailed in that case. We will talk a little bit later about [*United States v.*] *Torres* [28 F.3d 1463 (7th Cir. 1994)], and I think that *Torres* suggests that there may be an “out” for the government as well.

