

**A LEGAL EARTHQUAKE:
THE AFTERSHOCKS OF *UNITED STATES v.*
*\$405,089.23 in U.S. CURRENCY***

*Miriam A. Krinsky**

PROFESSOR GURULÉ: That leads me to our next speaker It is my pleasure to introduce Miriam Krinsky. She is the Chief of the Criminal Appellate section in the U.S. Attorneys Office in Los Angeles and a former colleague of mine. She is a graduate of UCLA Law School. She established her legal career working in a prestigious law firm in Los Angeles, Hufstедler, Miller, Carlson & Beardsley. She worked there from 1984 to 1987. In 1987, she joined the U.S. Attorneys Office in Los Angeles and worked there until 1988 when she . . . commenced work in another U.S. Attorneys office, in the District of Maryland, where she was a member of the Organized Crime Drug Enforcement Task Force. She worked there for approximately two and a half years, and then returned to Los Angeles where she has been working since. The responsibilities that she oversees as Chief of the Appellate section includes a docket of 1,800 criminal appellate matters, which has grown substantially since I left the Attorneys Office in 1989. Miriam Krinsky is also responsible for participating in and overseeing the drafting of the government's rehearing *en banc* petition before the Ninth Circuit Court of Appeals in the case of *United States v. \$405,089.23 in U.S. Currency* [33 F.3d 1210 (9th Cir. 1994)]. I asked Miriam if she would talk about the Circuit's decision, her opinion regarding the decision, what the current status of that case is, and to address more specifically the issue of double jeopardy and whether or not the Double Jeopardy Clause is indicated. Also, some of the so-called exceptions that the federal circuits have identified as being related to proceeds as it relates to prosecution and so forth. It is my pleasure to welcome Miriam Krinsky from the U.S. Attorneys Office in Los Angeles.

MIRIAM KRINSKY: Thanks, Jimmy Most residents in the country, whether they are lawyers or not, are aware of the fact that in January of 1994, the Los Angeles area was shaken by an earthquake of historic proportion. There have been aftershocks since that date and the impact of those events have continued to be felt throughout the L.A. area.

The average citizen is not necessarily aware of the events of September 1994, but those of us in this room have felt the impact of those events to this day. On that date, the legal community was awoken from its slumber, just as Los Angeles-area residents were awakened by the Northridge quake. They were shaken, however, not by any movement in the earth, but by the Ninth Circuit's decision in "405," as we call it.

Just as the ground has continued to shake in Los Angeles in the wake of the

* The views expressed herein are those of Ms. Krinsky personally, and are not necessarily the official views of the Department of Justice or the United States Attorneys Office for the Central District of California.

Northridge earthquake, the Ninth Circuit's decision in *405* similarly has resulted in legal aftershocks. Those aftershocks are being felt not just within the Ninth Circuit but throughout the country. It is an area of the law where the ground has yet to settle in, just as we have not yet seen the ground settle in the wake of the Northridge quake. What I would like to focus my remarks on today is, "What was the legal framework, or what did the ground look like before *405* shook it?" So, I will first discuss in general what double jeopardy principles are, and what some of the [previous] cases . . . have told us about that preexisting legal framework. I will talk about the *405* decision itself, what the actual predicate was for that decision, what the panel held in *405*, and what the status is currently as we wait for things to settle in. Finally, without giving any predictions as to what the Ninth Circuit would do, because I never profess to predict the inner workings of the Ninth Circuit, I will at least give you some thoughts and identify some areas that have resulted in continuous litigation within the Ninth Circuit and throughout the country. Finally, I will attempt to identify what the "aftershocks" have been following *405*.

I. LEGAL BACKGROUND

Let me return to the first topic. How did things look, legally, before *405* came down? To understand *405* you have to have a working knowledge of three Supreme Court cases: [*United States v.*] *Halper* [490 U.S. 435 (1989)], *Austin* and *Kurth Ranch*. You also need to have at least a working knowledge of what double jeopardy is all about. For those of you who are experts in these areas, I apologize for this quick review course, but I want to make sure that we are all up to speed with that working knowledge.

What then, are the double jeopardy principles that come into play when we are looking at this analysis? The Fifth Amendment is obviously the starting point. "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." I am sure that everybody understands that, so I don't think that we need to describe it any further. But seriously, though, we don't necessarily know exactly what those words mean, because we don't utter them in the course of common conversation. But it will at least give some insight to examine what the cases have told us that those words mean. What they tell us—although we now know that at least two Justices on the Supreme Court do not fully agree with this, Justices Scalia and Thomas—but what most people have believed that they tell us, is that there are three interests that are implicated by those words. In other words, three things that your government cannot do. First, the government cannot engage in subsequent prosecution of somebody for the same offense after an acquittal. If you are once found not guilty, you cannot subsequently be prosecuted by the same arm of the government that prosecuted you the first time. Secondly, the government has no right to engage in a subsequent prosecution after a conviction. So, in other words, before we get to the third interest implicated by double jeopardy, what we see is the right not even to be put through the *process* a second time. The third interest is slightly different. It says that individuals have a right not to be punished twice for the same offense. That part of double jeopardy—which is often referred to as the "multiple punishment" interest—is what most people believe is at issue in *405*.

If we focus, then, on the third of those prohibitions—the prohibition against multiple punishment—the crucial question becomes, "When is the double jeopardy line crossed for multiple punishment purposes?" There are a couple of things that have to

be present before that double jeopardy prohibition against multiple punishment has been violated. First of all, someone has to be “punished” twice. So, if someone has been punished once and the second remedy that the government seeks to extract is not deemed to be punishment—and again, that is going to become the “\$64,000 question”—there is no violation of double jeopardy. The second thing that we know, pursuant to the case law, is that the punishment has to have been in a separate proceeding. If the government, in one proceeding, in a manner authorized and intended by Congress, punishes someone in two different ways, there has been no violation of double jeopardy. Finally, as I alluded to earlier, the punishment has to have occurred, and has to have been exacted, by the same sovereign. While legal scholars may not always agree with it, if the state government criminally prosecutes someone, there is nothing to stop the federal government from seeking a second punishment for the same offense. It has to be the same sovereign for double jeopardy to be offended.

As I indicated, the question that has resulted in the greatest debate is, “When is a civil sanction against somebody, a civil penalty, deemed ‘punishment’ within the meaning of the Double Jeopardy Clause?” That is where the Supreme Court cases sketch the legal landscape that preceded the 405 decision. As of the 1980s, it looked like the answer to that question was a hard and fast, “never.” Never would it be the case that a remedial civil sanction would be deemed to be punishment. The Supreme Court seemed to have said that much in the 1984 decision by the name *United States v. 89 Firearms* [465 U.S. 354 (1984)]. Those legal waters were muddied a little bit by the end of the 1980s.

In 1989, the Supreme Court issued the *Halper* decision, which was the first of the “government losses” alluded to by Professor Blakey. Let me tell you what happened in *Halper* because I think it is a situation where bad facts resulted in—at least what government lawyers believe to be—bad law. Halper, the defendant, was convicted of a violation under the False Claims Act [31 U.S.C. §§ 3729-31]. The defendant had submitted to the government some false medical claims resulting in the defendant’s overcharging the government for those medical claims. He was prosecuted criminally, sentenced, and then the government decided to proceed against the defendant under a civil false claim statute which allows for a civil penalty to be exacted. So far, I think that most of us in this room would agree that it does not sound terribly egregious. When that tide starts to turn a little bit is when you look at the end result of that civil proceeding. In that civil proceeding, the government extracted \$130,000 in funds. Again, especially in today’s economy, that doesn’t seem like an earth-shattering amount. What starts to look a little more troubling is when you consider two facts. The first is, the amount of overcharging was under \$600.00. The second is, the actual loss to the government was in the vicinity of \$16,000. So that \$130,000 penalty, when viewed in this context, starts to look a little eye-opening and startling. The Supreme Court was asked to consider whether that seemingly solely “civil” penalty should be deemed “punishment” that would implicate the Double Jeopardy Clause.

The Supreme Court, not surprisingly, was somewhat troubled by the facts of the case, and said a couple of things in resolving the issue of whether one should characterize this civil penalty as punishment. First of all, the label of a sanction or a penalty as “civil” as opposed to “criminal” is not the end of the discussion. The fact that a sanction or penalty is labelled as “civil” does not mean, by definition, that it can’t be construed as punishment pursuant to the Double Jeopardy Clause. Instead, the Supreme Court told us that in certain rare—and that is a critical word—in *rare* cases the civil

penalty can be *so extreme* or *so divorced from* or *so disproportionate* to the damages to the government or the expenses involved, that it will, in that rare case, be deemed to be punishment. In fact, the Supreme Court concluded that *Halper* was just such an example of that rare, disproportionate, extreme situation.

What should we take from the *Halper* decision? Well, I suggest to you that the first thing that we need to bear in mind is that the *Halper* Court was not attempting to create a broad-based general proposition. Instead, the opinion was premised on the unique facts presented, and made clear that the inquiries were to be fact-bound, a fact-intensive analysis. The next lesson that we should take from *Halper* is the fact that, in *Halper* at least, it is crystal clear that the double jeopardy interest that was considered and was believed to have been violated in that case was the multiple punishment protection that arises under double jeopardy. There is absolutely no suggestion in *Halper* that the concern was one of subsequent prosecution. All *Halper* talks about is multiple punishment.

When did the next legal wrinkle in all of this come about? It came about in the *Austin* case in 1993, which interestingly was not even a double jeopardy case. In *Austin*, following the defendant's prosecution and conviction on various drug charges, the government sought to civilly forfeit certain property. The defendant's opposition was not that the forfeiture was a double jeopardy violation but that the forfeiture, in relation to the rest of what had gone on in that case, was excessive under the Eighth Amendment. So, the issue in *Austin* was whether the Eighth Amendment should apply to all to civil forfeitures. The government said, "No, this type of forfeiture is not even subject to Eighth Amendment analysis." In resolving that debate, the Supreme Court held that such forfeitures should be deemed punishment for purposes of the Eighth Amendment. So, calling upon their analysis in *Halper*, the Court said, at least for Eighth Amendment purposes, that such civil forfeitures are subject to an excessive fines analysis.

It is important to bear in mind what was and was not at issue in the *Austin* decision. The *Austin* decision, while it looked at the forfeiture statute as a whole, was looking at it only for the purpose of determining the threshold applicability of the excessive fines analysis. Or in other words, the *Austin* case continued to recognize that the ultimate question whether the forfeiture was excessive remained a fact-intensive and fact-bound inquiry. There is nothing in the opinion that would suggest to the contrary, that the ultimate question is one that can be analyzed on any kind of broad basis, rather than a fact-based or fact-intensive analysis.

The legal landscape was completed in 1994 with the *Kurth Ranch* decision. In *Kurth Ranch*, once again a drug case, the issue was not a forfeiture but a highly unusual tax that existed at the time in the state of Montana. Pursuant to that statute, following the defendant's marijuana trafficking conviction, the government imposed a tax worth many times the value of the marijuana at issue in that case. The Court considered whether that type of a tax, following a conviction and following criminal punishment, should be deemed a violation of the Double Jeopardy Clause. In other words, should that tax be construed as punishment such that double jeopardy interests would be implicated? By a 5 to 4 vote, the Supreme Court held that the tax in that case was punitive in nature, or in other words, that the tax was punishment under the Double Jeopardy Clause.

There are a couple of interesting aspects to that holding. The first is not in the majority opinion itself, but rather, as I referenced earlier, in the opinion of Justice

Scalia, joined by Justice Thomas. In his dissenting opinion, Justice Scalia questioned whether the Court, in *Halper*, had started down the wrong path, and called into question the continued validity of *Halper* itself. In fact, Justice Scalia suggested that perhaps the notion that double jeopardy includes three interests—the third of which is multiple punishment—is a fallacious assumption and perhaps there should not even be a multiple punishment prong to double jeopardy. Maybe those concerns can be protected by due process interests, or by excessive fines analysis. The dissenting opinion is somewhat telling, at least as to the views of those two Justices on the Court. The second thing to bear in mind in regard to *Kurth Ranch* is that the tax in that case was not your run-of-the-mill tax. It was a highly unusual tax and given the facts that I am going to enumerate in a moment, it is frankly not surprising that the Court deemed that act to be a punitive one. The tax was conditioned on commission of the crime; the marijuana subject to the tax had already apparently been destroyed; and the marijuana was taxed at approximately 400 times its market value. It was not surprising with that factual predicate that the Supreme Court said that this tax can't possibly have been anything but punitive. The Court was able to look at those facts and deem any extraction of the tax, under that statute, to be punitive. My final observation regarding the *Kurth Ranch* opinion is to note that there is a sentence at the very end of the opinion that is somewhat puzzling because it references the notion of subsequent prosecution. I choose to think that it was merely sloppy drafting on the part of the majority. But, to the extent one believes that there is perhaps some suggestion in *Kurth Ranch* that this should be analyzed as a subsequent prosecution issue, as opposed to a multiple punishment analysis, that would be a great departure from the analysis in *Halper*, which was clearly nothing but a multiple punishment case.

II. THE 405 DECISION

Hopefully, now we are all forfeiture and double jeopardy experts and we are ready to tackle the events of September of 1994, the 405 decision. What was the factual predicate of that decision? The defendants were convicted by the United States Attorneys Office in the Central District of California of various narcotics offenses that stemmed from a large scale methamphetamine operation involving not just the manufacturing and distribution of methamphetamine, but also the laundering of meth proceeds through various companies. Around the time of the superseding indictment, the government instituted civil forfeiture proceedings against various assets and money in a bank account controlled by the defendants. The government's forfeiture theory was one of proceeds. The government suggested that—and pursued that civil forfeiture on the grounds that—those assets and those bank accounts were the proceeds of the defendants' methamphetamine trafficking operation. Pursuant to the stipulation of both sides, there was no quarrel about this. The forfeiture action was stayed to allow the criminal case to be completed. That happened, the defendants were convicted, and following that conviction the government sought and obtained a summary judgment in civil forfeiture proceedings.

On appeal, the defendants—who were, interestingly, proceeding *pro se*—raised a variety of arguments challenging the forfeiture, including the claim that the civil forfeiture constituted punishment and was in violation of the Double Jeopardy Clause. After submitting the case with no oral argument, the Ninth Circuit, in an opinion authored by Judge Reinhardt and joined in by Judge Poole and District Court Judge Jack Tanner from the state of Washington, reversed the forfeiture on the grounds that it was a

double jeopardy violation.

That holding was based on two building blocks, without either of which the decision couldn't have come out the way it did. The building blocks in the court's decision were, first of all, the conclusion that the criminal prosecution and the civil proceeding, [although] they were coordinated, [and although] they were part of a single prosecutive effort, should nonetheless be deemed separate proceedings for double jeopardy purposes. That was building block number one. Building block number two was the court's conclusion that these forfeitures—forfeitures premised on a proceeds theory, where the government simply sought to strip these drug dealers of their ill-gotten gains—should be deemed to be punishment, not because of the facts of this particular case, but because of a categorical analysis. In other words, the court said that it is incumbent upon the courts to look at the forfeiture statute as a whole, and if any part of the statute is punitive, every other forfeiture under that statute falls along with the punitive part of the statute.

Let me return to each of those two building blocks. The separate proceedings analysis by the court was contrary, as the court recognized, to that of other circuits. The court cited two opinions out of the Second and Eleventh Circuit Courts that have adopted a contrary view and that, instead, embrace the notion that a forfeiture is permissible and should not be deemed a separate proceeding as long as it is part of a single coordinated prosecutive effort. The undercurrent of the court's holding—and it's not disguised in any way, shape or form—is a hostility towards civil forfeitures and particularly a hostility towards this type of parallel prosecutive effort. Indeed, Judge Reinhardt referred to this type of civil forfeiture as a “manipulative prosecution strategy” [405, 33 F.3d at 1217]. Essentially, what the court said was that a forfeiture would be permitted where the government chose to criminally prosecute as well, only if the government chose to include that forfeiture in the indictment. So, Judge Reinhardt said to the prosecutors in the Ninth Circuit that if you choose to proceed with a criminal prosecution, the only way that you can forfeit assets is if you do so criminally as part of that same indictment.

On the punishment part of the analysis, the court based its analysis on the *Halper* and *Austin* decisions. No mention of *Kurth Ranch*. The court held that all civil forfeitures under these statutes are to be deemed punitive because all of the statute rises or falls together. This reasoning parted company with the analysis of the Fifth Circuit in the *Tilley* decision [*United States v. Tilley*, 18 F.3d 295 (5th Cir. 1994)]. As Judge Reinhardt stated, “we must look to the entire scope of the statute which the government seeks to employ, rather than to the characteristics of the specific property the government seeks to forfeit” [405, 33 F.3d at 1220]. This approach is a clear departure from the fact-intensive or fact-bound approach that was suggested in the *Halper* decision. As I indicated earlier, the court reached its decision despite the fact that in 405 the government's forfeiture was premised on a proceeds forfeiture rationale.

III. THE GOVERNMENT'S REHEARING REQUEST

Where does the decision stand today? Before I get to the government's respectful differences with the opinion, in mid-October the government filed a petition for rehearing *en banc*, which is essentially the government's request that the three-member panel decision be reviewed by an eleven-member panel of the Ninth Circuit. Thereafter, the claimants were ordered to respond to the government's rehearing *en banc* petition, which indicates that at least somebody out there in the Ninth Circuit finds our argu-

ments to be of some interest. We are still waiting, any day or week now, to hear from the Ninth Circuit on that issue.

Though I hadn't planned to do so, I can give you my thoughts or predictions, such as they are, on the likely outcome of 405. We are asking the court to revisit, *en banc*, each of the building blocks that have created the holding. In other words, we are asking the court to revisit first, the notion that a civil forfeiture—such as in this proceeds case—should be deemed to be punishment under this new categorical approach; secondly, we have asked the court to revisit the notion that a coordinated prosecutive effort that Congress appears to have intended should be deemed a single proceeding.

What do we feel in relation to the first of those—the issue of punishment—or, in other words, what is our difference with the categorical approach that was used by the court? The first thing that we have said, not surprisingly, is that we believe it to be contrary to the clear language and approach of the *Halper* decision. *Halper* said in unambiguous language that the analysis was to be a fact-intensive one, and as a result, a civil forfeiture being labelled as punishment should be the “rare case.” In fact, in a concurring opinion out of the Ninth Circuit shortly after 405, before the ink was barely dry on that decision, one of the judges in the Ninth Circuit, Judge Pamela Rymer, said that while she recognized she was bound by 405, she nonetheless wondered if it really was consistent with *Halper*'s fact-intensive reference to the “rare case” of punishment. So, at least one judge in the Circuit has shared our concern about whether that approach is an approach that can be reconciled with the *Halper* decision.

We have also noted the obvious, which is that the Ninth Circuit's approach is one that has created a split in the Circuits. When you look at what has happened in this particular case, by sweeping so broadly the Ninth Circuit has brushed under the punishment rug forfeitures that are purely proceeds cases. This is a result that we believe to be somewhat perverse, in that all we are attempting to do is to get back from an individual something—assets or amounts of money—that was never legally his to begin with. They were illegally obtained.

While the Ninth Circuit suggests in 405 that the result was required or somehow followed naturally from the *Austin* decision, our rehearing *en banc* petition again quarrels with that conclusion, and suggests instead that *Austin* did not require the categorical approach used by the court. We asked the court *en banc* to bear in mind that *Austin* was an Eighth Amendment case and that in that context, when we look at the Eighth Amendment analysis, the *Austin* Court was asked to consider, as a threshold matter, whether the Eighth Amendment even applied. It is only as to that *threshold* question—the first of the two-step part of the process under the Eighth Amendment—that the Supreme Court used what could be deemed a “categorical approach” or a “view of the entire statute.” *Austin* continued to recognize that the ultimate excessive fines inquiry—just as we believe the ultimate double jeopardy inquiry—was one that was controlled, in the end, by the facts in [a] particular case. The *Austin* categorical approach used for threshold applicability . . . is simply not one that we can transfer into the ultimate question, [either] for [excessive fines or] double jeopardy purposes. Finally, it is our position that the *Kurth Ranch* decision, an opinion that arose from a strictly punitive tax statute, cannot be viewed as having toppled the analysis in the *Halper* case.

As to the separate proceedings analysis, we have not only argued that the court's approach is at odds with that of other circuits, we have also pointed out our view that the “single proceeding” approach—namely that a coordinated prosecutive effort that

includes a civil forfeiture act should be deemed a single proceeding—is consistent with Congressional content. If you trace through some of the history of forfeiture legislation, of which I am not as expert as Professor Blakey, it does not appear that Congress created civil forfeitures as an *exclusive* vehicle for the government to pursue. Instead, they appear to have been created as an *additional* vehicle for the government to use. Indeed, if you look at the fact that civil forfeitures can be stayed while a criminal proceeding is pending, and the fact, pursuant to the statute, that a civil forfeiture's venue can be held to exist in the same judicial district where criminal prosecution is underway, those procedural vehicles make sense only if Congress knew full well and intended that this type of parallel effort exist. We also think that there is a hint in the *Halper* decision of this notion of parallel proceedings. When the Supreme Court said, on page 450 of *Halper*—that nothing prevents “the [g]overnment from seeking and obtaining both the full civil penalty and the full range of statutorily authorized criminal penalties in the same proceeding . . .”—the only way you can give that comment any meaning at all—because criminal proceedings will not have the same docket number [as civil cases]—is if you assume that the Supreme Court intended, by their reference to the “same proceeding,” a broad notion of a coordinated prosecutive effort as constituting a single proceeding. Finally, the *true* concern that one should have in relation to this double jeopardy analysis is that the government not be allowed to proceed with civil forfeiture after a criminal prosecution based solely on dissatisfaction with the criminal penalties. That concern was in no way, shape or form raised on the facts of this particular case.

IV. AFTERSHOCKS IN THE WAKE OF 405

What have been the aftershocks of the 405 decision? Well, in the past seven months we've seen an avalanche of litigation, primarily in the Ninth Circuit, but throughout the country as well. We've seen hundreds of collateral challenges to convictions by defendants who were subject prior to those convictions to forfeitures, many of which occurred in an administrative context. We have also seen decisions out of other Circuits, including the Seventh Circuit's decision in the *Torres* case, that suggest some support for part of the reasoning in the 405 decision. Finally, there have been a number of major areas of litigation, a couple of which I will very briefly touch upon, that have yet to be resolved and probably won't be resolved until the 405 debate has ended. The first area of ongoing litigation relates to how broadly one should construe the holding in 405. More specifically, should 405—which arose from a civil judicial forfeiture—apply equally to an administrative forfeiture where the defendant has not contested the seizure by the government through an administrative proceeding? The *Torres* decision out of the Seventh Circuit said [405] should *not* be applied in that kind of context. The Ninth Circuit has yet to rule on that issue.

Second, . . . to what extent should 405 be applied retroactively? To what extent should defendants after the fact be entitled to the benefit of the Ninth Circuit's holding? A District Court in San Diego, I believe it was, has said that there should be no retroactive application. Most courts have said that retroactive application is appropriate. Again, that issue has yet to be resolved, at least in the Ninth Circuit.

Third, what double jeopardy interest is implicated by 405? As I have indicated, there is some confusion regarding this issue, and not just in that sentence at the very end of *Kurth Ranch*. There is confusion in 405 itself as to whether or not it was intending to deal with “multiple punishment” or the “subsequent prosecution” line of

double jeopardy. As it turns out, not only does the government believe that this is a multiple punishment question, but Mr. [James] Wren and Mr. [Charles] Arlt [the individual claimants in 405] in their responses to our *en banc* request have indicated that they agree that this is a multiple punishment case, and nothing else. Why does it matter? It matters for a number of reasons. [One is that], if we proceed ahead with a criminal prosecution and the defendant has been acquitted, then we have never punished that person, and we can now proceed with any kind of forfeiture. If the analysis is premised on the subsequent prosecution prong of the Double Jeopardy Clause, then a later civil forfeiture action would be improper.

Fourth, when should we conclude that the punishment has been imposed criminally? Should it be on the day of sentencing? Should it be the day that the sentencing is affirmed by a Circuit court? Should it be the day the sentence is completed? Literally, when should we say that punishment has been imposed? The Ninth Circuit tried to grapple with that later inquiry in a civil case in the [*United States v.*] *Barton* decision [46 F.3d 51 (9th Cir. 1995)]. While initially it suggested that a civil forfeiture attaches when the forfeiture is completed, they reissued that decision and limited it to deal with the facts of that case. In that case, the answer to the civil forfeiture complaint occurred after the criminal proceeding had been completed, so we couldn't possibly say anything but that the civil case came second.

Fifth, when can the 405 protections be waived? It appears that the Supreme Court contemplated a waiver of double jeopardy. To what extent should a defendant who enters a guilty plea be construed as waiving double jeopardy interests? Again, the Circuit has yet to comment on that issue.

Finally—recalling that multiple punishment arises if and only if punishment in the first instance and the second instance all stemmed from the same offense—are there instances where the forfeiture has not been premised on the same offense as the criminal conviction? Again, that's an argument that the government has been pursuing.

While this is an area that is in a great deal of flux and while both sides may disagree as to how these things should ultimately "shake out," I think one thing that we can agree upon is that there will be many more aftershocks before the ground settles in. And I think that we can probably also agree that, most likely, the final chapter in this book is going to be written in Washington, D.C., when the nine members of the Supreme Court end up considering this issue.

PROFESSOR GURULÉ: Thank you Miriam. It is always rewarding and informative to have someone as part of a panel who is on the "front lines," as it were, of the current issues in the law. And the 405 case is certainly that, a front line. I think there is a very good chance, as you say, that this case will ultimately be decided by the Supreme Court, and I can only hope that we get a good resolution, if that happens, on the questions you outlined for us here today. I think one issue Miriam raises is particularly interesting, when we're talking about double jeopardy issues, and that is the question of how you frame—that is, how you draft—the complaint. I think it is particularly interesting that, while a court is bound by the [Supreme] Court decision [in *Blockburger v. United States*, 284 U.S. 299 (1932)], there nevertheless remains the question as to whether or not the civil forfeiture was based on the same offense. Consequently, what I read—and what she suggests—is that if it wasn't, then double jeopardy doesn't attach. And so, I could certainly see, stemming from that, a strategy developing by prosecutors in terms of being quite specific in the civil forfeiture complaint of delineat-

ing the specific criminal offense, the Title 21 offense, upon which the civil forfeiture is being based. And insuring that is a different offense than the criminal offense with which the defendant was previously prosecuted. That becomes particularly tricky when you're talking about a section 848 or a section 846 conspiracy offense, or possession with intent to distribute, or simply distribution—one could argue those are different offenses—or a telephone count under 843(b), being a different offense than the conspiracy offense, and therefore double jeopardy.

Well, I certainly agree that we're not going to hear the end of these issues in the near future, and there's going to be, I believe, a flood of litigation spawned from them for some time to come.