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GOVERNMENTAL ABUSE OF FORFEITURE POWERS: THREE CASES

E. E. Edwards

PROFESSOR GURULÉ: Well, thank you Stef. You’ve certainly given us a lot of hot buttons and given us a lot to discuss during the roundtable discussion. But, before we do that, I want to introduce our final speaker. We’ve saved, of course, the best for last. Bo Edwards is going to be addressing us next. Bo comes to Notre Dame from Nashville, Tennessee, where he is a senior member of the firm of Edwards and Simmons. He has worked there since 1988. His practice is devoted to state and federal criminal defense, federal civil rights litigation, and state and federal forfeiture. In addition, he’s been an active member of the A.B.A. Criminal Justice Section. He chaired the defense function committee of the A.B.A. Criminal Justice section from 1984-1986. He is a co-chair of the National Association of Criminal Defense Lawyers—the Asset Forfeiture Abuse Task Force. He is a member of the National Trial Defense College; he serves as a faculty member and lecturer. So, he has extensive experience in civil and criminal forfeiture litigation. Mr. Edwards will be speaking briefly on protection from government prosecution and the innocent owner defense . . . . So, with that, on behalf of the Law School, I want to thank you for coming all the way from Nashville, Tennessee to address us. We appreciate your presence here. And, now let’s give a warm welcome to Bo Edwards.

E. E. EDWARDS: Jimmy, thank you very much. It is an honor for me to be here with you all . . . . There is one member of the audience here today that I think deserves some recognition. He probably has the least interest in civil forfeiture as anybody here, but he has been a perfect gentleman and a delight to have in the audience and I think we should recognize Stef Cassella’s son, Brian. Brian, thank you for being here. I explained at lunch today, to Brian, that lawyers can argue and jump up and down, and still, when the argument is over, we’re just arguing about law stuff, and we really like each other. Well, I have the highest admiration for your father, Brian. We do, however, disagree on a few legal principles. And we’re going to get into a few of those. But I like him a lot.

The old thought, “power corrupts, and absolute power corrupts absolutely” is more than a truism. It is, in fact, a description of the impact of modern civil forfeiture laws on law enforcement. I think today’s discussion has underlined one thing in my mind. And that is that this debate really goes to the heart of the concept of private property that we have developed in this country over two centuries. And make no mistake about it, the government is directly attacking those concepts that for more than two hundreds years we have, more or less, taken for granted. The government is trying to turn that upside-down. I think that as you hear some of the cases that I’m going to discuss with you this afternoon, you will see that what grows out of civil forfeiture by its very nature, and by human nature itself, is not so much individual greed, but institutional greed. Institutional greed that is a logical result of what goes on, and the pro-
c edures that are used, in civil forfeiture. It's inevitable. It's not something that can scarcely be restrained as long as we use the device of civil forfeiture in the form that it is now used.

The problem is not that taking the ill-gotten gains out of the hands of drug lords, or organized criminals—or other, disorganized criminals—isn't a laudatory goal. It is. The problem is that inserting the profit motive in selected parts of the task of ferreting out crime, it is doomed to distortion that disrupts property rights and that punishes innocent people. And, it seems to me, it is not a far-fetched statement to say, that for better than two centuries our country has stood on the proposition that the innocent, above all, deserve the protection of the structure of our legal system. I would suggest that the economic incentive placed into the function of law enforcement is extremely dangerous in a country where private ownership of property is a cornerstone of our freedom. And we are risking our freedom if we allow this to go unrestrained.

Let me illustrate. Suppose you were a police commissioner or a chief of police and you called all your units together one day and said, "From this day forward, the policy of this department is going to be to enforce these ten laws. I've got a list of ten here that seem to be popular these days. Here is the list of ten, you are to enforce in your every waking moment, these ten laws. Here are the first nine. And, by the way, with respect to the tenth one, I am pleased to inform you that anything you seize you can keep. No go out and enforce these ten laws." Now, let me ask you the next question. Which of those ten laws are you going to choose to enforce tomorrow, or the next day, or the next? I suggest its probably the one where you get to seize things and keep it, right? Why? Because we're human beings, that's the way we are. We respond to incentive, and our country has become the strongest in the world because of the profit motive. If you put profit in ferreting out crime, the crime you're going to ferret out is the one that gives you profit. So, the fact is, that despite the very laudatory objective of civil forfeiture, and despite the fact that, on occasion, it really does work to seize and forfeit the ill-gotten gains from really bad people, it is also true that civil forfeiture has seriously flawed the focus and priorities of law enforcement in the United States.

If you were a DEA agent ten years ago, the way you got ahead—the way you got good recommendations in your file and got promotions and grants—was to make the big drug busts. These days, that's almost incidental. It's not a big drug bust that matters if you're in the DEA; it's the big seizure. Is it inconsistent with our constitutional republic, founded on the strongest concepts of private property, to permit seizures of property based exclusively on probable cause—with probable cause established on the meagerest of hearsay, possibly—without initially establishing probable cause before a neutral and detached magistrates, and without an adversary hearing, and never, ever again having any additional burden of proof.

Suppose this were a simulation. Suppose we were in the land of Oz, if you will, and we were all students in an academic setting. Suppose we were creating a criminal justice system for the land of Oz. Suppose someone stood up in this setting and said, "I propose that we have a system where the government can take property anytime they want to, only upon deciding on their own that they have probable cause to believe that property has been used, or is going to be used, for some illegal purpose." Any problems with that? Okay, I'll go a step further. Suppose you don't even have to know that; suppose someone just has to tell you that and you say, "Sounds good to me, I'd like to seize their property." Okay so far? Suppose that, before you seize the property,
you don't have to do anything. You don't have to go before a judge and explain the facts; you don't have to get his approval. You don't have to send out a notice and give people who have an interest in that property an opportunity to come before the judge and show the judge that the government is wrong. And, as a matter of fact, after you go out and seize their property, you don't have to lift a finger. You don't have to bring any proof into court; you let the other side have the burden of proof. God forbid the other side has a problem—for example, things are a little tight right now and they can't afford a lawyer. Or equally likely, they can afford a lawyer, and they hired one, but the lawyer doesn't understand forfeiture law. Or suppose the lawyer understands property law, but just slips up and misses a deadline.

Unfortunately, some of Mr. Cassella's colleagues do not have as benevolent an attitude about missing deadlines as I learned he does, this afternoon. It was only a couple of years ago when you got your notice of forfeiture, not from the federal building downtown, but from Washington. It didn't matter if you lived in, let's say, Tennessee, and were accustomed to going to Nashville to the Federal Building or Memphis to the Federal Building. If you got a notice of forfeiture, you dealt with the Asset Forfeiture Office in Washington. If you lived in Phoenix, the same. If you lived in Nome, Alaska, the same. And that forfeiture notice would say, "We have seized this property. We believe you may have an interest in it, so let us tell you the deal we are going to make you. You can file a petition for remission, and tell us all the good reasons we ought to give this property make to you." And they really make it sound good. Doesn't cost you a dime, just send them information telling us why we ought to give it back and they will consider that information. On the other hand—in small print, last paragraph of the notice—"If you want to get into court, it's going cost you. You've got to file a claim after the first notice of publication and you've got to file a claim and cost bond." Just read that, that doesn't sound very attractive. That's the way it was done.

But, let's suppose you're a little cynical, and you decide you don't want to trust the seizing agency that gets to keep the property with making the decision whether to give it back to you. So, you are, after all, going to file a claim. Okay, when do you file? Do you run right down to the bank, get a cashier's check and mail it in? Oh, no. You can only file it during twenty-day windows. When does that window open? When the government decides to publish a notice. And a few years ago, they would say, "There will be a notice in some Wednesday's edition of USA Today." Didn't tell you when, just be looking. Well, because there are some cases I want to get to, I won't belabor that point, because I understand that the government now does tell you when they're going to publish the notice. A real break. But my point is that civil forfeiture cases are not fought on a level playing field. And getting back to our simulation in the Land of Oz, if any of you think that's the kind of country you would like to create in your simulation, then you can leave now because you won't be interested in the rest of my talk.

Suppose on a football field a few hundred yards from here, instead of being level, the field was slanted at, oh, about a five-degree break. And let's suppose that one of the teams that engaged in intercollegiate athletics on that field—the one wearing the gold helmets—always started at the upper end of the field, and the opponent always started at the lower end of the field. And even after half-time it stayed the same .... Well, I submit to you that that's the way civil forfeiture laws are designed. It's not a level playing field. In fact, the laws are designed so the government can win.
There are procedural stumbling blocks. There are any number of ways that even the best-meaning lawyer representing a claimant in a civil forfeiture can mess up. And even the finest criminal defense lawyers are afraid of civil forfeiture, because they know just enough to know that it's different from anything else in the law.

Now, let me do this. I went to Vanderbilt Law School . . . [W]hen I graduated I had never heard of the Supplementary Rules for Certain Maritime Claims. I just didn't know they were there. I didn't take the course on admiralty, and it wasn't on the bar exam. I didn't learn about those darn things until about a decade or so ago, when I got a civil forfeiture case and found that, goodness gracious, there's a set of rules that I didn't even know were there. Do you know where federal statute sets out the rules of procedure for civil forfeiture cases? The Tariff Act of 1930. Logical place to look, wouldn't you say? That's where they are. But if the incredibly broad powers in this act that are placed in the hands of the government—and the lowest law enforcement officer, and the deputy sheriff, and the patrol officer in the municipal police department squad car—if this incredible power that is given to law enforcement by civil forfeiture were used always discretely and selectively, we wouldn't be having this symposium today. And the government wouldn't be zero-for-six in the last six cases decided by the Supreme Court.

But the truth is, human beings don't work that way. If you give the government that kind of power, its going to be abused. There are some courts in the country that have suggested that such laws have been abused. "We continue to be enormously troubled with government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes." The Second Circuit in United States v. All Assets of Statewide Auto Parts, [971 F.2d 896, 905 (2nd Cir. 1992)]. "There is a growing body of judicial literature critical of the overbroad and overbearing scope of the legal fiction used in in rem forfeiture proceedings and of the relatively few 'due process' guarantees statutorily attached to these procedures." United States v. Sonny Cook Motors [819 F.Supp. 1015, 1018 (N.D. Ala. 1993)]. "Forfeiture is 'a harsh and oppressive procedure' which is not favored by the courts . . ."—at least, not by some courts—"Since 'there is little to discourage federal agents from seizing property illegally and then seeking evidence of probable cause,' courts must guard against the abuse of forfeiture in the government's zeal to apprehend and prosecute drug dealers." [United States v. $31,990 in U.S. Currency, 982 F.2d 851, 856 (2nd Cir. 1993), quoting United States v. One 1976 Mercedes Benz 280S, 618 F.2d 453, 454 (7th Cir. 1980), and George C. Pratt and William B. Peterson, Civil Forfeiture in the Second Circuit, 65 St. John's L. Rev. 653, 668-69 (1993)]. There are many other examples. If we paid attention to the lessons of history, we shouldn't be surprised. And we should have known what would happen with this type of expansion of civil forfeiture powers.

As we've heard early this morning, the antecedent of civil forfeiture is the greed that the English Crown had—it's the medieval law of the deodand. The deodand was basically—and I may get a few of the historical facts mixed because it happened a long time ago and I wasn't there—but the idea was, if an inanimate object was used to cause the death of a person, the owner of the property forfeited the deodand. The deodand was the value of the object to the Crown. It was believed that the King or Queen—remember the "Divine Right of Kings" was taken very seriously back in the 12th and 13th century—was God's representative on Earth. So the justification was that the Crown would use the deodand to have masses said for the deceased. However,
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according to the English historian Maitland, who has written *The History of the English Law* and other similar works (Frederick Pollock & Frederic W. Maitland, *The History of the English Law* (1895)), there is no record that the Crown ever got around to having those masses said. The Crown did, however, get around to collecting the deodand. In fact, as early as 1208, the Statute of Edward the Second provided the procedure by which a jury would be summoned to assess the value of the deodand, which would be paid to the King. Later on, the English Crown got a little more sophisticated and started doing deals with his local Lords. And he would share with the Lords for helping in their assistance in collecting the deodands. Sound familiar? I remember there was a U.S. Attorney in Tennessee a few years ago, and it was common knowledge that you could never call him, because he was always out giving a check to some rural sheriff. Well, that is a medieval concept, brought modern. That’s what the Crown did. And the deodand then came to be an important fund raising vehicle for the English Crown.

I don’t want to belabor this, because we have more important things to talk about, but what actually happened is that, as the Industrial Revolution occurred in England, there were two developments that put pressure on the deodand. One was that, with the development of more modern transportation, there were more train wrecks, there were more trains running into carriages, and there was more traffic and people were getting hurt. Well, coupled with the law of deodand which was invoked when someone died as the result of some object or non-human cause, there was also the problem that the English law did not provide an action for wrongful death. So, people began to get more and more upset about paying the deodand. For example, there was a famous case decided in an English court—I just remember right off hand—where an English jury assessed the value of a locomotive that had caused the death of three people. And the train company claimed that the deodand was the value assessed against the locomotive—which was a little low according to the commentator. The Crown claimed that since three people were killed, the train company owed the Crown three times the value that was assessed by the jury.

But you get the idea that was a lot of struggling in English courts over the deodand. Then, Lord Campbell came along and introduced a bill into Parliament in 1845 to repeal the law of deodand. The only remarkable thing about that is that it was 1845 and not an awful lot earlier. But, that’s probably [due to] the power of the revenue source to the Crown. During the debate, which resulted in the repeal of the deodand in 1845, the Lord Chancellor answered the argument of Lord Campbell for the repeal of the deodand. And he said that the system—that is deodands—which Lord Campbell has dallied on was “pregnant with absurdity.” In other words, they recognized the absurdity of the idea that the Crown was owed something in such circumstances. But, the Lord Chancellor suggested one or two points for consideration. The first point was, “that deodands form part of the ordinary revenue of the Crown and the property of the Crown has been granted out to the Lords and franchises and public corporations.” So, in essence, the Lord Chancellor was saying if you repeal the law of the deodand, you’ve got to find some other revenue source for the Crown. I think the modern analogy is the memorandum that Richard mentioned this morning, where Attorney General Barr was telling the U.S. Attorneys around the country to... get that money in because we’ve passed certain projections through Congress of what we’re going to get, and you’re falling down on the job. So go out and take some more property. It doesn’t sound very consistent with the ideas of due process that most of us have grown up
Let me, for the rest of my time, talk about three cases and relate them to what I see as the problems—some of the problems—in modern civil forfeiture. And I'll leave it to you to decide if the enforcement of modern civil forfeiture statutes results, inevitably, in a large-scale abuse of innocent people, inconsistent with the concepts of fairness and justice that this country has embraced for over two centuries.

There are three cases I'll talk about today. The first two involve good, innocent, fine people. People that, in fact, I've been very proud to represent. People that you would enjoy meeting and listening to. The third involves a perhaps less attractive person that you would be less comfortable with. But nevertheless, remember that if the government can do it to any of them, they can do it to any of us.

The first is Willie Jones. Willie Jones is an African-American—a black man of about 6'3" or 6'4". Weighs about 300 pounds. He's in his late thirties. He looks like a retired NFL linebacker. Could have played ball for Notre Dame. As it happens, he grew up in rural northern Alabama and didn't play football. But he did work on a farm and he learned how to grow shrubs. There are a lot of nurseries in northern Alabama, and one of the things Willie is very good at is making things grow. So over the years, he became a landscaper. But he is not a big business man. He sort of works out of his home, has a vacant lot where he keeps a couple of ten-year old trucks that he uses in his business. But, nevertheless, he is a small businessman. In late February of 1991, Willie Jones went to the Nashville International Airport, to the American Airlines ticket counter, paid cash—I think he had about $500 in cash in his pocket, and paid $300 and something—for a round-trip ticket to Houston, leaving later that day. His purpose was to go to Houston to the wholesale nurseries in the Houston area to shop for shrubs for his Spring inventory. As it later developed, he had a secondary motive in that there was a certain, young, African-American lady whom he had met a few months earlier who lived in Houston and worked for an airline. And he was interested in seeing the lady, as well; but, that's another story. After he bought his ticket, paying cash, he proceeded through the security checkpoint at the national airport. He had a modest-sized utility bag, which the security person actually unzipped and went through. He carried an extra pair of shoes, some underwear, toiletry articles, nothing suspicious. She put everything back, zipped it back up and gave it back to him. In the meantime, the ticket agent had called the interdiction unit stationed at the airport. The DEA has a nation-wide program of commercial interdiction, and virtually every commercial airport with any significant traffic in the country now has an interdiction unit, which typically results from a task-force agreement signed between the DEA and local law enforcement agencies. In the case of the Nashville Airport, there was a seven-person interdiction unit: three airport cops, three local Nashville cops and one DEA agent. And the ticket agent called the interdiction office and said this black guy just paid cash for a round-trip ticket to Houston, which we all know is a famous source city, right?

So they hurried into the airport, immediately picked up Willie Jones, as he went through the security checkpoint, and observed his bag being hand-checked by the security employee. They asked the security person if she'd found anything unusual, and got a negative response. They followed him to his departure gate, introduced themselves, and, in fact, called him by name—which scared him. They introduced themselves as police or agents at the time—I don't recall exactly which—asked him if he would mind going with them to a more private location; they needed to talk to him. He agreed. They went across the concourse to an empty departure gate, through some
glass doors that went into a vestibule to which the jet-way was connected at that gate. Once you got through the doors and they close, the way the light reflects, the people in the jet-way could see out, but the public could not see in. Well, they talked to him a while about who he was. He told them he was a landscaper. He told them where he was going, he showed them his ticket, and so forth. Then they proceeded to search him. They searched his bag first—he didn’t mind that—and found nothing. They asked him if they could search his person, and Mr. Jones recalls that he declined to answer. They had a different story. But, at any rate, they searched his person and found, in a pouch that was tucked under his waist band and under his shirt and pants, a lined pouch containing $9,000 in cash—whereupon they seized it.

Now, what probable cause—even as light a standard of proof of that—did they have at that time? Well, they knew that he was a black man with a round-trip ticket to a drug source city. What more do you need? In their minds, that’s all they need. And I do not suggest to you that they acted maliciously. They acted in the belief that they had the perfect authority to seize this man’s drug money. Now, suppose I were there, or Mr. Cassella were there, that day, and had paid cash—for whatever reason: suppose we were about maxed out on our credit cards. Is it likely that the ticket agent would have called the narcs and said we just bought a round-trip ticket to Houston? Probably not. Had we been approached, would we have agreed to be searched? Probably not. In fact, for some years now, I have done everything that a drug courier can do when I fly. When I get off the plane, I go through the whole profile, except doing back-flips, and no one has ever stopped me and asked me what I was doing. Never.

But at any rate, they seized his money. They took him to their office where they subjected his money to a dog sniff. And sure enough, the dog laid on the money, so they kept it. Mr. Jones came to the law firm of Edwards and Simmons. And, naive lawyer that I was, Mr. Jones was told that there shouldn’t be any problem in getting the return of this money. After all, he had never in his life been charged with a drug offense, he had no history of drug use or drug dealing, and there was no question we could prove he was a landscaper. In fact, we could call a local FBI agent to testify that Mr. Jones had landscaped his yard. Well, we then got a notice of seizure from the Asset Forfeiture Office in Washington. Mr. Jones did not have the $900—the required 10% bond—to get into court, because that $9000 was his working capital. That was just about all of the cash money he had. I mean, he wasn’t destitute; he didn’t go hungry. But he didn’t have an extra $900. So, I put that into an affidavit and sent it to the Asset Forfeiture Office asking them to waive the bond. In response, we received a computer generated letter saying, “No.” And that’s just about all it said. No reason was given. So, I wrote the Asset Forfeiture Office asking, “Why did you refuse to waive the bond? Please tell me. Mr. Jones does not have $900. He does have a couple of old pick-ups—actually they were one-ton trucks—but he really can’t hock them because he uses them in his business everyday.” Got no response.

So, we filed another affidavit giving more details about Mr. Jones’ economic predicament, and that, no kidding, he could really not afford to pay a $900 bond to get into court. But he really did want to get into court. This time, we got a letter from a real person, saying, “No.” So, at that point, we had a dilemma. Basically, the dilemma was to give up—whereupon Mr. Jones would be relegated to that never-never land of the 85% of folks who never file a claim—or, to do the only other thing that I could think of, which was to sue the government. Therefore, we sued the government. And because the government had refused to waive the bond, we were able to bring an
action under [42 U.S.C.] § 1983—which is a civil rights suit—against the federal
government and the local police that seized his money. Because they were local police,
state action was involved, so that invokes the civil rights statute. So we brought two.
The government’s first response was not to say, “Hey, don’t worry about it. We see
that Mr. Jones is well-meaning and really doesn’t have the extra money to post the
bond. Let’s just not fight about that; we’ll waive the bond. Let’s go on and get on with
the forfeiture case.” That would be a reasonable response, but it was not the govern-
ment’s response. The government’s response was that the United States District Court
does not have jurisdiction to review the decision of the Asset Forfeiture Office, and
cannot pass judgment on whether the waiver of the bond was wrongfully refused.
Well, fortunately, the U.S. District Court in Jones v. [United States] DEA first held
that, under the Administrative Procedures Act—I would have preferred that the proce-
dure be under the Fifth Amendment—but, under the APA, the District Court could, in
fact, review the decision in refusing to waive the bond. And, the DEA acted in bad
faith in refusing to waive the bond. The bond was ordered waived, and the case was
set for trial in about 30 days. The government got a little more time, but after a few
depositions and some discovery, we had a trial.

In the meantime, Mr. Jones’ case began to attract media attention, which made
some of Mr. Cassella’s colleagues uncomfortable because reporters kept calling Wash-
ington saying, “Why are you trying to take this man’s money who says he’s in the
landscape business in Nashville, and nobody seems to be able to prove that he’s not?”
So they fought. We had a trial and, in the course of the trial, the closest the govern-
ment could come to making any connection between Willie Jones and drugs was that
about six or eight months after Mr. Jones’ money was seized, the stewardess in Hous-
ton married a man who had a drug record. And the government, although they did not
begin the trial with this theory, closed the trial with the theory that Mr. Jones had
previously been to Houston to buy drugs which had been fronted by the stewardess’
boyfriend, and was going back to Houston to take this money to pay for it. Well, the
theory didn’t work, since there was no proof to support it. So the government lost that
case. And in the course of discovery in the case, some interesting things turned up.
Two things turned up. Part of the DEA’s interdiction program involves sending agents
out, not just to ticket agents at airports and bus stations and train stations, but to hotels
in the hotel area, offering rewards to hotel clerks that to tip them off about people who
act suspiciously. And that’s part of the interdiction program. Another part of the dis-
covery was that we learned that, in a very high percentage of cases, the officers in-
volved it the interdiction unit targeted people who were minorities: blacks, hispanics,
and other minorities.

So, the district court in Jones v. United States DEA [819 F.Supp. 723 (1993)],
held that the money was seized without probable cause in violation of Mr. Jones’
Fourth Amendment rights and ordered it returned. And, in one of the first cases in the
country, it held that the interdiction unit had been targeting people on the basis of race,
and that such targeting violated the Equal Protection Clause of the Fourteenth Ame-
dntment. A very significant holding, in my judgment, because of what is going on, not
just at the Nashville Airport, but at other places as well.

One other holding, incidentally, was based on some DEA documents coming out
of DEA labs. It seems that a DEA chemist got samples of shredded money from feder-
al reserve banks and tested them and found that an alarming percentage of those bills
had traces of cocaine. A drug dog can detect nanograms—which is one billionth of a
gram—of cocaine. Do you know how American money supply has been contaminated with this cocaine? The Federal Reserve Bank does it. Do you know what happens when money is seized from drug dealers? The DEA and local law enforcement officers take it to a local bank, where it is sent to a Federal Reserve Bank. The Federal Reserve Bank then puts it through their automated money-sorting machines, which run on these on rubberized belts. And if a couple of nanograms of cocaine gets off of one bill and onto the belt: presto, you've got a whole slew of money that is contaminated. And that's how the Dade County District Attorney, Janet Reno, happened to have some money a few years ago—which she gave to a reporter to have tested—and sure enough, it had cocaine traces on it. So the district judge in Jones v. United States DEA also held that a drug alert on currency was of microscopic value to the government in establishing probable cause. Interesting thing is that the DEA chemist's report that recommended against using trace analysis or drug dogs for drawing any conclusions with respect to currency had been issued in something like 1988. You would think that the government would get the word around that it is wrong to use drug alerts on currency to take money. But it's still happening, and it will continue to happen because they're greedy. They want money.

Second case. Alabama doctor. Rural town in Northwest Alabama that is sort of like West Virginia; you have to be going there. It's not close to anywhere; it's not on the way to anywhere, you just have to be going there. The doctor—I guess he's 70 now—was in his late 60's when this occurred. He grew up during the depression. When he was 5 years old, he lost—he can tell you to the penny—I think it was $39.40. But his parents lost all of their savings when the local bank failed. And he saved money throughout his professional career. When he gets home in the evening, he just takes whatever cash he has in his pocket and sticks it in a shoebox—or actually, it was a drug sample box. And when that box gets full, he puts it in the back of his closet and starts another box. We should be so frugal, but he has been doing that all of his life. In 1987, he went to a friend of his, a former neighbor, who was president of a small-town bank in Alabama and set up an account. And he told him that he wanted to put some savings in that account, and he wanted the interest off this savings to go to a local private school in his hometown. It seemed that the Chambers Academy, this kindergarten through 12th-grade school in the doctor's hometown, was about to fold. It had a large debt, and it simply couldn't make the debt payments as well as run the school on the modest tuition that it collected from the people that sent their children to that school. The doctor wanted to do something to benefit his hometown, so he set up this account. And he, eventually, moved most of his life savings into this account: over 2 million dollars. That was in 1988, mind you, when this account was created. And for about 3 years, all the interest—every penny—from this account went to the school and the school was saved, literally. Eventually, the school, using the money donated by the doctor, paid off the debt, and righted itself.

In the meantime, the doctor's wife was becoming concerned about the money in the back of the closet. Nobody knew how much money it was. They just knew that the doctor had been sticking money back there for a long time. And she had visions of the house catching fire or someone breaking in. And she kept saying to her husband, "You really need to do something about that." So, finally, the doctor was determined that the school was going to get its debt paid off. And the school was having trouble, even with the interest on the account. So, the doctor did two things. He called the banker and told the banker to send some of the principal to the school. And they decided to
take the money out of the closet, count it and take it to the bank. Well, it turned out to be $317,000 in cash. Much of it—virtually all of it—in 5's and 10's and a few 20's. Musty-smelling. You can imagine; some of it had been there fifteen years or more. But at any rate, they packed the trunk of their car with boxes containing $317,000 in cash and carried it down to the bank. Well, the bank where their other money was on deposit, was just a few miles from the doctor's hometown, but it was, like, a three-hour drive from the Alabama town where he practiced medicine. Well, they had car trouble on the way. And, the long and short of it is that they were late getting there and the bank had already closed so they took the money to the home of the bank president and gave it to him. He was shocked to learn how much money was involved, but he type-wrote—a receipt: “Received: of (the doctors name)”—actually, they miscounted, but it was actually $317,000 in cash—“for deposit to the account of Chambers County Educational Foundation.” They dated it and signed it. He gave it to the doctor and took the cash.

Now, I need to tell you one more thing. For the three years or so that the account had been in existence, the doctor was almost obsessive about his anonymity. He told the bank president that he didn’t want his name anywhere connected with the money, because he didn’t want to get known as a rich doctor. Because people sued rich doctors. And he had a teenage daughter. And people kidnap rich doctors’ daughters. So the banker—at the doctor’s instructions—put the name of “Chambers County Educational Foundation” on this account. Now, what would happen, you might be thinking, if the doctor died or the bank president died. Well, it would have been a mad show. Because, in fact, there were only a handful of people at the school that knew that the doctor had created this account. And probably only the school treasurer, who is an accountant, knew how much it was—or approximately how much it was—because all they knew was that they got a check every month from the bank . . . . But in any event, the doctor left, went back home—in fact he borrowed the bank president’s wife’s car—and they drove back home that night, the doctor with is receipt in hand, believing that all was well.

The bank president, the next morning, took the money to the bank, and put it in the bank vault. And he decided that because the doctor wanted to keep his name out of things, that he would take the money out of the vault—$8,000 or $9,000 at a time—to avoid filing a Currency Transaction Report, commonly called a CTR. Now, I should briefly explain the CTR. It is a requirement that a banker report to the government any transaction over $10,000. It’s of recent vintage, as you might imagine: part of the war on drugs. But this CTR didn’t fit into the doctor’s plans so well, because—the banker figured—if the local teller were to see on this CTR that ol’ doc has all this money . . . well, then his secret would be out. That happens in small-town banks. I grew up in a small town, I promise you. Just take my word, it happens. So, the president took money out of the vault—$8,000 or $9,000 at a time—and went to neighboring banks and bought cashier’s checks.

MR. TROBERMAN: Smurfed. He smurfed it.

MR. EDWARDS: Smurfed. He smurfed the bank’s own money.

PROFESSOR BLAKEY: Bad idea.
MR. EDWARDS: Took the money back to his bank and deposited it to the account that the doctor had created. He did this for about six weeks. Somewhere along the line, someone in one of the neighboring banks called the FBI or the IRS or somebody—bank examiners—and sure enough, the FBI showed up on the banker’s door and asked him about it. And the banker told him. “This is what I did. I think it’s alright. I mean, I didn’t see anything wrong with it.” And, in fact, the banker later testified that he did it because he thought that by doing that he was sort of doing an end-run around the Currency Transaction Report requirement, and he wouldn’t have to send the document to—wherever they go, to the Treasury Department—saying the doctor had brought this money in.

Understand, the transaction between the doctor and the banker was perfectly legitimate. There’s nothing illegal about taking $317,000 to the bank and depositing it to an account. And—lest you think you’ve got me somewhere—as it later turned out, not only had the doctor reported on his income tax and paid taxes on this money, he had over-reported. And he got about a $50,000 refund from the IRS when we got into all this. But anyway, here’s what happened. The IRS finds out about this money, finds out that there is 2.5 million dollars in this account, and they go and seize it. The whole shabang. Because, after all, that money represented a violation of the currency reporting statute. It was put into an account, thereby tainting the entire account, and they seized the doctor’s entire life savings. He had a little over $100,000 in an IRA elsewhere that they didn’t get. Otherwise, they wiped him out. And they threatened to prosecute the bank President and the bank President’s son—who was the bank Vice President—because he had, on one day, made one of these cash transactions. And they were still talking about indicting the doctor.

Well, unfortunately the bank President was so afraid of what might happen to his son that he cut a deal to plead guilty to currency transaction violations in return for the government dismissing the charges against his son, the bank vice president. The doctor had not yet been indicted. Then they got around to the doctor. The money was seized in June of 1991 and a stay was entered, so nothing happened in the forfeiture case, the money just sat there collecting interest. Then they finally indicted the doctor. We started discovery, started collecting evidence as to what the doctor had done, and started turning that evidence over to the government. We had everybody in the doctor’s hometown with any connection to the school begging us to be called as witnesses to talk about how the doctor had saved the school. We had people in the small town where the doctor practiced begging to be called as witnesses to talk about how the doctor had saved their son, or whatever. This doctor charged five dollars for a routine office visit. In 1994, or 1993, he was still charging five bucks for a routine office visit. The people that didn’t want to testify for him were the other doctors in that town that charged substantially more. But anyway, that’s a different matter.

The week before the criminal trial was to begin, the government decided that perhaps they didn’t want to put on this proof after all, and they agreed to a pre-trial diversion that would result in a dismissal with prejudice of the indictment. But, they would not agree to abandon the civil forfeiture case. They still wanted the money. So, after getting some discovery and establishing that the money was not tainted and it was not money that on which taxes had not been paid (in fact, that there was nothing wrong with the money, and the only violation that had occurred was the violation by the bank for not filing a Currency Transaction Report: an obligation which federal law places on the bank, not the depositor), a motion was filed for summary judgment in
the forfeiture case. And the result was a granting of partial summary judgment and an order that all the money be returned, except the $317,000 cash deposit. We then went to trial on what was left of the $317,000.

And two months ago, unfortunately, a district judge in the Middle District of Alabama held that because the doctor "exhorted" the bank president not to file a CTR—a substantial stretch from the bank president’s testimony, in my view—he forfeited that money. And held, remarkably, that the Eighth Amendment did not apply. The judge wrote, “Given that Claimant requested to remain anonymous and First Bank failed to file the requisite CTR, due, at least in part, to the behest of Claimant, the court finds that the United States possessed sufficient probable cause to seize the defendant currency” [*United States v. Account Number 50-2830-2, 884 F.Supp. 455, 459 (M. D. Ala. 1995)]. The court further concluded that, not only is the forfeiture of the defendant’s money not a violation of the Excessive Fines Clause of the United States Constitution, the action is not amenable to Eighth Amendment scrutiny, as long as the amount forfeited is no more than the defendant currency. The Eleventh Circuit is now going to determine whether it is a violation of the Excessive Fines Clause to forfeit this money. It seems to me—there being no question whatsoever that when Congress passed the currency statutes they were targeting people who engaged in syndicated, large-scale illegal gambling, laundering money, or other large-scale illegal activities, and clearly did not have in mind a rural Alabama doctor who established an account to support a small private school in a town of about 5,000 people—that the Excessive Fines Clause, ideally, would apply to this case, even if the innocent owner defense did not apply. And I think it does. But that is an example of how a statute that can rationally be justified—I mean, the currency transaction statutes are easily justified when you look at what happens, what goes on in transactions between South America, Central America and Florida, to say nothing of the rest of the country—is very difficult to justify in the absence of protection of innocent parties in our forfeiture laws.

Let me quickly run through the last case, because it involves some very important issues. But, it also involves some folks who are not nearly as attractive as the doctor and as the landscaper. Two brothers in Chicago named Messino were involved in—the government believes—large-scale cocaine transactions throughout much of the eighties. In September of 1991, the government sent out scores of officers, filed an interim complaint, and seized everything that they could find that these two brothers owned. They seized seven pieces of real estate, roughly 36 vehicles—cars, trucks, motorcycles, a couple of boats, trailers: anything on wheels. One of the brothers had a more-or-less legitimate business of buying classic cars, restoring them, and reselling them. There was not a whole lot of dispute about that. But he also had a prior drug conviction; I’m not suggesting that the government did not have some fairly substantial proof that one or both of the brothers were involved in drug activities. But at any rate, they seized everything that these brothers owned. A few weeks later, after claims were filed, as soon as the first notice of deposition went out, the government moved for a stay. Except there was no pending indictment at that time against any of the claimants, and there were like eighteen or twenty claimants in the case—fifteen or sixteen, in addition to the two brothers. No one had any pending criminal charges against them, but the District Court stayed the case. That was in December of 1991. It is now April of 1995 and there is yet to be an adversary hearing, of any kind, in that case.

Well, what happened a little later was one of the brothers was indicted for drug deals that occurred during the months of the seizure and two or three months subse-
quent to the seizure. He later pleaded guilty to those charges. But while the charges were pending, a motion was filed to release some of these assets so, he could pay defense counsel. The government elected not to participate in a hearing to prove that all of the assets they seized were probably subject to forfeiture. But the district judge still, putting so much faith in the Assistant U.S. Attorney that asked him not to, refused to release any substantial assets. An appeal was taken to the Seventh Circuit. And, as in the case of the United States v. Michelle’s Lounge [39 F.3d 684 (7th Cir. 1994)], last October, the Seventh Circuit held that civil forfeiture was no different from criminal forfeiture when it had the effect of withholding assets for use to hire counsel for criminal defense. And it remanded the case for an adversarial hearing . . . . That was the first case where a Court of Appeals had applied that standard to civil forfeiture; it had previously been applied in criminal forfeiture cases.

What happened next, on remand, was that the government took the position that they did not want to go to a hearing, and assets could be released to pay counsel in the criminal case. In January of this year, after assets were in fact released, there were two pieces of property left in the civil forfeiture case as to which there were no claimants, except Clement Messino. One was a piece of commercial property where a drug transaction had occurred that Messino had pleaded guilty to—the one I told you about a moment ago. And another was an old Harley-Davidson motorcycle. In the meantime, in November of 1993, the big conspiracy indictment had come down, charging the two brothers and four or five other folks with this drug conspiracy. The very same drug conspiracy that had been described in the civil forfeiture complaint filed in September of 1991. After the court entered an order releasing all these other assets to pay counsel—except for these two items claimed by no one except Clement Messino—on that day, we filed a confession of judgment, admitting that felonious drug transactions had taken place in connection with the properties and that they were subject to forfeiture. Especially with regard to the commercial building, there was no question that the government could prove it. We also tendered a proposed judgment forfeiting those properties to the United States, as sought by the United States in their complaint. For some strange reason, the Assistant U.S. Attorney objected. Now, you would think logically that when the defendant offers the plaintiff in the case everything that the plaintiff sought in filing the case, there shouldn’t be anything to argue about. I mean, it’s one of the few circumstances where there really is no longer anything to argue about. But the government objected to that. And of course, I’m being sarcastic; they knew that as soon as the judgment was entered, then a motion to dismiss the pending criminal case would be filed on the double jeopardy premise. And since Torres was decided by the Seventh Circuit last year—I think it was—there was a fairly strong argument that the criminal indictment was subject to dismissal. Because after all, as the Seventh Circuit had said in October of 1994 in that very decision, the government was pursuing a very questionable policy in pursuing parallel civil forfeiture and criminal cases.

That was in January. So far, the federal district judge, unfortunately, who was—well maybe it’s unfortunate, or not—but at any rate, was just sworn in last fall as a district judge, and was touching some very complex and tough sticky issues for the first time, has done nothing. She initially set a date at which she was going to reveal that she would enter the judgment or not enter the judgment. And then, on that date, [she] said she had not made up her mind. Finally, on March 30th—in the meantime the criminal conspiracy trial has begun and is wrapping up this week—she ruled that because there was a stay in effect, dating back to 1991 or early 1992, her hands
were tied and she could not rule on this issue of whether a judgment should be entered. Well, you might think to yourself, “That doesn’t make sense. The stay was issued by the district court and could be lifted by the district court.” Which is true, but nevertheless that was the ruling. And so, as I mentioned here above, a petition for a writ of mandamus, has been filed in the Seventh Circuit [titled] Messino v. Manning, District Judge, and is now in briefing.

So, despite the fact that I’ve been practicing for almost twenty-five years now and thought I knew very well—all too well—how to lose a case, I can’t lose this one. Because, obviously, in light of what the government did in this case, there was only one purpose: to tie up this property. They didn’t want to forfeit it in a civil forfeiture case; they brought corresponding criminal forfeiture accounts in the indictment. So, if they can prove that some of this property is forfeitable, they want to get it in the criminal case. They were simply using the statute, and the stay provisions of the civil forfeiture statute, to tie up this property for as long as they wanted. Now, you could argue that the District Court should not have allowed them to do that, and I would say you’re right. But, in this case, the District Court permitted it—without any due process, without any adversarial hearing—for well over, now, three and a half years. All of these assets have been tied up, and suddenly, when the defendant says, “Okay, with respect to these last two pieces, I give; they’re yours,” the government says, “Oh no, we don’t want them now.” I think that what happened was that by confessing judgment, that ended the case or controversy. The defendant was conceding that which the plaintiff sought in its complaint—everything that the plaintiff sought in its complaint, in fact—with respect to this claim. Therefore, there was no Article 3 jurisdiction; the court had no jurisdiction left to do anything but to enter a judgment in favor of the plaintiff. And that’s precisely what we did ask the Seventh Circuit to order the District Court to do in the writ of mandamus. And we have asked that the judgment be entered pro tunc to the day the confession of judgment was filed. Tune in to the next chapter to see what the Seventh Circuit thinks about it.

I think that the conclusion that can be drawn is this. When you give prosecutors and law enforcement officials such a vast amount of virtually unchecked power, innocent people are going to suffer, and the rights of private property that our country has cherished and protected are going to be diminished. And if that’s what we want, then that’s what we’ll get. I hope that is not what we want, and that, in the months to come, both the U.S. Supreme Court and the Congress can be persuaded that some very substantial reform is necessary. Thank you.

PROFESSOR GURULÉ: Thank you very much, Bo. I appreciate your remarks. And, again, you have given us further food for thought as we continue to debate and litigate these complex issues.