

ROUNDTABLE DISCUSSION: LEGISLATIVE PROPOSALS ON FORFEITURE

PROFESSOR GURULÉ: [W]hy don't we take . . . the remaining time that we have and see if we can get some of the law students involved in the debate. Let me open the floor to any questions involving the many issues that have been raised so far today regarding any of the Supreme Court decisions that have been discussed, or the legislative proposals that have been suggested. You can pose your question to any particular member of the symposium panel. Yes, Bill.

BILL TUNELL: I suppose that my question would be for Mr. Cassella. You said that the Justice Department doesn't have an official proposal yet. I'm wondering though—a couple of questions, really I suppose—first of all, when do you think the Department's proposal might come out? And secondly, what is your sense of how close the Justice Department's proposal is going to be to the speech that you outlined this afternoon—sort of your ideal world?

MR. CASSELLA: If I had my druthers, the Justice Department's proposal would look an awful lot like the speech I gave this afternoon; but there's no guarantees in this life. And I can't predict exactly when, because an awful lot has to be done in terms of getting all the constituent parts of the federal government to sign off on any legislative proposal that the administration sends to Capitol Hill. The Justice Department does not propose legislation. The administration proposes legislation. So, if Justice comes up with something which it thinks is just dandy, but Treasury disagrees, or someone else in the federal government disagrees, it's not going anywhere.

We tried in good faith, throughout all of last year, to come up with a legislative proposal which met our critics from the defense bar side halfway. And [we are] working through an ABA Bar Association Sub-Committee to come up with something which might be a consensus proposal that the defense bar could join us in. Two things happened. Number one, my learned friends did not find it went far enough. Before we even had it finished, they were out on Capitol Hill lobbying against it, before it was even released. And secondly, it was equally detested among law enforcement, who thought it gave up the farm.

A good compromise might be defined as something that makes everybody unhappy; a bad compromise might be defined as something that nobody supports. And that's what we ended up with. Often there was something that the defense bar didn't think went far enough. For instance, we would propose the government would have to file a complaint within 90 days and they'd say, "No, it has to be 60 days or we won't support the bill." And, at the same time, the law enforcement folks were saying, "Are you crazy? We can't be held to a 90-day limit in terms of when to file a complaint. We can't support the bill." So, where we are now is, given the defense bar is on record saying that anything short of where they are with Congressman Hyde and Congressman Conyers isn't going to pass the muster, and because we need to support the federal law enforcement, we're coming up with another bill which probably is closer to the law-enforcement side than we were last year. And when we finish nailing down

that political support, then the bill will go to Congress.

MR. TROBERMAN: If I could have just a moment or two to respond. To my understanding, what happened was that Henry Hyde introduced a bill which, I think, had some modest proposals that we certainly would have liked to have seen. And frankly, I'm not sure that the DOJ would have been that irate if it had passed. The Conyers bill goes a lot farther. And while I'd like to see it happen, realistically I don't think there's much chance.

But at that time, when Chairman Jack Brooks—House Judiciary Chair—was reviewing the Conyers proposal and the Hyde proposal, Janet Reno wrote a letter to Mr. Brooks and said, "Dear Mr. Brooks, the DOJ acknowledges that there are certain spots in asset forfeiture reform that are under attack and we would appreciate it if you would take no action on either of these two bills, until we conduct a thorough review of all the asset forfeiture laws, and we can come up with our own proposal, which we anticipate will take about 90 days." So Chairman Brooks went along with that, and there was no action taken. In the meantime, Mr. Cassella, and some of his colleagues were working on their DOJ proposal. Now as I understand it—and correct me if I'm wrong—the bulk of the DOJ proposal was not something that was drafted in response to the Hyde bill, but something that Mr. Cassella had been working on for several years and was mostly crafted over Christmas break a couple of years ago. And really, was a wish list of everything the DOJ always wanted, but never had. It was most appropriate that he was doing this over Christmas, because that's really what it was: a giant present for the Department of Justice.

We looked at it, and those areas where we thought there was middle ground we talked to him about. We didn't say we wouldn't support the bill if it had a 90-day rule instead of a 60-day rule. But there are things that are just draconian in that proposal—and I don't know if the '95 proposal is much different or not, I haven't seen it.

MR. CASSELLA: If you didn't like last year's, you won't like this one a lot more.

(AUDIENCE LAUGHTER)

MR. TROBERMAN: And that, of course, has been the response; "If you don't like the little crumbs we'll give you then we'll take it all back and make it worse." What I believe that I saw in the DOJ proposal is far worse than current law. And again, I would characterize it as nothing more than a wish list for the DOJ, of everything they've always wanted but didn't have. And maybe they felt that if they threw out everything, including the kitchen sink, then maybe Congress would eventually give them a plum, and they'd still be coming out ahead. I would concede that it did switch the burden of proof to the government, but that was a small price to pay for all of the other baubles that they were going to get in that bill.

PROFESSOR GURULÉ: Let me raise one question—and I know that Nancy Kim has some interest in this issue, as well, because she did a directed reading for me on the innocent owner defense. And, the recommendation that she came up with, as I recall, is quite similar to the recommendation that Stef Cassella has proposed, at least on his own behalf. Neither of them made a distinction, at least as I understand it, between the pre-illegal act donee and the post-illegal act donee and the sole issue of disjunctive-

conjunctive on the knowledge, commitment, consent issue. And—at least my understanding of what Stef is suggesting here—is that if we have a person who is a *pre*-illegal act donee—even if that person had knowledge—but if that person did not consent (and consent meaning consent as established by *Calero-Toledo*, all reasonable acts to prevent), then that person would still qualify as an innocent owner. But then, if the person is a *post*-illegal act donee, is receiving it after the fact, consent really doesn't have much real meaning in that situation because you can't consent to property that you've had no ownership or proprietary interest in prior. But there, I take it, that knowledge as to the illegality of the assets then would preclude or disqualify the person from coverage under the innocent owner defense. To me, that seems reasonable, that seems fair. Let me just pose that, is that something that would be acceptable to the National Association of Criminal Defense Lawyers? On that one issue.

MR. TROBERMAN: Well, let me express my personal opinion, because obviously I haven't really run that scenario by NACDL. But I don't have a problem, at least as to post-[illegal act] transferees, if you had knowledge that property was used illegally at the time you've acquired it, then I don't have a problem with not being able to raise an innocent owner defense at that point. However, if I did not have knowledge at the time I acquired [the property], I think I should be able to claim to be an innocent owner.

My concern is more toward what the standard of reasonableness is that going to be under *Calero-Toledo*, because it was a very harsh standard there, "all reasonable steps." Does that mean that the wife and two kids, when the husband's dealing dope out of the house, have to report it to the police? And risk the husband going to jail and losing all of the income and ultimately not being able to pay the mortgage and being out on the street, in any event. I mean, what do you consider to be "all reasonable steps" necessary to prevent? Does she have to throw him out of the house? Does she have to get a gun and shoot him? Does she have to walk him down to the police station? Is it enough to simply say, "I was afraid of my husband and therefore I didn't do anything." Or, "I was afraid that if I called the police, he would be arrested and then I would be alone, we would lose the house, etc. etc. ." I don't know how the courts are going to come down and define what "all reasonable steps" means.

PROFESSOR GURULÉ: But at the same time, that's a term of art that we use all the time in the law. And juries are often left with having to resolve [that issue] along with the specific facts and circumstances of the case. And maybe that scenario—where the spouse, with the two children and no other means of income and maybe a pattern of spousal abuse by the husband, and so forth—under those circumstances, whatever conduct she took, I mean maybe just telling him to stop might be sufficiently reasonable under those circumstances, but not in others. At least it seems that's a good starting point. I don't think that the two sides are too far off on that. Let me ask if there's other questions. Nancy.

NANCY KIM: I have one question for Mr. Cassella. One issue that I couldn't really resolve for myself was about the *post*-illegal act donee and whether that donee should be able to assert an innocent owner defense. And I was intrigued by the fact that you had said that the wrongdoer was capable of transferring to a minor who is, by definition, incapable of having knowledge of the illicit act. In which case, I can see where

you wouldn't want that child to be able to assert an innocent owner defense. And then, the focus would be on the criminal defendant being able to take advantage of a loophole. However, if you change that scenario where the donee is a charitable organization, then, I don't know that I'm necessarily comfortable with completely eliminating an innocent owner defense to a donee, when in my mind the purpose of an innocent owner defense is to focus on subsequent transferees, and his innocence or her innocence.

MR. CASSELLA: I take your point, and it's a good point. And it's something that I've thought a lot about. But one possible way to make a distinction is to look at the purpose of the transferor. Did he give it to the minor child in order really to retain control over it himself (which might be a fact in evidence when the minor child is the transferee)? Versus, if he gave it to the United Way, clearly he was not retaining any benefit or enjoyment and maybe in that instance you should come up with some other rule.

In my own mind, I have concluded that donees should not be able to keep the property for these reasons. One, that's always been the rule in the criminal forfeiture context, and there's no evidence from the twenty to twenty-five years of application of that statute that it has caused any particular hardship. I do appreciate that taking money away from a charitable organization, or other donee, that came to rely on the money—it didn't have to be the United Way, it could be someone that felt that, "Oh, now that I have this money, I can afford to go to college, and therefore not work this summer." Some doctrine of reliance might apply. There's some possibility of hardship there, but in general, I like the notion of making the civil and criminal statutes work in parallel. The fact, that there hasn't been a problem with the criminal statute, and the propensity for drug dealers and other criminals to try and find ways to evade laws with loopholes, [makes me] come down on the side of honoring the rights of he who gives value for the property, and being more concerned with the enforcement of the law with respect to people who don't give value for the property.

Having said all that, that's why we have a remission in the litigation procedure. The Attorney General, day in and day out, reverses forfeiture actions through the exercise of her equitable authority, when a case, such as the one you posit, exists. We have a whole unit of people in our office who do nothing except for reverse forfeiture actions, which are legally sustainable, but which in the interest of justice ought to be mitigated. And since we have that safety valve, that seems to be appropriate, and would be applied in that kind of case.

PROFESSOR GURULÉ: And let me pose this question, because this appears to be a strong concern of the most vocal critics of civil forfeiture. And I believe Bo raised this in his comments earlier. And I didn't hear this as a ponderable for legislative reform that you outlined, Stef. What if the legislative proposal eliminated the Law Enforcement Asset Forfeiture Fund? So this concern about law enforcement using civil forfeiture to supplement its own budget, and consequently, there's this inherent conflict here or this temptation to abuse civil forfeiture in order to supplement the Department's income or the law enforcement agency's income. Is that something the Department is considering or that you would adopt?

MR. CASSELLA: Certainly no, to answer the first question. And therefore what I would do would be irrelevant, for this reason. There's a great irony here. I very much believe

that the cops are not out there acting as bounty-hunters; certainly that's true with respect to federal law enforcement. It may not have been clear from the presentations today, but federal agencies *do not* retain the property that they forfeit. It goes into a general fund. Then, through appropriations, it gets appropriated back out. So, the DEA does not retain dollar-for-dollar the money that they seize.

That's not the rule with respect to state or local law enforcement; they do get the money back. They get 80% of it back. So, if there is any danger of bounty-hunting going on, it would be with respect to state and local agencies. So the question might be posed, should there be a proposition against returning money to state and local agencies? Not because they really are acting as bounty-hunters, but because of their appearance. I mean, I can't tell you how many times I've heard the talk that Bo just gave about how the cops are out there grabbing money. And because there's that perception, it diminishes the work that we all do, both in terms of how we are perceived by the courts and the public, and in terms of what the legislative response might be.

I would be tickled pink to get rid of the issue by simply finding a way to put some statutory limits on the use of the property. Here's the great irony; it is the policy of the Department of Justice that state and local law enforcement cannot use forfeited funds that we assist them in forfeiting, for salaries. Why? Precisely to avoid the appearance of bounty-hunting. Notwithstanding all of the talk about how Congress feels about reforming forfeiture laws, the one thing they have told us absolutely that they will do first is to consider legislation reversing the government's policy. Because they feel that the federal government is meddling in the rights of state and local law enforcement to spend the money as they will. It's a federalism issue. This Republican Congress feels that the federal government must worry about the federal program, and state and local law enforcement folks ought to be able to worry about state and local law enforcement. And if they feel they want to use their forfeited [funds] to hire more deputy sheriffs, then that's what they ought to do, and federal government mind your own business. Go talk to Senator Feinstein about this one. They feel extremely strongly up there that our policy is wrong, notwithstanding that we are motivated by the desire to avoid any appearance of impropriety. They want very much local cops to have total control. So, to the contrary, no. We are not considering abolishing the use of the money in that way, because there's absolutely no political support for that position.

PROFESSOR BLAKEY: Jimmy, I have had to live with the asset forfeiture thing at the state level, when you put your civil RICO's, and you have forfeiture in it, what do you do with it? And there's another reality that we haven't heard from our criminal defense bar. There is the blunt fact that there's a limited amount of money for the state. And that if you go beyond looking for the conviction, and you begin worrying about the extra effort for the asset seizure, you spend time and money—law enforcement money. And if you can't get back at least the cost you put into it, you just burn up your time. What law enforcement will then do is to just go after convictions. They won't do forfeitures. Because if they do forfeitures, it'll burn their budget up. And if they go to the state legislature, the state legislature will give them "x" amount of money. Whether you burn it up in forfeitures or you burn it up in convictions, they don't care; you just burn it up. And so that the proposal not to give them the money back is a proposal not to do forfeiture. I mean, let's talk about practicalities. It's a proposal not to do forfeitures. And if that's your objective here—is not to do forfeitures because if they do them, to a certain degree they'll be abusive—I say to you that a balance has to be

struck in here somewhere.

What you say, it surely is true: that some forfeitures will be bounty-hunted motivated. But not all are. But the practical implication of your proposal not to give it back to law enforcement is few or none will be done. And I have to look at your proposal, not in a theoretical way—say, appearance of impropriety or the danger. I have to ask, how will it work out in fact? And I think that the general impact of forfeiture on crime is salutary. Taking the profit out of crime makes an awful lot of poetic sense to me. And that if your proposal would result in a rolling back of that policy, then I have to say its a bad idea. And I would rather hear from you something, some guarantee of some way that you can curtail it, rather than eliminate the abuse, going out and bounty-hunting and augmenting the budget.

And I'll tell you another practice that's happened at the state and local level. The state legislature is perverse. Let's say you have a good law enforcement unit. It's got a \$100,000 budget, and it goes out and collects \$50,000 in forfeitures. The state legislature will then cut its regular law enforcement budget by \$50,000. And what suddenly happens is that as the forfeiture budget return increases, the state legislature cuts the regular budget. And the next thing you know, the law enforcement unit is, in effect, a forager. They've been denied everything except what they can make by forfeiture. And that's an impact of the fact that the state legislature first builds schools. And afterward, nothing is left over. Nowadays, it's going to be first, build prisons, then schools, and law enforcement and these other things—[like] judges and judge's salaries—are the last. So the problem you're talking about is not this little one. It's this whole budgetary process at the state level. And the pressure on state budgets for prisons and schools and Medicare just will crowd out, entirely, the law enforcement budget. Particularly, if the law enforcement budget has an alternative like forfeitures. And I don't think you can discuss this thing in isolation without recognizing that you're talking about a whole budgetary process and that there are multiple dimensions in it.

I think maybe we just have to live with the bounty-hunting dimension of it. It's like an adverse consequence. If we're going to have a welfare system, we're going to have a certain amount of welfare cheats. And the only way you can eliminate those cheats is to eliminate welfare, and we're unwilling to do that. And we can put some anti-fraud measures in it, but basically as long as you're giving people money some people are going to steal it. So, as long as you're going to give them back a little bit of money, some of them are going to take this case and not that case because of the forfeiture impact.

I'll give you an example, where I'm arming you with information. For example, I'm a police officer. And I can either hit this operation when the dope arrives and take off the street \$100,000 worth of cocaine. Or, I can wait ten days and hit it when the money is there and the cocaine's in the street. Now, which will I do?

MR. EDWARDS: You'll get the money now.

PROFESSOR BLAKEY: Oh, you know what I'll do. Well, in all likelihood, I'll wait a couple of days until the money is in and then I'll hit it, because I'll get the money. The money goes into my budget, whereas the cocaine comes off the streets.

MR. CASSELLA: There's a real good law-enforcement reason for doing it that way too. The cocaine can be replaced by the bad guy a lot more cheaply than he can replace the

\$10,000.

PROFESSOR BLAKEY: Yes. But what you have to understand is, that the reason we're having this thing called "drug enforcement" is that we don't want cocaine on the streets. The object is to get the cocaine off the street: not to get the money, and then still have the cocaine on the street. Because, if the cocaine goes on the street, we know "x" number of people will overdose on it.

MR. TROBERMAN: The government then becomes the drug lords. They're the ones who are reaping the profit.

PROFESSOR BLAKEY: Exactly. And I don't know what you do about that. In some states, you'd have to say to the law-enforcement people, "There are ethics in this. And that there's a judgment now that's not just financial, that's ethical, about how you hit, when you hit." And you hit it as soon as you can, with the idea of benefitting society, and not benefitting our budget. And if you have abuse, I think you have to train people out of that, rather than setting up endless rules. Or, you can deprive them of the forfeiture card altogether.

PROFESSOR GURULÉ: I think that of all the issues that we have discussed today—and there have been many—for me, the most complex and I think the most difficult to resolve is the double jeopardy issue. And I think that neither the *en banc* decision—if in fact a rehearing *en banc* is granted—nor a Supreme Court decision—if, in fact, 405 goes up to the Supreme Court—is by any means going to resolve it. I mean, it may resolve one issue or one aspect or two aspects of the myriad of issues that we've discussed today. But I think that is going to be with us for a number of years to come.

I see Steve McClain has a question. Steve just authored an article for the Notre Dame Law Review on the double jeopardy issue [Stephen H. McClain, Note, *Running the Gauntlet: An Assessment of the Double Jeopardy Implications of Criminally Prosecuting Drug Offenders and Pursuing Civil Forfeiture of Related Assets under 21 U.S.C. § 881(a)(4), (6) and (7)*, 70 Notre Dame L. Rev. 941 (1995)]. I worked closely with Steve on that, and he's very familiar with the 405 case and very familiar with *Halper* and *Kurth Ranch* and the other decisions that we've discussed. Steve.

STEPHEN MCCLAIN: Well, I wasn't here earlier, so I don't know if this was discussed or not. But my question would be to Mr. Cassella. What is the [Justice] Department's position on the double jeopardy issue? I talked to Miriam last night at dinner, and she said that maybe *Austin* shouldn't apply to double jeopardy. And if that is the Department's position, then I was wondering how can that be? If punishment is punishment for the Eighth Amendment, why isn't it punishment for double jeopardy?

PROFESSOR GURULÉ: I think that comment from the audience echoes Richard's earlier comment. I think he made a similar comment.

MR. CASSELLA: If we're talking about a multiple punishments analysis—which we all here seem to agree is the correct analysis—for there to be a double jeopardy violation, there have to be two punishments, in the same proceeding, for the same offense, imposed against the same defendant, by the same sovereign. In almost every double jeopardy case litigated so far, that I've seen, the defendant fails to establish at least

one—and often all five of those elements. So, our position has been to litigate every double jeopardy case, raising every one of those issues, and establishing a body of case law that fleshes out what all those concepts mean.

For example, we think that the forfeiture of proceeds of a crime and the forfeiture of the *corpus delicti* of a crime is in no way considered punishment, that's remedial. And, so on the first prong the defendant would fail. We think that, with respect to the same proceeding, two parallel actions—one criminal and one civil—instituted contemporaneously so that there's no accusation that the government brought its civil forfeiture action after it was unsatisfied with the result of the criminal case, instituted contemporaneously, would be considered the same proceeding. And the entire structure of the forfeiture statute and that's what Congress intended. For example, the civil statute says [that] venue for the civil statute shall be where the criminal case is pending. Why say such a thing if you didn't intend for there to be parallel proceedings? The civil statute says that the civil statute may be stayed while the criminal case goes forward. Again, a silly thing to say if you didn't intend for there to be parallel proceedings. So, we think, that, in most cases, parallel contemporaneous civil and criminal proceedings count as the same proceeding.

With respect to the same offense, in my view, a civil forfeiture, being an *in rem* action, and the criminal prosecution being an *in personam* action, are never the same offense. Because each contains an element that the other does not under the *Blockburger-Dixon* [*Unites States v. Dixon*, 113 S. Ct. 2849 (1993)] test that the Supreme Court has enunciated. In a criminal case, you've got to prove that the defendant committed a crime: not an aspect of the civil forfeiture case. In a civil forfeiture case—in virtually every one that I am familiar with—there are a couple of exceptions. You have to prove that the property was involved in the crime: not an aspect of a criminal prosecution. They are *always* separate offenses. Congress is punishing—if punishment is the right term—in a civil case, the use or deriving of property from the commission of crime. In the case of criminal offense, they're punishing the commission of the crime by a particular individual. So, I think they're always separate offenses.

Having said that, in almost every case I've seen—there are few that don't satisfy this—the government did in fact forfeit based on one offense, and prosecute based on another—forfeit for money laundering, and prosecute for drugs. Forfeit for conspiracy, prosecute for the subsequent offense. In those cases, the double jeopardy violation doesn't exist and we're winning almost all of those in the district courts.

For the defendant, you're not punishing the same defendant if in the forfeiture case this defendant never filed a claim. It just boggles the mind that we can say we have previously punished a criminal defendant when earlier, all we did was forfeit property *to which he did not file any claim*. There is no double jeopardy without prior jeopardy. Say we seize a pile of cash from the center of a table where all the drug dealers were sitting around at a meeting, and we go out and do a forfeiture action, and now we have a criminal prosecution against one of the guys at the table. He claims double jeopardy. But, who was punished by the forfeiture? No one at the table filed the claim. Any one of them could conceivably have the same double jeopardy claim as any other one. It seems to me that the defendant hasn't been punished unless the defendant had previously said, "That's my money you're taking away," and lost in a court of law. But if he never makes the claim, or he makes a claim and then defaults on the claim in some effort to [beat] the system and create a double jeopardy objec-

tion, I think he's waived any right to assert an interest in the property. He's neither, therefore, been punished, nor has he ever established any ownership in the property. And, so there's no double jeopardy violated.

STEPHEN MCCLAIN: Can I ask you if that would still be true if, say, a car, or a house if forfeited under [21 U.S.C. §§ 881](a)(4) and (a)(7), and there's a deed that clearly indicates ownership, or a title document, which clearly indicates ownership of a car? Would you say, "If you don't show up at the forfeiture, you don't have a claim of ownership."? Or, would you then say, "Well, the claim of ownership can be something beyond showing up at the proceeding. It could be a document that property law recognizes."?

MR. CASSELLA: I don't think the document that property law recognizes would be sufficient, for two reasons. One, because he could be simply a nominal owner. I think that naked legal title is not sufficient to establish standing, and so the fact that one's name is on a document is never going to be enough, without some evidence of exercise of dominion and control.

And secondly, I think there are two aspects. You have to establish that you are an owner—that you really are—and that you were punished. Maybe you didn't care about the property; maybe it was useless to you. And so, I think you need to at least be at a hearing to prove the additional issue of punishment, above and beyond title ownership.

And, maybe as a final point, I would just posit that we need some requirement, or run the risk of having no check against frivolous lawsuits on the issue. There are almost forty such cases by individuals in Washington. There are dozens in Alaska, and they are all over the Ninth Circuit. We have people asking to be released from 5, 10, 15-year, life sentences, because earlier, their Rolex watch was seized by the customs service, and they didn't file a claim to it.

MR. TROBERMAN: Could I ask a question, of Stef? I am puzzled, Stef, then, what lengths do you think one needs to go through in order to have jeopardy attach in a civil case? I mean, I assume you only allow meritorious forfeiture actions. And if that is the case, then almost by definition, the claimant does not have a meritorious defense. So does that mean, absent a meritorious defense, that he has to go through a trial where he knows that it's frivolous? To commit Rule 11 violations?

MR. CASSELLA: That was the argument in one case—I can't remember the name of it—but there was one where the defendant said, "I shouldn't have been required to file a claim, because it would have been futile to file it, because I would have lost."

MR. TROBERMAN: Now, I agree with you that a claim needs to be filed, in these cases.

MR. EDWARDS: Except in cases of titled property, maybe.

MR. TROBERMAN: Let's assume—just at this point, for purposes of this session—you file a claim. Need you do any more than that for jeopardy to attach? Have you confessed to it sufficiently? You say, "This is mine, and I don't have a defense. If you want to take it, go. Take it. Run."

MR. CASSELLA: I think that is sufficient, assuming that you then proceed to prosecute the claim. If you file a claim and then immediately abandon it, or abandon it when the time comes for it to be tried, to me, that's the same thing as not filing a claim. I don't think you create jeopardy by filing a claim and then never prosecuting the claim.

MR. TROBERMAN: Well, how do you file an answer if all the allegations in your complaint are true? You can't deny them. So what do you do? Confess judgment? It seems to me that you're asking for something that can't be done. You know, you're saying in order for jeopardy to attach, you have to throw out frivolous arguments.

MR. CASSELLA: I don't think so. I think you have to file a claim, say, "It's my property, I object to its forfeiture." And have the court enter a judgement. I mean, it's a fair question, because if the defendant really agrees that the property is forfeitable, then I suppose, there's nothing much for him to say.

MR. TROBERMAN: What's the difference, then, between that and filing a claim and then defaulting? You don't file an answer, because you can't file an answer denying the allegations in the complaint.

MR. CASSELLA: Well, it's definitely a fair question. But there has to be some way to distinguish between somebody who's not filing an answer for that reason, and the person who is clearly trying to create a jeopardy bar, which, as you know, is going on.

PROFESSOR BLAKEY: But isn't the answer to your problem, Stef, is that people who didn't do it in the past and are trying to get out, they've waived; that takes care of all the old cases. In the future, going out, it is two separate offenses.

MR. CASSELLA: I don't know; let me flesh a situation out for you. A real case in San Diego. DEA makes a drug bust on the street, and they seize the car that was on the scene. They haven't yet decided whether to forfeit the car, but they seized [it] at the time. Two days later they notify defense counsel that they've decided not to forfeit the car, and he can come, or have his client come, and pick up the car. Defense counsel shows up and says, "No, we think that the car is subject to forfeiture. Go ahead and forfeit the car." And the DEA says, "No, we really think that the car shouldn't be forfeited. It belongs to you. Come get it." And defense counsel says, "No, you started the process. You have to complete the process. Forfeit the car, we insist." If that's what the law requires, then the law is an ass. Right? I mean, that can't be right. And that's what's going on as people are trying to [beat] the system, and create double jeopardy problems.

PROFESSOR BLAKEY: You know, even in that one, you would still have the argument that it's a separate offense. Because the use of the car was not an element of the possession of the drugs, and the misuse of the car didn't include my culpability in the possession of the drugs.

MR. CASSELLA: True. And if the Supreme Court accepts that argument—and I know it's a winner—then I have no problem. But right now, any one of these arguments might be a winner or a loser in the next five years. And we have to make every single

one of them, and annoy defense counsel.

PROFESSOR BLAKEY: No, I understand that. And I'm inclined to think that it's for common-sense reasons—not because of anything else—a *Blockburger*-type analysis is going to be adopted. Either that, or a double-proceedings analysis is going to take it, just because it's bizarre.

PROFESSOR GURULÉ: Let me follow up to that question, and then I think we have to stop; it's been a long day. But, my question is, whether or not the civil forfeiture—on the *Blockburger* issue: same elements, same offense test—does the civil forfeiture complaint become a greater offense, and the criminal offense is the lesser offense?

PROFESSOR BLAKEY: No!

MR. CASSELLA: I don't think so. The Ninth Circuit says so, in [*United States v. One Piper Cherokee [Aircraft]*, 37 F.3d 489 (9th Cir. 1994)], but they don't give any analysis. They just declared that the forfeiture was the greater offense, and the underlying crime was the lesser offense

PROFESSOR GURULÉ: Well, exactly. A species of greater offense: *Harris v. Oklahoma* [433 U.S. 682 (1977)]

MR. CASSELLA: But I don't think that's right. I think there is an element to each that is not in the other, as I said before. But, even if it were true that forfeiture were a species of greater offense, and the underlying crime was the lesser included, that would not mean that there was necessarily a double jeopardy bar. The *Blockburger* test is one device by which we discern Congressional intent. Did Congress intend to create two statutes or one statute? Use the *Blockburger* test, separate elements, determine what the answer is. But that's not the only way. In any number of cases, as Bob can tell you, the courts have held that RICO and the underlying predicate are separate offenses, notwithstanding the fact that RICO entirely subsumes the predicate, because Congress has created a "multilayered" offense. The same is true with respect to conspiracy and the underlying predicate act, CCE and the underlying drug offense, [or] money laundering and the underlying predicate. In my view, forfeiture is the same sort of thing. Assuming that we didn't win the first argument—that the *Blockburger* test knocks this out—and there is a "lesser included offense" argument, it's a multilayered offense. And the entire structure that I indicated before—where Congress indicates an intent to create a parallel proceeding—would indicate that Congress intended this to be a separate sanction.

PROFESSOR GURULÉ: I would agree. I would agree on that point.

Well, let me once again thank our participants, especially those that travelled from Tennessee and Washington State and Washington D.C. . We very much appreciate the time that you have given us, your insights that you have given us into these complex issues. I want to personally thank all of you on behalf of Notre Dame Law School. At this time I would like to turn this over again to Bill Tunell, I think that he has a few remarks and a few things that he would like to distribute out.

BILL TUNELL: I would also like to give my thanks to all the members of the panel. In case the audience doesn't fully appreciate how far our panelists have travelled, Ms. Krinsky came all the way from Los Angeles to be with us. Mr. Cassella is from Washington, D.C. . Mr. Troberman is from Seattle. And, of course, the shortest trip by any of our panelists—except for our professors—was made by Mr. Edwards, from Nashville. Because all of them have come such a long way to participate in this event, and because of their contribution here today, we have some small tokens of our appreciation. For our out-of-town panelists, commemorative Notre Dame plates, made of Irish Bone china. And working from the theory that our professors have thus far in their careers become inundated with Notre Dame paraphernalia—a little more traditional gift; professional pen sets. On behalf of the University of Notre Dame, the Notre Dame Law School, and the *Journal of Legislation*, we thank you very much.

(APPLAUSE)