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Eviction Without Conviction: PublicHousing Leasehold Forfeiture Under 21 U.S.C.Section 881

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NOTES

EVICTON WITHOUT CONVICTION: PUBLIC HOUSING LEASEHOLD FORFEITURE UNDER 21 U.S.C. SECTION 881

On April 27, 1990, a group of law enforcement officials that included over thirty United States marshals, local police officers, and a SWAT Team wearing ski masks and carrying automatic weapons, forcibly entered four apartments in an Ann Arbor, Michigan, public housing complex.¹ Law enforcement officials gave the six adults and seven children in the targeted units ten to fifteen minutes to gather personal belongings before evicting them.² As the police boarded up the windows and changed the locks on the doors of the apartments, local news stations filmed the scene and a United States Attorney proclaimed the evictions another victory in the war on drugs.³

The Ann Arbor evictions were part of a United States Department of Housing and Urban Development (HUD) and Department of Justice pilot program instituted nationwide on June 25, 1990.⁴ On that date, HUD

1. Oppat, *Federal Agents Evict 6 from Housing*, Ann Arbor News, Apr. 28, 1990, at A1, col. 1. See also Gearhart, *UNITY Fights Back Against Property Seizures*, TENANTS' VOICE, May-June 1990, at 1, col. 1 (describing evictions of tenants at Ann Arbor public housing complex). One tenant described the eviction from her public housing unit:

[A] group of five men came into my house and seized it. I was just starting to feed the baby breakfast when the men entered my house and told me that I had ten minutes to gather my belongings and get out. Two of the men were uniformed policemen. Two of the men wore hoods. One man had a U.S. marshal's jacket. The men were armed. One of the hooded men carried a camera and began filming my house. My daughter Renita woke up with three strange men, including a man with a hood, in her room. They were filming her in bed when she awoke. The men refused to leave the room when my daughter got up. She was forced to get up and dress with them present. Renita was extremely upset by these actions. . . . I was given ten or fifteen minutes to gather a few clothes in a bag and then led out of my home. . . . After I was evicted, I spent a couple of nights at the Embassy Hotel with a Department of Social Services Emergency Housing Voucher. The Hotel told me they wouldn't allow my children to stay with us. I was forced to split up my family and leave my children with a friend.

Affidavit of Victoria Nelson, *reprinted in* ABA RECOMMENDATION, ABA Special Comm. on Housing and Urban Development Law, at 3 (1990) (proposing that courts grant victims of Public Housing Asset Forfeiture Project (Forfeiture Project) notice and opportunity to be heard prior to seizure). See also *infra* notes 94-95 and accompanying text (describing tenant's account of leasehold forfeiture as comparable to full-fledged criminal search).

2. Affidavit of Victoria Nelson, *supra* note 1.

3. Gearhart, *supra* note 1.

4. *U.S. Seizing Leases of People Suspected in Illegal Drug Deals*, N.Y. Times, June 26, 1990, at A16, col. 1 [hereinafter *U.S. Seizing Leases*]; see Richmond Tenants Org., Inc.

launched the Public Housing Asset Forfeiture Demonstration Project (Forfeiture Project) in nineteen cities across the United States.⁵ The Forfeiture Project did not involve traditional evictions, but instead used what HUD characterized as "leasehold forfeitures" to accomplish its purposes.⁶ The use of leasehold forfeitures purportedly enabled law enforcement officials to remove, more quickly than allowed under standard eviction procedures, public housing tenants suspected of drug trafficking.⁷ In a leasehold forfei-

v. Kemp, 753 F. Supp. 607, 608 (E.D. Va. 1990) (describing Forfeiture Project); *Kemp Plan: Evict Drug Dealers from Public Housing*, Chicago Tribune, May 16, 1990, at C14, col. 1 (same).

5. *U.S. Seizing Leases*, *supra* note 4. The Department of Housing and Urban Development (HUD) originally had planned to implement its Forfeiture Project in 22 cities. *Id.* HUD officials refused to explain their reasons for eliminating three unidentified cities from the final target list. *Id.*

6. Squitieri, *Public Housing Drug Suspects Get the Boot*, USA Today, June 25, 1990, available in LEXIS, Nexis Library, Currnt. File. The term "leasehold forfeiture" refers to the government's eviction of the tenants from the premises and commencement of formal civil forfeiture proceedings against the property. *Id.*; see *infra* notes 37-50 and accompanying text (describing civil forfeiture procedure).

7. *U.S. Seizing Leases*, *supra* note 4. HUD and the Department of Justice developed criteria for selecting those public housing tenants most suitable for eviction under the Forfeiture Project:

1. The violator should be the leaseholder of the property. (The term "violation" refers to the person whose actions give rise to the forfeiture.)
2. Compelling evidence should be developed that the violator participated in at least two felony drug offenses. (Drug purchases by undercover law enforcement officials from individual notorious drug dealers or evidence obtained pursuant to a search warrant would satisfy this criteria.)
3. Where appropriate, the violator should be prosecuted by local, state, or federal authorities for drug activities.
4. The property should be an open and notorious site of drug distribution.
5. Careful consideration should be given to factors involving family members of the violator and other registered occupants of the property. Those involved in this effort will seek to minimize the impact of the government's actions on minors and/or elderly, should they be effected by the action. Appropriate human resource services support (i.e. child welfare, emergency shelter, etc.) should be prearranged where minors or the elderly are effected.

HUD and Justice Announce Strike Against Drug Dealers in Public Housing, PR Newswire, June 25, 1990, available in LEXIS, Nexis Library, Wires File.

Ironically, litigation stemming from HUD's implementation of the Forfeiture Project has resulted in many leasehold forfeitures taking longer than if HUD had simply followed normal eviction procedures. See *Anti-Drug Housing Rule is Challenged*, Wash. Post, Oct. 27, 1990, at F8, col. 1 (noting that legal and procedural delays have frustrated efforts to evict public housing tenants accused of drug dealing); Saul, *Seeking to Balance Law With Order*, Newsday, October 14, 1990, at 4, available in LEXIS, Nexis Library, Currnt. File (same). Consequently, HUD Secretary Jack Kemp asked the Board of Directors of the Legal Services Corporation (LSC) to discourage local affiliates from representing public housing tenants involved in leasehold forfeiture proceedings. Bryson & Youmans, *Crime, Drugs, and Subsidized Housing*, 24 CLEARINGHOUSE REV. 435, 440 (1990). The Board of Directors of the LSC adopted the following non-binding resolution on June 25, 1990:

Whereas, the drug problem in our country has had a devastating effect on the poor, especially those who live in public housing; and,

ture proceeding, a magistrate, on the basis of an informant's testimony at an *ex parte* hearing, can grant law enforcement officials an order allowing the officials to seize a public housing unit without first giving the unit's tenants the benefit of a pre-seizure notice or hearing.⁸ By expanding the

Whereas, the Board of Directors of the Legal Services Corporation is concerned about reports of the LSC grantees representing persons involved in drug-related eviction and other housing proceedings involving publicly funded housing; and,

Whereas, resources available to legal services programs to provide legal representation to the poor are limited, and should be used in the most effective manner and only for meritorious cases; and,

Whereas, some legal services grantees have opposed recent actions by the Department of Housing and Urban Development aimed at evicting drug dealers despite government standards that housing authorities have proof beyond a reasonable doubt that the leaseholder committed at least 2 felony drug crimes and will face prosecution and despite the fact that the presence of drug dealers in public housing brings misery to many thousands of poor tenants.

Be it therefore resolved, that the Board of Directors of the Legal Services Corporation urges all legal services grantees to adopt immediately policies that discourage representation of persons involved in drug-related activity in drug-related eviction and other housing proceedings involving publicly funded housing;

Be it further resolved, that the Board of Directors of the Legal Services Corporation urges all legal services grantees to assist eligible tenant organizations, resident management organizations, and individual clients in anti-drug activities; and,

Be it further resolved, that the Board of Directors of the Legal Services Corporation urges Congress to seek a legislative remedy which would prohibit LSC grantees from representing persons involved in drug-related activity in drug-related eviction and other housing proceedings involving publicly funded housing.

Memorandum from LSC Board Chairman to Program Boards and Directors (June 29, 1990), reprinted in 24 CLEARINGHOUSE REV. 513 (1990).

Prior to the Forfeiture Project, HUD Secretary Kemp began streamlining evictions of public housing tenants engaged in drug-trafficking by eliminating the administrative grievance hearing traditionally required between the tenant and the Public Housing Agency (PHA) before eviction could occur. National Housing Law Project, Inc., *The Exclusion of Evictions from the Public Housing Grievance Process*, 19 HOUSING LAW BULLETIN 43, 43 (1989). Congress authorized PHAs to exclude evictions from the grievance process if HUD determined that state court eviction procedures provided the basic elements of due process. 42 U.S.C. § 1437d(k), as amended by Act of Nov. 28, 1990, 42 U.S.C.A. § 1437d(k) (1991). By 1990, HUD had eliminated the administrative grievance hearing in forty states after determining that the court eviction procedures of those states provided adequate due process to public housing tenants. Bryson & Youmans, *supra* at 440-41. See generally *Drugs in Federally Assisted Housing: Hearing on S. 566 Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking, Housing, and Urban Affairs*, 101st Cong., 1st Sess. (1989) [hereinafter *Drugs in Federally Assisted Housing*] (statement of Wade Henderson & Jacqueline Berrien, American Civil Liberties Union) (criticizing HUD's efforts to eliminate administrative grievance hearing for drug-related evictions); Note, *Drug-Related Evictions in Public Housing: Congress' Addiction to a Quick Fix*, 9 YALE L. & POL'Y REV. 161 (1991) (authored by Lisa Weil) [hereinafter Note, *Drug-Related Evictions*] (criticizing recent congressional and administrative action addressing drug and crime problems in public housing).

8. See ABA RECOMMENDATION, *supra* note 1, at 1 (describing operation of Forfeiture Project); *infra* notes 37-50 and accompanying text (describing civil forfeiture procedure). But see *infra* notes 12-16 and accompanying text (examining *Richmond Tenants* decision requiring government to provide pre-seizure notice to public housing tenants).

scope of property interests subject to forfeiture under 21 U.S.C. section 881,⁹ the Anti-Drug Abuse Act of 1988¹⁰ granted the federal government the authority to seize public housing leasehold interests used or intended to be used to facilitate felony drug transactions.¹¹

9. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 511 (codified as amended at 21 U.S.C. § 881 (1988)). Subsection 881(a) lists the various kinds of property subject to seizure by the federal government. 21 U.S.C. § 881(a) (1988). Subsection 881(a)(1) mandates the forfeiture of controlled substances; subsection 881(a)(2) mandates the forfeiture of materials and equipment used or intended for use in manufacturing or distributing controlled substances; subsection 881(a)(3) mandates the forfeiture of property used or intended for use as a container for controlled substances or equipment used to manufacture controlled substances; subsection 881(a)(4) mandates the forfeiture of all conveyances used or intended for use to deliver or facilitate the delivery of controlled substances; subsection 881(a)(5) mandates the forfeiture of all books, records, and research used or intended for use in violation of Title 21; subsection 881(a)(6) mandates the forfeiture of all money, negotiable instruments, securities, or other things of value used or intended to be used in exchange for controlled substances; subsection 881(a)(7) mandates the forfeiture of all real property, including any leasehold interest, used in any manner to facilitate the commission of a felony drug offense; subsection 881(a)(8) mandates the forfeiture of all controlled substances possessed in violation of Title 21; subsection 881(a)(9) mandates the forfeiture of all chemicals, drug manufacturing equipment, tableting machines, and gelatin capsules possessed, distributed, or intended to be distributed in violation of Title 21. 21 U.S.C. § 881(a)(1)-(9) (1988). Congress amended § 881(a) in 1990, adding two subsections to the list of property subject to forfeiture: Subsection 881(a)(10) mandates the forfeiture of all drug paraphernalia; and subsection 881(a)(11) mandates the forfeiture of all firearms used or intended for use to facilitate the sale, possession, or concealment of controlled substances, equipment, or proceeds traceable to such property. 21 U.S.C. § 881(a) (1988), *as amended by* Act of Nov. 29, 1990, 21 U.S.C.A. § 881(a) (1991). Subsections 881(b)-(k) set out the applicable procedures for administering the statute. 21 U.S.C. § 881(b)-(k) (1988).

10. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 5105, 102 Stat. 4325 (codified at 21 U.S.C. § 881(a)(7) (1988)); *see infra* note 11 (examining significance of Anti-Drug Abuse Act of 1988).

11. 21 U.S.C. § 881(a)(7) (1988). For purposes of this Note, two congressional amendments to § 881 are of particular concern. In 1984, Congress amended § 881(a) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 by passing the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 306(a), 98 Stat. 2050 (1984) (codified as amended in scattered sections of 21 U.S.C.). The Comprehensive Crime Control Act of 1984 added paragraph (a)(7) to § 881, mandating the forfeiture of real property used to facilitate drug transactions. 21 U.S.C. § 881(a)(7) (1988). With the passage of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 5105, 102 Stat. 4301 (codified at 21 U.S.C. § 881(a)(7) (1988)), Congress further amended § 881(a)(7) to include leasehold interests within the scope of real property subject to forfeiture. *Id.* Specifically, § 881(a)(7) states:

§ 881 Forfeitures

(a) Subject property. The following property shall be subject to forfeiture to the United States and no property right shall exist in them:

...

(7) All real property, including any right, title, and interest (*including any leasehold interest*) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or

Shortly before HUD began its seizure of leases under the Forfeiture Project, a group of public housing tenants, in *Richmond Tenants Organization, Inc. v. Kemp*,¹² sued HUD Secretary Jack Kemp to enjoin HUD from carrying out the Forfeiture Project.¹³ On June 18, 1990, Judge Richard L. Williams of the United States District Court for the Eastern District of Virginia issued a preliminary order enjoining HUD from seizing public housing units located within the Eastern District of Virginia unless the government first provided tenants with pre-seizure notice and an opportunity for a hearing.¹⁴ Judge Williams issued a final ruling in the case on December 19, 1990, holding that all public housing leaseholders had to be informed, through a letter, that forfeiture of their leaseholds without prior notice and hearing is illegal.¹⁵ Although HUD now gives tenants notice of the seizure, it has continued to implement the Forfeiture Project.¹⁶

This Note argues that the use of 21 U.S.C. section 881, the civil forfeiture statute, as a means for implementing the Forfeiture Project, is fraught with constitutional problems. Part I of this Note examines the history of *in rem* forfeiture and examines how the modern civil forfeiture statute, section 881, evolved. Part II argues that the forfeiture of a public

omission established by that owner to have been committed without the knowledge or consent of that owner.

21 U.S.C. § 881(a)(7) (1988) (emphasis added).

12. 753 F. Supp. 607 (E.D. Va. 1990).

13. *Richmond Tenants Org., Inc. v. Kemp*, 753 F. Supp. 607, 608 (E.D. Va. 1990).

14. *Id.* A few days after issuing the order calling for pre-seizure notice in public housing leasehold evictions, Judge Williams granted the tenants' motion for a national class and expanded the initial order to include all public housing tenants in the United States. *Id.* Cf. *United States v. Premises & Real Property Located at 4492 S. Livonia Road*, 889 F.2d 1258, 1262-65 (2d Cir. 1989) (holding that *ex parte* seizure of private home under 21 U.S.C. § 881(a)(7) without notice and hearing for homeowner violates due process), *reh'g denied*, 897 F.2d 659 (2d Cir. 1990).

15. *Richmond Tenants*, 753 F. Supp. at 610. Judge Williams based his decision in *Richmond Tenants* on the fact that pre-seizure notice and hearing substantially reduce the risk that an erroneous deprivation of property will occur. *Id.* Judge Williams said that an adversarial hearing at which the accused can confront and cross-examine his accusers permits the accused to ferret out mistaken or intentionally false testimony. *Id.* Judge Williams added that because a home is immobile, unlike a car, plane, or yacht, the possibility of exigent circumstances requiring only an *ex parte* probable cause hearing is limited. *Id.* at 609. Finally, Judge Williams noted that the government still may establish its strong interest in deterring drug trafficking regardless of whether the seizure occurs before or after an adversarial proceeding. *Id.* at 610. See *United States v. Premises & Real Property Located at 4492 S. Livonia Rd.*, 889 F.2d 1258, 1262-65 (2d Cir. 1989) (holding that before forfeiture of home can occur, government must provide notice and opportunity to be heard, absent exigent circumstances), *reh'g denied*, 897 F.2d 659 (2d Cir. 1990); *In re Kingsley*, 802 F.2d 571, 580 (1st Cir. 1986) (Coffin, J., concurring) (same); *United States v. Leasehold Interest in Property Located at 850 S. Maple*, 743 F. Supp. 505, 509-10 (E.D. Mich. 1990) (same); *United States v. Parcel I, Beginning at a Stake*, 731 F. Supp. 1348, 1352 (S.D. Ill. 1990) (permitting no-notice seizure in forfeiture action only when necessary to prevent further unlawful activity or destruction or concealment of property).

16. LaFraniere, *U.S. Alters Plan to Evict Drug Dealers*, Wash. Post, June 26, 1990, at A5, col. 1.

housing leasehold interest is really a criminal *in personam* forfeiture, not a civil *in rem* forfeiture. By using traditional tests developed by the United States Supreme Court, Part II demonstrates that the leasehold forfeitures contemplated by HUD and the Department of Justice are criminal in nature. As a result, the Constitution demands that courts provide the civil forfeiture claimant with the full protection of criminal procedural rights. Part III discusses Eighth Amendment issues raised by public housing leasehold forfeiture. Finally, Part IV examines the definition of leasehold interests in section 881 and identifies the inherent conceptual problems that the government encounters when it attempts to seize intangible, non-transferable property interests.

I. EVOLUTION OF CIVIL FORFEITURE

The idea that inanimate objects involved in wrongful acts should be subject to forfeiture has existed since biblical times.¹⁷ Oliver Wendell Holmes, Jr. analyzed the development of the forfeiture concept and other related early forms of liability in *The Common Law*.¹⁸ The development of the principle of *in rem*, or civil, forfeiture resulted from early man's need to pacify his desire for revenge by personifying the offending object.¹⁹ This led persons to attach liability to the object doing the damage rather than to the object's owner.²⁰ Holmes believed that primitive man blamed objects rather than their owners because primitive man was incapable of identifying the actor ultimately responsible in the chain of causation.²¹ From these beginnings, the medieval English institution of the *deodand* developed.²² Under the institution of the *deodand*, any object causing the death of a person was subject to forfeiture to the Crown.²³ Holmes viewed the institution of the *deodand* as an advancement over the earlier state of affairs, because a person's death was no longer solely the concern of the deceased's friends and relatives, but instead was also the concern of the Crown.²⁴ The

17. See *Exodus* 21:28 (concerning biblical concept of forfeiture). "If an ox gore a man or a woman, that they die: then the ox shall be surely stoned, and his flesh shall not be eaten; but the owner of the ox shall be quit [absolved]." *Id.*

18. O.W. HOLMES, JR., *THE COMMON LAW* 1-38 (1923 ed.).

19. *Id.* at 11. "The hatred for anything giving us pain . . . leads even civilized man to kick a door which pinches his finger." *Id.* Holmes cites the example of a tree which falls on a man and kills him. *Id.* The tree is comparable to an animal in its nature, and is chopped into pieces for the deceased's relatives, thereby quelling what Holmes terms the "passion of revenge." *Id.*

20. *Id.*

21. *Id.*

22. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-84 (examining historical roots of civil forfeiture); D.B. SMITH, *PROSECUTION AND DEFENSE OF FORFEITURE CASES* § 2.02 (1985 & Supp. 1990) (examining history of *in rem* forfeiture). The use of the term "*deodand*" to describe the medieval institution of subjecting to forfeiture any object causing the death of a person is derived from the Latin *Deo dandum*, which means "to be given to God." *Calero-Toledo*, 416 U.S. at 681 n.16.

23. SMITH, *supra* note 22, § 2.02.

24. HOLMES, *supra* note 18, at 24.

Crown now took over the family's claim to the offending object and used the value of the object toward purchasing masses for the soul of the deceased, or for some other charitable purpose.²⁵ However, the *deodand* soon became a source of revenue for whomever the Crown designated as the public beneficiary.²⁶ The use of the *deodand* was not abolished in England until the middle of the nineteenth century with the passage of the first wrongful death statute.²⁷

The institution of the *deodand* and Holmes' personification theory explain many of the differences between the modern civil and criminal forfeiture statutes. Because the concept of civil forfeiture evolved from the legal fiction that property associated with a criminal act is itself guilty of the wrongdoing, a criminal conviction of the property owner is not a prerequisite to a successful civil forfeiture suit.²⁸ In contrast, *in personam*, or criminal, forfeitures center upon a defendant's personal guilt.²⁹ At early

25. *Id.* See *Calero-Toledo*, 416 U.S. at 681 (1974) (examining history of civil forfeiture).

26. Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notation of Sovereignty*, 46 TEMP. L.Q. 169, 182 (1973).

27. See SMITH, *supra* note 22, § 2.02 (tracing history of *in rem* forfeiture). Examining the history and evolution of forfeiture, the Supreme Court noted in *Calero-Toledo* that the abolition of the *deodand* institution in nineteenth century England was simultaneous with the passage of Lord Campbell's Act creating a cause of action for wrongful death. *Calero-Toledo*, 416 U.S. at 681 n.19. The two occurrences were linked because Lord Campbell did not want to abolish the *deodand* institution, with its tendency to deter carelessness, particularly by railroads, unless the law granted the deceased's survivors a right of action. *Id.*

In the seventeenth century, England's Navigation Acts used a specific application of an *in rem* forfeiture—a procedure known as the maritime lien. See HOLMES, *supra* note 18, at 25-29 (noting that rationale and historical justification for institution of *deodand* applied with same force and logic in admiralty law); SMITH, *supra* note 22, § 2.03 (examining history of civil forfeiture and English admiralty law). A ship, if involved in an accident or if its owner attempted to avoid paying customs duties, was typically the only source of security in dealing with distant trading partners. HOLMES, *supra* note 18, at 28. The easiest way to satisfy a claim in these instances was to seize the ship, leaving the foreign owners to seek indemnity elsewhere. *Id.* Merchants liked the system of *in rem* forfeiture because they could proceed against the property itself with a greater chance of compensation than in a suit at common law against some destitute master or part owner of a ship. Steckley, *Merchants and the Admiralty Courts During the English Revolution*, 22 AM. J. LEGAL HIST. 137, 143, 151 (1978). See Note, *Fear and Loathing and the Forfeiture Laws*, 75 CORNELL L. REV. 1151, 1153 (1990) (authored by Michael Schecter) [hereinafter Note, *Fear and Loathing*] (noting that merchant class preferred *in rem* forfeiture proceeding). Consequently, American forfeiture statutes borrowed some provisions from English admiralty and customs laws governing *in rem* forfeiture. SMITH, *supra* note 22, § 2.03. See *Calero-Toledo*, 416 U.S. at 682-83 (examining development of *in rem* forfeiture statutes in America); 21 U.S.C. § 881(b) (1988) (providing for "[s]eizure pursuant to Supplemental Rules for Certain Admiralty and Maritime Claims").

28. See *United States v. One 1976 Chevrolet Corvette*, 477 F. Supp. 32, 34 (E.D. Pa. 1979) (finding that innocence, non-involvement, and lack of negligence of owner of seized property are not valid defenses to forfeiture action); SMITH, *supra* note 22, § 2.03 (same). Because civil forfeiture is based upon the legal fiction that the property is the wrongdoer, peculiar case names result, with the government as the plaintiff and the property as the named defendant. *Chevrolet Corvette*, 477 F. Supp. at 32. The owner of the property is referred to as the claimant. *Id.* at 33.

29. See 21 U.S.C. § 853(a) (1988) (requiring property owner's conviction of underlying

common law, the convicted felon forfeited all his personal and real property to the Crown, based on the rationale that in committing the criminal offense the convicted felon had breached the king's peace and no longer deserved the right to own property.³⁰ The same rationale underlies the modern criminal forfeiture statute. The defendant's personal guilt gives the government the right to seize property connected with the defendant owner's criminal activities.³¹ Therefore, a successful criminal forfeiture proceeding can take place only after the criminal conviction of the property owner.³²

In response to the escalating drug problem in the United States, Congress developed the modern civil forfeiture statute by amending the Comprehensive Crime Control Act of 1984 and enhancing section 881, with the intention of giving law enforcement officials a more effective way to take the profit out of the drug trade.³³ The use of the enhanced provisions of section 881 is controversial, not only because it often results in what some consider excessive penalties,³⁴ but also because Congress has classified section 881 as a civil statute.³⁵ By using the civil label, Congress rendered inapplicable many constitutional safeguards that would otherwise have been available if Congress had labeled section 881 a criminal statute.³⁶

The government usually initiates a civil forfeiture action under section 881 by means of a magistrate's issuance of a seizure warrant at an *ex parte*

felony drug transaction before government may bring criminal forfeiture action); SMITH, *supra* note 22, § 2.03 (examining differences between civil and criminal forfeiture).

30. See *Calero-Toledo*, 416 U.S. at 682 (1974) (noting historical rationale of criminal forfeiture).

31. See 21 U.S.C. § 853(a) (1988) (requiring property owner's conviction of underlying offense before property becomes subject to forfeiture).

32. *Id.*

33. See S. REP. NO. 225, 98th Cong., 1st Sess. 191, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS, 3182, 3374-3404 (providing legislative history of passage of Comprehensive Crime Control Act of 1984). The 1984 amendments to the Comprehensive Drug Abuse Prevention and Control Act of 1970 enhanced the use of civil and criminal forfeitures because Congress expanded the scope of property subject to forfeiture. *Id.* at 3377. See also *supra* note 11 (examining amendments to 21 U.S.C. § 881).

34. See *infra* note 157 (noting commentators expressing Eighth Amendment concerns with § 881 civil forfeiture statute).

35. Compare 21 U.S.C. § 881 (1988) (placing civil forfeiture statute in part of Title 21 labeled "Administrative and Enforcement Provisions") with 21 U.S.C. § 853 (1988) (placing criminal forfeiture statute in part of Title 21 labeled "Criminal Offenses and Penalties"); see also *United States v. Twenty-Five Hundred Dollars*, 689 F.2d 10, 13 (2d Cir. 1982) (finding that Congress intended civil label in § 881 forfeiture statute), *cert. denied*, 465 U.S. 1099 (1984); Note, *Fear and Loathing*, *supra* note 27, at 1155 (same).

36. See *infra* notes 51-120 and accompanying text (examining courts' inconsistent approach to applying full range of criminal procedure to civil forfeiture cases). See, e.g., *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 362-66 (1984) (holding that Fifth Amendment's double jeopardy clause does not apply to civil forfeiture proceeding); *United States v. United States Coin & Currency*, 401 U.S. 715, 718-21 (1971) (holding that Fifth Amendment privilege against self-incrimination applies to civil forfeiture proceeding); *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 702 (1965) (holding that exclusionary rule applies to civil forfeiture proceeding).

probable cause hearing.³⁷ Once the magistrate grants the warrant, the government may seize the property.³⁸ At trial, the most important principle governing section 881 civil forfeiture is that, after the government makes an initial probable cause showing, the burden of proof shifts to the claimant.³⁹ Although the government must make an initial probable cause showing, it may do so through the use of hearsay.⁴⁰ The government presents its probable cause showing as its case-in-chief before the jury, establishing that it has reasonable grounds, rising above mere suspicion, to believe that the property is subject to forfeiture.⁴¹ The claimant has the right to cross-examine witnesses that the government may put on to make its probable cause showing.⁴² Following this cross-examination, the claimant presents his case-in-chief.⁴³ The claimant, however, must limit his presentation to ad-

37. See 21 U.S.C. § 881(b) (1988) (listing procedures by which government may initiate civil forfeiture action). The Second Circuit explained the various means by which the government may seize property under § 881(b): The government may file a complaint consistent with the Supplemental Rules for Certain Admiralty and Maritime Claims that permit a court clerk to issue a summons and warrant for the arrest of the vessel or other property without requiring a certification of exigent circumstances. *United States v. Premises & Real Property Located at 4492 S. Livonia Road*, 889 F.2d 1258, 1262 (2d Cir. 1989), *reh'g denied*, 897 F.2d 659 (2d Cir. 1990); see SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS C(3) (listing procedures for forfeiture of property). If the Attorney General has probable cause to believe that the property is subject to civil forfeiture, the government may seize the property following applicable customs laws, and in accordance with § 881(d). *Livonia Road*, 889 F.2d at 1262. Finally, the government may request a seizure warrant in the manner provided for in the Federal Rules of Criminal Procedure, requiring an *ex parte* probable cause determination by a magistrate. *Id.* at 1262-63; see FED. R. CRIM. P. 41 (providing mechanism for obtaining warrant).

38. 21 U.S.C. § 881(d) (1988).

39. See 21 U.S.C. § 881(d) (1988) (stating applicable laws governing burden of proof in civil forfeiture proceeding). Placing the burden of proof on the claimant is a procedure borrowed from the customs and navigation laws governing the English system of *in rem* forfeiture. See *supra* note 27, (tracing development of *in rem* forfeiture in America). Section 881(d) incorporates, by reference, 19 U.S.C. § 1615, the statute governing the burden of proof in civil forfeiture suits. 21 U.S.C. § 881(d) (1988). Section 1615 provides in pertinent part:

In all suits or actions . . . brought for the forfeiture of any vessel, vehicle, aircraft, merchandise, or baggage seized under the provisions of any law relating to the collection of duties on imports or tonnage, where the property is claimed by any person, the burden of proof shall lie upon such claimant; and in all suits or actions brought for the recovery of the value of any vessel, vehicle, aircraft, merchandise, or baggage, because of violation of any such law, the burden of proof shall be upon the defendant: *Provided*, That probable cause shall be first shown for the institution of such suit or action, to be judged of by the court[.]

19 U.S.C. § 1615 (1988) (emphasis in original). For an examination of the burden of proof problem in civil forfeiture proceedings see SMITH, *supra* note 22, § 11.03.

40. *Livonia Road*, 889 F.2d at 1267. See SMITH, *supra* note 22, § 11.03 (noting that government can demonstrate probable cause with hearsay evidence); Landman & Hieronymus, *Civil Forfeiture of Real Property under 21 U.S.C. § 881(a)(7)*, 70 MICH. B.J. 174, 177-78 (1991) (same).

41. *United States v. Banco Cafetero Panama*, 797 F.2d 1154, 1160 (2d Cir. 1986).

42. SMITH, *supra* note 22, § 11.03.

43. *Id.*

missible evidence.⁴⁴ The claimant must prove, by a preponderance of the evidence, either that no nexus existed between the property and the drug trafficking,⁴⁵ or that the illegal use was without the claimant's knowledge or consent.⁴⁶ If the claimant produces no such evidence, the court may grant the government summary judgment based solely upon its earlier probable cause showing.⁴⁷ After the claimant has made his case-in-chief, the government is given the opportunity for rebuttal.⁴⁸ The fact that a court previously has acquitted a claimant in a criminal action does not frustrate a later civil forfeiture action against the claimant's property because of the lower standard of proof required in the civil setting.⁴⁹ However, a criminal conviction collaterally estops an owner from asserting in a later civil forfeiture proceeding that his property was not connected with drug dealing.⁵⁰

II. DUE PROCESS ISSUES

The constitutional safeguards controlling criminal prosecutions are not applicable to civil enforcement proceedings.⁵¹ Accordingly, in a civil pro-

44. *United States v. Property Known as 6109 Grubb Road*, 886 F.2d 618, 622-23 (3rd Cir. 1989).

45. 21 U.S.C. § 881(a)(7) (1988). Section 881(a)(7) subjects to forfeiture real property "which is used, or intended to be used, in any manner or part, to commit, or to facilitate" the commission of a felony drug transaction. *Id.* See generally Note, *Substantial Connection and the Illusive Facilitation Element for Civil Forfeiture of Narcoband in Drug Felony Cases*, 25 U. OF RICHMOND L. REV. 171 (1990) (authored by Steven S. Biss) (examining wide range of judicial interpretation of term "facilitate" in § 881(a)).

46. 21 U.S.C. § 881(a)(7) (1988). Section 881(a)(7) allows a claimant to avoid forfeiture by establishing an innocent owner defense. *Id.* In order to establish an innocent owner defense, the claimant must prove that he had no knowledge of illegal drug activity or, if he had knowledge, that he did not consent to the illegal drug activity. *Id.*; but see generally Note, *The Innocent Owner Defense to Real Property Forfeiture under the Comprehensive Crime Control Act of 1984*, 58 FORDHAM L. REV. 471 (1989) (authored by Lalit K. Loomba) (discussing courts' various interpretations of "knowledge or consent" language of § 881(a)). The statutory innocent owner defense developed from language found in *Calero-Toledo v. Pearson Yacht Co.*, 416 U.S. 663 (1974):

[I]t would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent. Similarly, the same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property[.]

Id. at 689 (citations omitted). For an example of a claimant's successful use of the innocent owner defense, see *United States v. Leasehold Interest in 121 Nostrand Ave.*, 760 F. Supp. 1015 (E.D.N.Y. 1991).

47. SMITH, *supra* note 22, § 11.03.

48. *Id.*

49. See *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 235 (1972) (holding that defendant's acquittal on criminal charges does not foreclose civil forfeiture proceeding because of differing burdens of proof); *Helvering v. Mitchell*, 303 U.S. 391, 397 (1938) (same).

50. See *United States v. One 1975 Chevrolet K-5 Blazer*, 495 F. Supp. 737, 740 (W.D. Mich. 1980) (holding that government may rely on facts adjudicated in prior criminal proceeding to establish probable cause requirement of civil forfeiture).

51. See *Mitchell*, 303 U.S. at 402-04 (holding that civil procedure is incompatible with

ceeding, the court may direct a verdict against the defendant, the government is not required to prove its case beyond a reasonable doubt, and the government can appeal an adverse finding.⁵² In addition, the civil defendant does not have the protection of the criminal trial guaranties of the Sixth Amendment⁵³ or the self-incrimination clause and the double jeopardy clause⁵⁴ of the Fifth Amendment.⁵⁵ Although the congressional labeling of a statute as either criminal or civil is compelling evidence of congressional intent as to the procedures that should apply, the label alone is not controlling.⁵⁶ The determinative inquiry is whether the statute at issue, although labeled civil, is actually criminal in nature, serving punitive rather than remedial purposes.⁵⁷

Because of the frequently harsh results of civil forfeiture statutes, the Supreme Court has, on several occasions, characterized civil forfeiture proceedings as quasi-criminal in nature and, thus, deserving of some of the traditionally criminal constitutional safeguards.⁵⁸ However, the Court's use of the quasi-criminal label to describe civil forfeiture proceedings has led

constitutional guaranties governing criminal prosecution because government does not have to prove its case beyond reasonable doubt and may appeal, defendant has no right to confront adverse witnesses or refuse to testify, and double jeopardy does not apply to civil enforcement of remedial sanction).

52. *Id.* at 403-04.

53. The Sixth Amendment to the United States Constitution states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

U.S. CONST. amend. VI.

54. The pertinent part of the Fifth Amendment to the United States Constitution states:

"[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

55. See *Mitchell*, 303 U.S. at 403-04 (holding that procedural protections of Sixth Amendment and double jeopardy clause and self-incrimination clause of Fifth Amendment do not apply in civil action).

56. See *infra* notes 70-82 and accompanying text (examining relevant criteria for determining when statute, although labeled civil, is criminal in nature).

57. *Id.* But see *Mitchell*, 303 U.S. at 400 n.3 (noting that distinction between remedial or punitive nature of statute may not be determinative inquiry in evaluating when criminal guaranties apply to civil action). The *Mitchell* Court said that in deciding when specific criminal procedural protections apply to civil actions the Court attempts to distinguish between the type of procedural rule involved rather than whether the statute is remedial or punitive in nature. *Id.* See also Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379, 392 (1976) (stating that Supreme Court separated constitutional procedural protections into two groups—one group containing provisions applied to narrowly defined criminal sanctions and other group containing provisions applied to punitive sanctions, whether or not labeled "criminal").

58. See *infra* notes 60-66 and accompanying text (examining Supreme Court decisions that hold some civil forfeitures to be quasi-criminal in nature).

to inconsistent application of the criminal constitutional protections.⁵⁹ In *Boyd v. United States*,⁶⁰ the Supreme Court applied the Fourth Amendment⁶¹ and the self-incrimination clause of the Fifth Amendment to a civil forfeiture proceeding.⁶² In reaching this conclusion, the Court focused on the main objective of the civil forfeiture—the penalization of the property owner for the commission of an underlying criminal offense.⁶³ The Court characterized such proceedings as quasi-criminal in nature.⁶⁴ Although the Court has refused to give full scope to the reasoning and dicta of *Boyd*,⁶⁵ the proposition that civil forfeitures are quasi-criminal in nature has remained intact.⁶⁶

59. See Clark, *supra* note 57, at 381-97 (noting Supreme Court's inconsistent approach to determining when constitutional criminal guaranties apply in civil proceedings). One commentator harshly criticized the Court's characterization of civil forfeitures as quasi-criminal, because no textual support exists in the Constitution for such a hybrid distinction, nor does the Constitution create a hierarchy of rights afforded the criminal defendant. Note, *Fear and Loathing*, *supra* note 27, at 1159-60. The Court's inability to account for why some constitutional criminal guaranties are applicable to a civil forfeiture proceeding when others are not may be partly explained by the Court's piecemeal examination of each of the potentially applicable constitutional provisions. *Id.* See also Note, *Constitutional Rights and Civil Forfeiture Actions*, 88 COLUM. L. REV. 390, 393 (1988) (authored by Jay A. Rosenberg) (noting Supreme Court's uneven and uncertain treatment of *in rem* forfeiture).

60. 116 U.S. 616 (1886).

61. The Fourth Amendment to the United States Constitution states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

U.S. CONST. amend. IV.

62. *Boyd v. United States*, 116 U.S. 616, 621 (1886). In *Boyd*, the Supreme Court addressed the applicability of the Fourth Amendment and the self-incrimination clause of the Fifth Amendment to an *in rem* forfeiture proceeding. *Id.* at 618. *Boyd* involved a merchant's forfeiture of thirty-five cases of plate glass for violating certain customs laws. *Id.* The government demanded that the claimants produce invoices regarding cases of previously imported glass. *Id.* The claimants objected to the government's subpoena requiring production of the invoices on the grounds that the production constituted an unreasonable search and seizure under the Fourth Amendment and compelled evidence from the claimants in violation of the Fifth Amendment. *Id.* The Court upheld the merchant's claim because the search and seizure of documents from the claimants was needed to render the government's forfeiture suit successful. *Id.* at 633. The Court stated that this search and seizure was therefore functionally equivalent to compelling a person to testify against himself in a criminal proceeding. *Id.* at 638. The Court said that civil forfeitures initiated by the government in order to penalize a property owner for underlying criminal offenses are quasi-criminal in nature, and therefore sufficiently criminal for purposes of the Fourth Amendment and the self-incrimination clause of the Fifth Amendment. *Id.* at 633-34.

63. *Id.*

64. *Id.* at 634.

65. *United States v. Ward*, 448 U.S. 242, 253 (1980) (finding that Court no longer follows full scope of *Boyd*).

66. See *United States v. United States Coin & Currency*, 401 U.S. 715, 718 (1971) (holding that Fifth Amendment's self-incrimination clause permitted claimant to refuse to file

Even though the Supreme Court uses the quasi-criminal label to classify civil forfeiture proceedings for purposes of finding the Fourth and Fifth Amendments applicable,⁶⁷ the Court has not made every constitutional criminal protection available in civil forfeiture proceedings.⁶⁸ If the Court classifies the forfeiture statute at issue as having a remedial, rather than a punitive, purpose, then the Court does not require constitutional criminal guaranties in the proceeding.⁶⁹ The relevant inquiry is whether the statute authorizes a sanction that is so punitive in nature that the sanction constitutes a criminal punishment requiring the proceeding designed to implement that sanction to include all the corresponding constitutional criminal protections.⁷⁰

In *Kennedy v. Mendoza-Martinez*,⁷¹ the Court identified seven factors useful for determining whether an act of Congress is so punitive in nature that the Constitution demands the application of the double jeopardy clause and the criminal procedural protections contained in the Sixth Amendment.⁷² The Court identified the factors from previous decisions applying traditional tests used to determine the nature of an act of Congress, including: (1) whether the sanction includes an affirmative disability or restraint; (2)

incriminating tax documents that government wanted to use in later civil action to seize money claimant earned in illegal bookmaking operation); *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700 (1965) (holding that government cannot use evidence obtained in violation of Fourth Amendment in later civil forfeiture proceeding to seize vehicle used to illegally transport intoxicating liquor across state line); Note, *Narrowing Civil Drug Forfeiture: Section 881, Substantial Connection and the Eighth Amendment*, 89 MICH. L. REV. 165, 183-84 (1990) (authored by James B. Speta) [hereinafter Note, *Narrowing Civil Drug Forfeiture*] (noting decisions after *Boyd* that use quasi-criminal label to describe civil forfeiture proceedings).

67. See *supra* note 66 (noting Supreme Court cases finding civil forfeiture sufficiently criminal in nature for some constitutional protections to apply).

68. See *infra* note 69 (examining cases where Court has found civil forfeiture to be civil in nature because forfeiture statute serves remedial purpose).

69. See *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 362-66 (1984) (holding that double jeopardy clause is inapplicable in later civil forfeiture of firearms due to remedial purpose of forfeiture statute); *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 235-37 (1972) (holding that defendant's acquittal on smuggling charge does not bar later civil action seeking forfeiture of goods violating tariff law because forfeiture statute is remedial in nature).

70. See *infra* notes 71-84 and accompanying text (setting out Court's analysis for determining when civil statute is so punitive in nature that full range of constitutional criminal guaranties should apply).

71. 372 U.S. 144 (1963).

72. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). The *Mendoza-Martinez* Court faced the question of whether an *ex parte* civil proceeding sufficiently safeguarded the rights of individuals who were stripped of their United States citizenship because they fled the country to avoid military conscription. *Id.* at 164. Recognizing both the right of citizenship guaranteed by the Constitution and the necessary power of Congress to require citizens to serve in the military, the Court held that in such a situation Congress can deprive an individual of his citizenship. *Id.* at 159-60. The Court added, however, that if the sanction imposed by an act of Congress is sufficiently analogous to a criminal punishment, then an *ex parte* civil proceeding to impose that sanction lacks the procedural protections required in criminal prosecutions. *Id.* at 167.

whether the sanction historically has been considered a punishment; (3) whether the sanction involves a finding of scienter; (4) whether the sanction promotes the traditional aims of punishment—retribution and deterrence; (5) whether the sanction applies to behavior that is already a crime; (6) whether a rational, alternative purpose may be found for the sanction; and (7) whether the sanction is excessive in regard to the alternative purpose assigned to it.⁷³

In *United States v. Ward*,⁷⁴ the Court refined the *Mendoza-Martinez* test used to determine whether a civil sanction is analogous to a criminal punishment.⁷⁵ The *Ward* Court addressed the question of whether the assessment of a civil penalty against an owner of a vessel that negligently discharged toxic wastes into navigable waters was so penal in nature that the Constitution demanded application of criminal protections in the civil proceeding imposing the sanction.⁷⁶ The Court adopted a new threshold inquiry.⁷⁷ First, the Court stated, the distinction between criminal and civil proceedings is a matter of statutory construction.⁷⁸ The Court stated that a court must initially determine whether Congress intended a civil or criminal penalty.⁷⁹ The *Ward* Court modified the *Mendoza-Martinez* test, giving considerable deference to congressional labeling of statutes as either criminal

73. *Id.* at 168-69. One commentator suggested that the application of specific *Mendoza-Martinez* factors to a particular statute is really a determination of the dominant purpose of the statute. Clark, *supra* note 57, at 435-90. Clark argues that statutes which restrict the application of the double jeopardy clause and the procedural protections of the Sixth Amendment should be subject to the same sort of strict scrutiny analysis that the Supreme Court uses in the equal protection and First Amendment areas. *Id.* at 444-89. The basic inquiry, says Clark, is whether the burden placed on the constitutional rights at issue serves some valid remedial or regulatory purpose that justifies the burden. *Id.* at 445. If a less restrictive alternative exists, then the statute implementing the remedial purpose is overbroad, and the statute serves no valid purpose by its overbreadth except to burden constitutional rights. *Id.* at 448-49. By reassembling the *Mendoza-Martinez* factors used in determining whether punishment is the dominant purpose of a statute, Clark avoids the inherent problems associated with the use of legislative history as evidence of congressional intent. *Id.* at 454-61. See Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930) (suggesting that legislative intent is a fiction). Dominant purpose is discoverable through less ambiguous indicia than legislative intent, Clark argues, because the question of whether the law serves a valid governmental purpose may be answered by asking whether the law is narrowly tailored and administered to serve the legitimate purpose asserted. Clark, *supra* note 57, at 447. Clark simply reworks the final two *Mendoza-Martinez* factors—whether the sanction serves some alternative purpose and whether the burden imposed serves that purpose or is excessive—into a kind of strict scrutiny analysis for determining the dominant purpose of a statute. *Id.*

74. 448 U.S. 242 (1980).

75. *United States v. Ward*, 448 U.S. 242, 244 (1980).

76. *Id.* at 244.

77. *Id.* at 248.

78. *Id.*

79. *Id.* The *Ward* Court stated that the main consideration in determining whether a statute is civil or criminal is if Congress expressly or implicitly stated a preference by the label it placed upon the statute. *Id.*

or civil.⁸⁰ The *Ward* Court held that if Congress has indicated a preference for establishing a civil penalty, only clear proof of a statute's actual punitive nature, through the application of the *Mendoza-Martinez* factors,⁸¹ can establish that the statute is actually criminal in nature.⁸² In *Ward*, the Court held that Congress explicitly labeled the statute at issue as civil.⁸³ The Court then applied the *Mendoza-Martinez* factors and determined that the statute was not sufficiently punitive in nature to require a court to apply all the constitutional criminal safeguards to a civil proceeding imposing the statutory penalty.⁸⁴

Although no court has yet applied the *Ward* test directly to section 881 public housing leasehold forfeitures, several courts have applied the test to other property interests subject to forfeiture under section 881.⁸⁵ The courts deciding these cases have focused upon the non-punitive purposes of section 881.⁸⁶ These courts have held that section 881 serves an important remedial purpose because it authorizes the forfeiture of property that could be used to facilitate drug trafficking.⁸⁷ The remedial purpose alone was significant enough for the courts to find that the statute was not criminal in nature.⁸⁸ However, the forfeiture of public housing leasehold interests presents a more compelling case for the courts to hold that this kind of forfeiture is punitive in nature and that constitutional criminal safeguards should apply.⁸⁹ Applying the first prong of the *Ward* analysis⁹⁰—whether Congress expressly evinced a preference for a civil or criminal sanction by examining the label Congress placed upon the statute—to section 881 forfeitures of public housing leaseholds reveals that Congress intended a civil sanction when it passed section 881.⁹¹ Section 881 is found in the part of Title 21 labeled

80. See Darmstadter & Mackoff, *Some Constitutional and Practical Considerations of Civil Forfeiture Under 21 U.S.C. § 881*, 9 WHITTIER L. REV. 27, 49 (1987) (noting that *Ward* decision refines the *Mendoza-Martinez* test in favor of congressional discretion).

81. See *supra* note 73 and accompanying text (identifying *Mendoza-Martinez* factors).

82. *Ward*, 448 U.S. at 248-49.

83. *Id.* at 249-51.

84. *Id.* But see Darmstadter & Mackoff, *supra* note 80, at 49 (noting that facts of *Ward* did not present Court with difficult case for applying full range of constitutional criminal protections because penalty amounted to only five hundred dollars and had direct correlation to cost of clean-up imposed upon society).

85. See *United States v. Twenty-five Hundred Dollars in United States Currency*, 689 F.2d 10 (2d Cir. 1982) (holding that § 881 forfeiture of money exchanged for drugs is not punitive in nature), *cert denied*, 465 U.S. 1099 (1984); *United States v. 1985 BMW 635 CSI*, 677 F. Supp. 1039 (C.D. Calif. 1987) (holding that § 881 forfeiture of automobile used to transport drugs is not punitive in nature).

86. *Twenty-Five Hundred Dollars*, 689 F.2d at 12; *1985 BMW*, 677 F. Supp. at 1044.

87. *Twenty-Five Hundred Dollars*, 689 F.2d at 12; *1985 BMW*, 677 F. Supp. at 1044.

88. *Twenty-Five Hundred Dollars*, at 12; *1985 BMW*, 677 F. Supp. at 1044.

89. See *infra* notes 90-120 and accompanying text (applying *Ward* and *Mendoza-Martinez* to § 881 forfeiture of public housing leasehold interest).

90. See *supra* notes 74-84 and accompanying text (setting out two-prong *Ward* test).

91. See *Twenty-Five Hundred Dollars*, 689 F.2d at 13 (finding that Congress intended civil label for § 881 forfeiture); Note, *Fear and Loathing*, *supra* note 27, at 1155 (same).

"Administrative and Enforcement Provisions," instead of the part labeled "Criminal Offenses and Penalties" where Congress placed the criminal forfeiture statute.⁹²

Finding that Congress intended a civil label for section 881 forfeitures, the second part of the *Ward* analysis requires application of the *Mendoza-Martinez* factors.⁹³ A public housing leasehold forfeiture involves an affirmative disability or restraint—the first of the *Mendoza-Martinez* factors—because law enforcement officials physically and indefinitely bar the public housing tenant from the rental unit.⁹⁴ The typical factual setting in which public housing leasehold forfeitures occur involves physically removing the tenant from the unit by law enforcement officials, ordering the tenant not to return to the rental unit, and changing the locks on the unit to prevent reentry.⁹⁵ The seizure and forfeiture of public housing involves an affirmative disability or restraint analogous to the carrying out of a criminal search warrant, except that under the Forfeiture Project the tenant is indefinitely barred from returning to the unit.

Application of the second *Mendoza-Martinez* factor, whether the sanction historically has been considered a punishment, reveals little because the civil forfeiture of intangible interests, let alone public housing leasehold interests, was unknown to the common law.⁹⁶

Application of the third *Mendoza-Martinez* factor reveals that section 881 requires a finding of scienter. Knowledge of the illegal drug transactions

92. *Id.* Compare 21 U.S.C. § 881 (1988) (placing civil forfeiture statute in part of Title 21 labeled "Administrative and Enforcement Provisions") with 21 U.S.C. § 853 (1988) (placing criminal forfeiture statute in part of Title 21 labeled "Criminal Offenses and Penalties").

93. See *supra* notes 74-84 and accompanying text (setting out two-prong *Ward* test).

94. See *United States v. Leasehold Interest in Property Located at 850 S. Maple*, 743 F. Supp. 505, 506-07 (E.D. Mich. 1990) (describing seizure of public housing tenant's leasehold under § 881 forfeiture proceeding). In *850 South Maple*, the United States District Court for the Eastern District of Michigan faced one of the first instances of HUD's use of § 881 to evict suspected drug dealers from public housing. *Id.* at 506. Before reaching its holding that the public housing leaseholder is entitled to pre-seizure notice and hearing in a § 881 forfeiture proceeding, the *Maple* court noted the circumstances under which the government seized the tenant's leasehold interest. *Id.* at 506-07, 509-11. United States marshals and a local police SWAT team descended upon the apartment in which the claimant, Charlotte Juide, and her two children lived. *Id.* at 506. Law enforcement officials awakened Juide and her children at gun point and gave them less than fifteen minutes to gather some personal belongings before the marshals physically removed them from their apartment. *Id.* at 507. Law enforcement officials then changed the locks, boarded up the windows, and ordered the Juides not to return to the apartment. Oppat, *supra* note 1; Gearhart, *supra* note 1. See also ABA RECOMMENDATION, *supra* note 1, at 1 (describing typical public housing leasehold seizure using § 881).

95. See *850 South Maple*, 743 F. Supp. at 506-07 (describing government's seizure of public housing leasehold interest using § 881); ABA RECOMMENDATION, *supra* note 1, at 1 (same).

96. See SMITH, *supra* note 22, § 11.03 (noting that traditional *in rem* forfeiture involved Crown's receipt of valuable tangible property interests that Crown could use for public good); *supra* notes 17-27 and accompanying text (examining historical development of *in rem* forfeiture).

is an element of the crime of drug trafficking.⁹⁷ Even though section 881 does not require the government to prove the mental state of the claimant, the claimant may assert an innocent owner defense by proving lack of knowledge or consent.⁹⁸

Under the fourth *Mendoza-Martinez* factor, section 881 promotes traditional aims of punishment—retribution and deterrence. The legislative history accompanying the 1984 amendments to the Comprehensive Drug Abuse Prevention and Control Act suggests that Congress intended to enhance the use of both civil and criminal forfeitures as a means of combatting the increase in drug trafficking.⁹⁹ Congress passed the 1984 amendments to eliminate the procedural provisions and ambiguities of the 1970 criminal and civil forfeiture statutes that had plagued the effective use of forfeiture by law enforcement officials.¹⁰⁰ Congress stated that the traditional criminal sanctions of fine and imprisonment were inadequate to deter or punish the growing drug trade.¹⁰¹ With the passage of the 1984 amendments, Congress believed that the revitalized forfeiture provisions would prove more effective in combatting drug trafficking by attacking the economic base of the crimes.¹⁰² When Congress turned its attention specifically to the 1984 amendment providing for the forfeiture of real property, it noted that the previous failure to provide for such forfeiture eliminated

97. 21 U.S.C. § 841(a)(1) (1988). The pertinent part of § 841 reads:

§841. Prohibited Acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person *knowingly or intentionally*—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Id. (emphasis added).

98. 21 U.S.C. § 881(a)(7) (1988). *See supra* note 46 (examining elements and development of innocent owner defense).

99. S. REP. NO. 225, *supra* note 33, at 3374. Congress alluded to a 1981 report released by the General Accounting Office to support its contentions that since the enactment in 1970 of the Racketeer Influenced and Corrupt Organizations Statute (RICO) and the Comprehensive Drug Abuse Prevention and Control Act, the forfeiture statutes had fallen far below Congress' expectations that these statutes would take the profit out of crime. *Id.*

100. *Id.* at 3375.

101. *Id.* at 3374.

102. *Id.* Congress realized the importance of attacking the economic power bases of criminals through forfeiture, stating that:

More than ten years ago, the Congress recognized in its enactment of statutes specifically addressing organized crime and illegal drugs that the conviction of individual racketeers and drug dealers would be of only limited effectiveness if the economic power bases of criminal organizations or enterprises were left intact, and so included forfeiture authority designed to strip these offenders and organizations of their economic power.

Id. (citation omitted).

a significant deterrent to using real property to facilitate drug transactions.¹⁰³ Furthermore, local Public Housing Agencies (PHAs) already had the power to evict tenants engaging in drug-related criminal activity in public housing units,¹⁰⁴ giving further credence to the view that the main purpose of the additional civil forfeiture provision in section 881 was to deter and punish. Finally, Congress did not appear to have adequately contemplated that public housing leasehold interests were subject to forfeiture, because public housing leasehold interests are not the kind of economic power bases that a remedial civil statute would need to address.¹⁰⁵ In fact, the amendments to the criminal forfeiture statute, which Congress passed concurrently with the 1988 amendments to the civil forfeiture statute permitting the forfeiture of leasehold interests, specifically excluded public housing from the list of federal benefits otherwise forfeitable.¹⁰⁶

Applying the fifth *Mendoza-Martinez* factor, the underlying behavior that section 881 addresses is already punishable as a crime.¹⁰⁷ For a section 881 forfeiture to take effect, the government must have probable cause to believe that the tenant's public housing leasehold is connected to some underlying drug offense¹⁰⁸ included within the drug-related criminal activities listed in 21 U.S.C. section 841.¹⁰⁹ The same criminal activity can trigger the

103. *Id.* at 3378. Noting the irony of not having provided a real property forfeiture provision in the Comprehensive Drug Abuse Prevention and Control Act of 1970, the legislative history of the 1984 amendments states that:

The extent of drug-related property subject to civil forfeiture under 21 U.S.C. 881 is also too limited in one respect. Under current law, if a person uses a boat or car to transport narcotics or uses equipment to manufacture dangerous drugs, his use of the property renders it subject to civil forfeiture. But if he uses a secluded barn to store tons of marihuana or uses his house as a manufacturing laboratory for amphetamines, there is no provision to subject his real property to civil forfeiture, even though its use was indispensable to the commission of a major drug offense and the prospect of the forfeiture would have been a powerful deterrent.

Id. (emphasis added).

104. 24 C.F.R. § 966.4(f)(12) (1991); 42 U.S.C. § 1437d(l)(5) (1988), as amended by Act of Nov. 29, 1990, 42 U.S.C.A. § 1437d(l)(5) (1991). See *infra* notes 111-12 and accompanying text (examining language of statutes, HUD regulations, and Public Housing Agency (PHA) leases granting local PHAs power to evict tenants engaging in drug-related criminal activity).

105. See S. REP. NO. 225, *supra* note 102, at 3374 (noting Congress' realization that forfeiture statutes must attack economic power bases of criminals in order to be effective). A public housing leasehold appears different in nature from the other kinds of property subject to forfeiture under § 881(a). See *supra* note 9 (listing property subject to § 881 forfeiture). Section 881 generally subjects to forfeiture economic power bases used in furtherance of drug trafficking like controlled substances, drug manufacturing equipment, airplanes, boats, automobiles, money, and guns. 21 U.S.C. § 881(a) (1988).

106. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 5301, 102 Stat. 4310 (codified at 21 U.S.C. § 853a (1988), as amended by Act of Nov. 29, 1990, 21 U.S.C.A. § 862 (1991)). See *infra* notes 140-57 and accompanying text (providing relevant text of § 853a and constitutional considerations that may have motivated congressional passage of § 853a).

107. 21 U.S.C. § 841(a)(1) (1988); see *supra* note 97 (setting out language of § 841(a)(1)).

108. 21 U.S.C. § 881(b) (1988); see *supra* notes 37-50 and accompanying text (examining § 881 civil forfeiture procedure).

109. 21 U.S.C. § 841(a)(1) (1988); see *supra* note 97 (setting out language of § 841).

criminal forfeiture provisions but only after a conviction for the drug offense.¹¹⁰ Additionally, HUD regulations¹¹¹ and local PHA leases permit evictions for similar underlying drug activity.¹¹²

Applying the sixth *Mendoza-Martinez* factor, section 881 serves no rational alternative purpose. Although the courts have, on occasion, assigned a remedial purpose to the civil forfeiture statute because it inhibits the drug trade by taking property used to facilitate drug trafficking,¹¹³ this rationale fails when applied to public housing leasehold forfeitures. Public housing leasehold interests are not the kind of economic power bases that a remedial civil statute would need to address.¹¹⁴ In addition, existing HUD regulations and PHA leases secure the same result—getting drug dealers out of public housing.¹¹⁵

Finally, applying the seventh *Mendoza-Martinez* factor, section 881 is excessive if its main purpose is remedial. The final factor in the *Mendoza-Martinez* test involves an inquiry into whether the punitive nature of the statute is so overbroad that other, less drastic means can achieve the alternative purpose of the statute.¹¹⁶ Section 881 public housing leasehold

110. 21 U.S.C. § 853(a) (1988); see *supra* notes 29-32 and accompanying text (examining rationale of criminal forfeiture).

111. 24 C.F.R. § 966.4(f)(12) (1991). Public Housing Agencies can evict drug dealers for violation of the tenant obligation to "refrain from illegal or other activity which impairs the physical or social environment of the project." *Id.*

112. 42 U.S.C. § 1437d(h)(5) (1988), as amended by Act of Nov. 29, 1990, 42 U.S.C.A. § 1437d(h)(5) (1991). Section 1437d(h)(5) states that:

Each public housing agency shall utilize leases which—

...

(5) provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or near such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy[.]

Id. "Drug-related criminal activity" is defined as the "illegal manufacture, sale, distribution, use, or possession with intent to manufacture, sell, distribute, or use, of a controlled substance." *Id.* See Note, *Drug-Related Evictions*, *supra* note 7, at 165-66 (examining congressional response to drug problem in public housing and changes brought about by Anti-Drug-Abuse Act of 1988).

113. See *supra* notes 85-88 and accompanying text (examining cases holding that § 881 has non-punitive purposes).

114. See *supra* note 105 and accompanying text (noting that Congress probably did not adequately contemplate that public housing leasehold interest would qualify as economic power base).

115. See *supra* notes 111-12 and accompanying text (setting out HUD regulation and Public Housing Agency lease provision permitting eviction of tenants engaged in drug-related criminal activity).

116. See Darmstadter & Mackoff, *supra* note 80, at 49-52 (applying *Mendoza-Martinez* factors to § 881 forfeitures generally). Darmstadter & Mackoff applied the *Mendoza-Martinez* factors to civil forfeitures in general and concluded that § 881 satisfied more factors than courts admitted. *Id.* at 50. First, they found that § 881 involved an affirmative disability or restraint, because the forfeiture stripped an individual of his property without compensation. *Id.* Second, Darmstadter & Mackoff noted that the incidental benefits that society receives

forfeitures are excessive,¹¹⁷ and Congress should achieve the remedial purpose of the statute by a less punitive means. If the alternative purpose of the statute is to inhibit drug trafficking through forfeiture of property and economic power bases used to facilitate the drug trade,¹¹⁸ section 881 is excessive when applied to public housing leasehold forfeitures. First, a public housing leasehold is different in nature from other economic power bases used in furtherance of the drug trade like automobiles, airplanes, boats, money, guns, or drug manufacturing equipment.¹¹⁹ Second, the forfeiture of an individual's housing of last resort founded upon mere suspicion of drug dealing is unduly punitive.¹²⁰

The application of the *Mendoza-Martinez* factors presents clear and convincing evidence that, although labeled civil, section 881 forfeitures of public housing leasehold interests are criminal in nature. Consequently, the procedural protections available in the civil forfeiture context are inadequate when used to deprive persons of these property interests. Only the full range of rights guaranteed by the double jeopardy and self-incrimination clauses of the Fifth Amendment and the criminal trial protections of the Sixth Amendment sufficiently safeguard the interests at stake in the civil forfeiture of public housing leaseholds.

III. EIGHTH AMENDMENT ISSUES

The Eighth Amendment is applicable to public housing leasehold forfeitures regardless of whether section 881 is characterized as civil or criminal in nature.¹²¹ If the statute is criminal in nature, courts may scrutinize section 881 under the cruel and unusual punishments clause of the Eighth Amendment.¹²² Conversely, if the statute is civil, courts may scrutinize section 881 under the excessive fines clause of the Eighth Amendment.¹²³

from § 881's impeding drug distribution are forms of general deterrence, another traditional aim of criminal punishment. *Id.* Third, Darmstadter & Mackoff stated, behavior which triggers § 881 forfeiture is already classified as criminal. *Id.* See also Note, *Civil Forfeiture of Real Property: The Government's Weapon Against Drug Traffickers Injures Innocent Owners*, 10 PACE L. REV. 485, 516-17 (1990) (authored by Patricia M. Canavan) (applying *Mendoza-Martinez* factors to innocent owners of property seized under § 881).

117. See *infra* notes 121-67 and accompanying text (arguing that § 881 public housing leasehold forfeitures violate Eighth Amendment).

118. See *supra* note 102 and accompanying text (noting congressional desire to use forfeiture statutes to attack economic power bases of criminals).

119. See *supra* note 105 and accompanying text (arguing that public housing leasehold interest is different from other kinds of property subject to § 881 forfeiture).

120. See *infra* notes 121-67 and accompanying text (examining Eighth Amendment issues raised by § 881 forfeiture of public housing leasehold interests).

121. The Eighth Amendment to the United States Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

122. See *infra* notes 136-57 and accompanying text (arguing that § 881 forfeiture violates cruel and unusual punishments clause of Eighth Amendment).

123. See *infra* notes 158-67 and accompanying text (arguing that § 881 violates excessive fines clause of Eighth Amendment).

The Supreme Court attempted to define the scope of the Eighth Amendment's cruel and unusual punishments clause in *Rummel v. Estelle*.¹²⁴ Upon a third felony conviction for obtaining money by false pretenses, the defendant Rummel, previously convicted of two prior nonviolent felonies, was given a mandatory life sentence with the possibility of parole under Texas' recidivist statute.¹²⁵ Rummel claimed that a life sentence was grossly disproportionate to his three convictions for nonviolent felonies and that the sentence therefore violated his rights under the Eighth Amendment's cruel and unusual punishments clause.¹²⁶ Affirming Rummel's sentence, the Court emphasized the unique nature of capital punishment, the context in which the most recent successful proportionality challenges had arisen.¹²⁷ The Court stated that the death penalty is different in kind from all other forms of criminal punishment, because the death penalty is unique in its rejection of the rehabilitation of the convict and its absolute renunciation of all concepts of humanity.¹²⁸ Secondly, the Court noted the case of *Weems v. United States*,¹²⁹ which constituted one of the rare occasions that proportionality review had succeeded in the non-capital case context.¹³⁰ As in the capital case proportionality challenges, the Court focused on the unique nature of Weems' punishment.¹³¹ Convicted of falsifying a public document, Weems' punishment was *cadena temporal*—harsh physical labor while in chains for a minimum of twelve years and one day.¹³² The Court distinguished between Eighth Amendment challenges based upon the nature of the punishment and challenges that focused on the duration of the punishment.¹³³ The Court found that the length of a sentence is completely within

124. 445 U.S. 263 (1980).

125. *Rummel v. Estelle*, 445 U.S. 263, 264-66 (1980).

126. *Id.* at 264-65.

127. *Id.* at 272.

128. *Id.* (quoting *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring)).

129. 217 U.S. 349 (1910).

130. *Rummel v. Estelle*, 445 U.S. 263, 272 (1980).

131. *Id.* at 274.

132. *Id.* at 273. The *Weems* Court vividly depicts the punishment of *cadena temporal*. *Weems v. United States*, 217 U.S. 349, 366 (1910). The Court noted that the minimum degree of the confinement in a penal institution was twelve years and one day, with the offender chained at the ankle and wrist, subjected to hard and painful labor, without assistance from family or friends, stripped of all marital authority, parental rights, and rights of property, and unable to participate in the family council. *Id.* The *Weems* Court found that even after the prison bars and chains were removed, the offender was still subjected to limitations on his liberty. *Id.* The offender was forever under the supervision of the criminal magistrate—unable to change domicile without giving notice to the magistrate and receiving permission in writing. *Id.*

133. *Rummel*, 445 U.S. at 274-75. See *Hutto v. Davis*, 454 U.S. 370, 373 (1982) (per curiam) (finding that successful Eighth Amendment challenges are based upon mode of punishment instead of length of sentence). Two years after *Rummel*, the *Hutto* Court upheld a 40-year sentence for the crime of possessing less than nine ounces of marijuana. *Id.* at 371-72. The Court said that in *Rummel* "we distinguished between punishments—such as the death penalty—which by their very nature differ from all other forms of conventionally accepted punishment, and punishments which differ from others only in duration." *Id.* at 373.

the legislative realm and that Eighth Amendment decisions should not appear to rest on the subjective views of the individual Justices.¹³⁴ However, the Court stated, more objective decision-making is possible when courts concentrate only on the nature of a punishment which is final and irreversible or unique when compared with traditional forms of imprisonment.¹³⁵

Public housing leasehold forfeitures provide courts with the necessary bright line objectivity that results when comparing highly unusual punishments different in nature from more traditional penalties.¹³⁶ When courts analyze Eighth Amendment challenges to section 881 public housing leasehold forfeitures, no subjective distinctions among individual decision-makers

134. *Rummel*, 445 U.S. at 274. The *Rummel* Court said that "for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative." *Id.* The Court did note, however, that a proportionality review would be appropriate in the extreme case if, for example, the legislature imposed a life sentence for overtime parking. *Id.* n.11. *But cf.* *Solem v. Helm*, 463 U.S. 277, 290 (1983) (holding that courts can review proportionality of sentence length to severity of crime committed); *see infra* note 148 (discussing *Solem v. Helm*).

135. *Rummel*, 445 U.S. at 275. After discussing *Coker v. Georgia*, 433 U.S. 584 (1977), where the Court struck down the death penalty as a cruel and unusual punishment for the crime of rape, the *Rummel* Court said that it was less difficult to distinguish between the death penalty and various other punishments short of the ultimate sanction; whereas, any constitutional distinction between lengths of sentences was hopelessly subjective. *Id.*

136. The Supreme Court's recent decision in *Harmelin v. Michigan*, 111 S. Ct. 2680 (1991), does nothing to weaken the principle that the cruel and unusual punishments clause of the Eighth Amendment prohibits certain methods of punishment. *Id.* at 2693 (Scalia, J., concurring). In *Harmelin*, the defendant Harmelin appealed his mandatory term of life in prison without possibility of parole for his conviction of possessing more than 650 grams of cocaine. *Id.* at 2684. Harmelin claimed that his sentence was unconstitutional under the Eighth Amendment because it was significantly disproportionate to the crime he committed and because it was imposed without taking into account the particularized circumstances of the crime and the criminal. *Id.* In the portion of Justice Scalia's opinion joined by a majority, the Court first held that, although severe, mandatory penalties are not unusual in a constitutional sense because they have been used throughout the Nation's history. *Id.* at 2701. Secondly, the Court held that simply because capital sentences require an individualized determination that the death penalty is an appropriate punishment does not justify extending the individualized capital-sentencing doctrine to sentences of mandatory life in prison without parole. *Id.* at 2701-02. The Court based its decision on earlier cases holding that individualized sentencing determinations are necessary in capital cases because the penalty of death is qualitatively different from all other forms of criminal punishment. *Id.* at 2702.

In the portion of his opinion joined only by Chief Justice Rehnquist, Scalia noted that the cruel and unusual punishments clause "disables the Legislature from authorizing particular forms or 'modes' of punishment—specifically, cruel methods of punishment that are not regularly or customarily employed." *Id.* at 2691. Scalia stated that a punishment does not violate the Eighth Amendment unless it is both severe and outside the bounds of Anglo-American common law tradition. *Id.* at 2699. Finally, Scalia stated that the Eighth Amendment contains no proportionality principle and concluded that *Solem v. Helm* was wrongly decided. *Id.* at 2686, 2696-701; *see supra* note 148 (discussing *Solem v. Helm*). Although the other three members of the majority did not join this portion of Scalia's opinion, they disagreed mainly with his overruling *Solem v. Helm* and the proportionality principle of the Eighth Amendment, not with his statement that the Eighth Amendment makes distinctions based upon the type of punishment imposed. *Harmelin*, 111 S. Ct. at 2702, 2704-05.

are possible, as the *Rummel* Court feared, because the forfeiture of a public housing leasehold interest, by its very nature, does not involve any comparison between lengths of terms of imprisonment. Secondly, because the forfeiture of a person's housing of last resort is, in effect, a sentence of homelessness,¹³⁷ a public housing leasehold forfeiture is unique in its rejection of rehabilitation and its absolute renunciation of all that is embodied in the concept of humanity.¹³⁸ Finally, the civil forfeiture of intangible property interests, like public housing leasehold interests, was unknown to Anglo-American common law tradition.¹³⁹

These Eighth Amendment constitutional concerns may have influenced Congress' passage of section 853a, a separate statute contained within the Anti-Drug Abuse Act of 1988 and applicable only to the sentencing provisions of section 853 criminal forfeitures.¹⁴⁰ Section 853a exempts from forfeiture federal benefits directly related to the health, survival, and welfare

137. See *United States v. Leasehold Interest in 121 Nostrand Ave.*, 760 F. Supp. 1015, 1032 (E.D.N.Y. 1991) (noting strong likelihood that loss of public housing will result in homelessness); *United States v. Robinson*, 721 F. Supp. 1541, 1544-45 (D.R.I. 1989) (holding that mandatory forfeiture of federal housing assistance payments for drug trafficking conviction violated proportionality principle of Eighth Amendment because it would result in sentence of homelessness). Testifying before Congress about the harsh consequences of evicting tenants from public housing, Henderson & Berrien said: "Public housing residents, by definition, are among the poorest and most vulnerable in our society. The economic characteristics of most public housing residents suggests [sic] that the next stop after eviction for many of these persons will be a homeless shelter, if they are lucky." *Drugs in Federally Assisted Housing*, *supra* note 7, at 79 (statement of Wade Henderson & Jacqueline Berrien, American Civil Liberties Union).

138. See *121 Nostrand Ave.*, 760 F. Supp. at 1032 (noting important role that decent housing plays in maintaining human dignity); see also Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1330 (1991) (noting that legislative declaration must be exclusive determination of whether proceeding is civil or criminal, except for shadow proceedings and cases involving inhumane punishments). Cheh stated that the legislative label is not determinative in shadow proceedings—proceedings that mirror a criminal prosecution in purpose and effect. *Id.* at 1386 n.325. Cheh's description of the other type of case where the legislative label is not dispositive might reasonably include public housing leasehold forfeitures:

[T]he other category of cases that may transcend the civil label is that in which the punishment imposed so dramatically expresses societal disapproval that its imposition only can be legitimated through the ceremony of a criminal conviction. *These punishments are those that actually separate a person from civilized society and label her as not worthy of being a member of the group.* Included in this category of punishments are execution, incarceration, and loss of citizenship, a kind of banishment that represents the ultimate separation from society.

Id. at 1363 (emphasis added).

139. See SMITH, *supra* note 22, § 11.03 (noting that historically *in rem* forfeiture involved Crown's seizure of valuable, tangible property interests capable of use for public good); *supra* notes 17-27 (examining historical development of *in rem* forfeiture).

140. 21 U.S.C. § 853a (1988), as amended by Act of Nov. 29, 1990, 21 U.S.C.A. § 862 (1991)).

of the recipient.¹⁴¹ Public housing is specifically excluded from forfeiture as a penalty for a drug offense.¹⁴² *United States v. Robinson*¹⁴³ supports the contention that Congress was aware of the potential problems raised by the Eighth Amendment ban on cruel and unusual punishments.¹⁴⁴ In *Robinson*, the government petitioned the court for the forfeiture of Robinson's lease, following her conviction for the knowing and intentional distribution of a controlled substance.¹⁴⁵ The government brought the forfeiture order under the criminal forfeiture provisions of 21 U.S.C. section 853.¹⁴⁶ Although the United States District Court for the District of Rhode Island based its holding on the restrictive language of section 853a that banned the forfeiture of essential federal benefits,¹⁴⁷ the *Robinson* court also noted that the mandatory forfeiture of the federal assistance payment because of Robinson's drug felony conviction violated the Eighth Amendment's proportionality principle.¹⁴⁸ First, the district court noted that although the criminal

141. *Id.* Section 853a states in pertinent part:

(a) Drug traffickers

(1) Any individual who is convicted of any Federal or State offense consisting of the distribution of controlled substances shall—

(A) at the discretion of the court, upon the first conviction for such an offense be ineligible for any or all Federal benefits for up to 5 years after such conviction. . . .

(d) Definitions. As used in this section—

(1) the term "Federal benefit"—

(A) means the issuance of any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States; and

(B) *does not include* any retirement, welfare, Social Security, health, disability, veterans benefit, *public housing*, or other similar benefit for which payments or services are required for eligibility[.]

Id. (emphasis added). There are no similar provisions for exempting federal benefits relating to the health and welfare of the recipient from being subject to § 881 forfeiture.

142. 21 U.S.C. § 853a(d)(1)(B) (1988).

143. 721 F. Supp. 1541 (D.R.I. 1989).

144. *United States v. Robinson*, 721 F. Supp. 1541, 1543 (D.R.I. 1989).

145. *Id.* at 1542.

146. *Id.*

147. *Id.* at 1545-46.

148. *Id.* at 1543-45. See *Solem v. Helm*, 463 U.S. 277 (1983) (providing Court's analysis for reviewing Eighth Amendment proportionality challenges). In *Solem v. Helm*, the Court addressed the question of when the length of a punishment is so disproportionate to the offense committed that it violates the cruel and unusual punishments clause of the Eighth Amendment. *Id.* at 284. In *Solem v. Helm*, defendant Helm was convicted for writing a no-account check. *Id.* at 281. Helm was sentenced to life imprisonment without possibility of parole because his six prior nonviolent felonies subjected him to South Dakota's recidivist statute. *Id.* at 279-81. The Court, by a five-to-four majority, held that Helm's life sentence violated the Eighth Amendment's prohibition on cruel and unusual punishments. *Id.* at 303. The Court stated that the Eighth Amendment forbids not only barbaric punishments but also sentences disproportionate to the severity of the crime. *Id.* at 284. The Court noted that a proportionality review should be based on objective criteria, including: (1) the gravity of the offense and the harshness of the punishment; (2) the sentences imposed on criminals convicted of different crimes in the same jurisdiction; and (3) the sentences imposed on criminals

forfeiture statute made the forfeiture of Robinson's property mandatory, the court had a constitutional duty to ensure that the statute did not inflict excessive punishment.¹⁴⁹ The *Robinson* court then focused on the first of the objective criteria of the Supreme Court's Eighth Amendment proportionality analysis—the harshness of the penalty in comparison to the gravity of the offense.¹⁵⁰ The *Robinson* court examined the circumstances surrounding Robinson's criminal conduct and found compelling the fact that she had not stored any drugs in her apartment, solicited the undercover agent to buy drugs, sold a large quantity of drugs, or sold drugs on any other occasion.¹⁵¹ The district court recognized that the forfeiture of Robinson's apartment and the federal housing assistance payments which subsidized it would take from Robinson her only means of obtaining housing for herself and her family.¹⁵² The district court stated that such a forfeiture was fundamentally different in nature from other forfeitures, because an order of forfeiture in this case would amount to a sentence of homelessness for Robinson and her three young children.¹⁵³

The same Eighth Amendment concerns which may have prompted the passage of section 853a present compelling reasons for finding section 881 public housing leasehold forfeitures inherently unconstitutional. First, the failure of Congress to provide public housing under section 881 the same protections it provided public housing under the criminal forfeiture statute of section 853 leads to incomprehensible results. Under the civil forfeiture statute, the government may seize the public housing leasehold of a person merely suspected of drug trafficking¹⁵⁴ while the government cannot subject the same property interest to criminal forfeiture after a person is actually

convicted of the same offense in other jurisdictions. *Id.* at 292. *But see* Harmelin v. Michigan, 111 S. Ct. 2680, 2686, 2696-701 (1991) (Scalia, J., concurring) (concluding that Eighth Amendment contains no proportionality principle and that *Solem v. Helm* was wrongly decided); Rummel v. Estelle, 445 U.S. 263, 274 (1980) (holding that courts should rarely review legislatively mandated terms of imprisonment); Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence* 40 HASTINGS L.J. 457, 479 n.98 (1989) (comparing Supreme Court's *Rummel* and *Helm* opinions). Sundby noted that:

The courts have been extremely reluctant to reverse sentences as disproportionate and generally have read *Helm* as limited to the unique case in which life imprisonment without parole has been imposed for nonviolent offenses. . . .

The courts' narrow readings are in part a result of the *Helm* majority's attempt to reconcile its holding with *Rummel* on the grounds that *Rummel* was factually distinguishable. . . . The major factual distinction was that *Rummel* was eligible for parole, while *Helm*'s life sentence did not have a possibility of parole.

Id. (citations omitted). *See also supra* notes 124-35 and accompanying text (discussing *Rummel* opinion); *supra* note 136 (discussing *Harmelin* opinion).

149. United States v. Robinson, 721 F. Supp. 1541, 1543 (D.R.I. 1989).

150. *Id.*; *see supra* note 148 (examining *Solem v. Helm* opinion and development of Court's Eighth Amendment proportionality analysis).

151. *Robinson*, 721 F. Supp. at 1544.

152. *Id.*

153. *Id.*

154. *See supra* notes 37-50 and accompanying text (setting out procedures by which government may subject property to forfeiture under § 881).

convicted of a drug trafficking offense in a prior criminal proceeding.¹⁵⁵ Second, an examination of the harshness of the penalty in light of the gravity of the offense leads to the comparison of a sentence of homelessness for the offense of suspected drug trafficking. Third, because the civil forfeiture statute is arguably criminal in nature as applied to public housing leasehold interests,¹⁵⁶ courts can no longer hide behind the legal fiction that an *in rem* forfeiture affects the guilty property and not the owner. By emphasizing the fact that public housing is usually housing of last resort and fundamentally different from other types of forfeitures, courts should presume that such forfeitures are constitutionally prohibited under the *Rummel* analysis of the Eighth Amendment.¹⁵⁷

The Eighth Amendment's excessive fines clause can also be used to challenge forfeitures in the civil context, because a fine can include a forfeiture.¹⁵⁸ The Supreme Court's reasoning in *Browning-Ferris Industries v. Kelco Disposal, Inc.*¹⁵⁹ suggests that the excessive fines clause of the Eighth Amendment is applicable in a civil proceeding when the government initiates the action.¹⁶⁰ After examining the history leading up to the adoption

155. See *supra* notes 140-42 and accompanying text (setting out limits § 853a places upon criminal forfeiture).

156. See *supra* notes 90-120 and accompanying text (arguing that forfeiture of public housing leasehold interests under § 881 is criminal in nature).

157. For other cases expressing Eighth Amendment concerns in § 881 civil forfeiture proceedings, see *United States v. One Parcel of Real Estate Commonly Known as 916 Douglas Avenue*, 903 F.2d 490 (7th Cir. 1990) (holding that forfeiture of apartment building where high-volume drug trafficking occurs is permissible; however, some situations might raise Eighth Amendment concerns because of § 881(a)(7)'s expansive language), *cert. denied, sub nom. Born v. United States*, 111 S. Ct. 1090 (1991); *United States v. Schifferli*, 895 F.2d 987 (4th Cir. 1990) (permitting forfeiture of dentist's office where several illegal prescriptions were written); *United States v. Premises & Real Property Located at 4492 S. Livonia Road*, 889 F.2d 1258, 1270 (2d Cir. 1989) (holding that government must provide pre-seizure notice and hearing before forfeiture of real property including defendant's home may take place), *reh'g denied*, 897 F.2d 659 (2d Cir. 1990). See also Note, *Narrowing Civil Drug Forfeiture*, *supra* note 66, at 191-96 (examining Eighth Amendment concerns raised by § 881 civil forfeiture); Note, *Fear and Loathing*, *supra* note 27, at 1175-78 (same); Note, *Shouldn't the Punishment Fit the Crime?*, 55 BROOKLYN L. REV. 417, 446-49 (1989) (authored by James M. Strauss) (examining Eighth Amendment implications of forfeiture of expensive automobile found to contain small quantity of marijuana).

158. BLACK'S LAW DICTIONARY 632 (6th ed. 1990). Black's defines the term "fine" as "[a] pecuniary punishment or penalty imposed by lawful tribunal upon person convicted of crime or misdemeanor. . . . It may include a forfeiture or penalty recoverable in a civil action[.]" *Id.* (citation omitted, emphasis added).

159. 492 U.S. 257 (1989).

160. *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 263-64 (1989). In *Browning-Ferris Industries*, the Supreme Court addressed the question of whether the excessive fines clause of the Eighth Amendment can limit the amount of punitive damages awarded in cases between private parties. *Id.* at 259. A jury awarded \$6 million in punitive damages to the plaintiff for the defendant's violations of tort and antitrust laws. *Id.* Refusing to hold that the excessive fines clause of the Eighth Amendment applied only to criminal cases, the Court did hold that the clause does not restrict an award of money damages in a civil suit when the government neither prosecutes the action nor possesses any right to receive a share

of the Eighth Amendment, the Court concluded that the main purpose of the Eighth Amendment is to place restrictions upon the government's prosecutorial power, thereby preventing the abuse of that power.¹⁶¹ No comparable concerns over governmental abuse of prosecutorial power arise when two private parties are engaged in a civil suit, the Court said.¹⁶² Although the Court refused to develop any standards to determine if government-imposed fines are constitutionally excessive, the Court did intimate that its ruling in *United States v. Halper*¹⁶³ addresses analogous Eighth Amendment concerns,¹⁶⁴ and therefore may prove helpful in an excessive fines analysis. The *Halper* Court held that the double jeopardy clause prevents the government from criminally prosecuting a person and then bringing a separate civil action for the same conduct when the fine imposed bears no rational relationship to the remedial objective of reimbursing the government for its costs in pursuing the action.¹⁶⁵ A recent United States District Court ruling used the *Halper* standard of excessiveness, despite rejecting the claimant's double jeopardy challenge, and held that when a civil forfeiture is unreasonable and unrelated to the damages suffered by the government, courts should not enforce the sanction.¹⁶⁶ Public housing

of the damage award. *Id.* at 263-64. But cf. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons From History*, 40 VAND. L. REV. 1233 (1987) (arguing that excessive fines clause of Eighth Amendment is applicable to suits between private parties); Note, *The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment*, 85 MICH. L. REV. 1699 (1987) (authored by Andrew M. Kenefick) (same).

161. *Browning-Ferris Indus.*, 492 U.S. at 266-67.

162. *Id.* at 272. The *Browning-Ferris Industries* Court noted the inconsistency of applying the Eighth Amendment excessive fines clause to private civil litigation because fear of governmental abuse of power is inappropriate in a case where a private party receives exemplary damages from another private party, and the government receives no portion of the damage award. *Id.* The Court cited *United States v. Halper* for comparison of another limitation on the government's prosecutorial power—the double jeopardy clause of the Fifth Amendment. *Id.* at 272, 275 n.21. In *Halper*, the Court faced the question of whether a civil sanction imposed by the government may be so oppressive and removed from the remedial purpose of the sanction that it amounts to punishment under double jeopardy analysis. *United States v. Halper*, 490 U.S. 435, 443 (1989). The defendant in *Halper* was convicted of 65 violations of the criminal False Claims Act, sentenced to two years' imprisonment, and fined \$5,000. *Id.* at 437. The government then instituted a civil action, seeking the statutorily mandated amount of \$2,000 for each violation—totaling \$130,000 for Halper's 65 violations of the statute. *Id.* at 438. Halper's overcharges on the fraudulent Medicare claims he submitted amounted to only \$585, and the government's investigatory and prosecutory expenses were only \$16,000. *Id.* at 437-38. The Court held that a civil sanction constitutes a punishment, for purposes of the double jeopardy clause of the Fifth Amendment, when it serves the aims of punishment—retribution or deterrence—instead of an acceptable remedial goal of reimbursing the government for its financial loss. *Id.* at 448-49.

163. 490 U.S. 435 (1989); see *supra* note 162 (examining *Halper* opinion).

164. *Browning-Ferris Indus.*, 492 U.S. at 275 n.21.

165. *United States v. Halper*, 490 U.S. 435, 451 (1989); see *supra* note 162 (examining *Halper* opinion).

166. *United States v. Certain Real Property & Premises Known As 38 Whalers Cove Dr.*, 747 F. Supp. 173, 178-81 (E.D.N.Y. 1990). In *Whalers Cove*, the United States District Court for the Eastern District of New York considered an Eighth Amendment excessive fines challenge

leasehold forfeitures present close questions under the excessive fines clause of the Eighth Amendment. Although the monetary value of a public housing leasehold may not be exorbitant, the indirect costs are incalculable to the tenant who is rendered homeless. Conversely, the one-time sale of even a small amount of drugs exacts a high price from the government and from society because of the costs of developing and maintaining enforcement programs to deal with the problems caused by drug abuse.¹⁶⁷ To avoid deciding the question of excessiveness on a case-by-case basis and rendering individuals homeless, courts should hold section 881 forfeitures of public housing leasehold interests per se unconstitutional under the Eighth Amendment's excessive fines clause.

IV. CONCEPTUAL ISSUES

Property traditionally subjected to *in rem* forfeiture had to meet two conditions: (1) the property had to be a tangible object tainted by its participation in a wrongful act; and (2) the seizure of the property had to result in the receipt of something of value by the Crown capable of use for the public good.¹⁶⁸ Consequently, the civil forfeiture of intangible property interests was unknown to the common law because intangible property interests did not meet either of the necessary conditions. Similarly, a public housing leasehold interest fails to meet the conditions of property historically subject to forfeiture because a public housing leasehold interest is an

to the government's seizure of claimant's \$70,000 condominium under § 881(a)(7). *Id.* at 174. The district court attempted to resolve the question of whether the forfeiture was punitive by using the *Halper* standard of excessiveness, despite the fact that the district court had rejected the claimant's double jeopardy challenge. *Id.* at 176-81. After noting that the Eighth Amendment and the due process clause of the Fifth Amendment safeguard similar interests—protecting the individual from arbitrary governmental activity—the *Whalers Cove* court said that if a civil forfeiture does not legitimately achieve proper remedial goals of making the government whole for its costs, the forfeiture is unconstitutional because retribution and deterrence are permissible aims only in a criminal proceeding. *Id.* at 179. Forfeitures are inherently suspect, the district court said, because the value of the forfeited property is not inevitably related to the harmful use to which it is put. *Id.* at 181. The district court concluded that although the claimant used his condominium to sell only a small quantity of drugs, the collateral consequences of his activity were enormous because of the governmental expense of maintaining federal enforcement programs to deal with the drug problem. *Id.* at 180.

Similar to the *Whalers Cove* finding that courts should not limit *Halper* to its double jeopardy setting, one commentator suggested extending the excessive fines clause of the Eighth Amendment to government-imposed civil fines regardless of whether the government seeks the imposition of the fine in a single proceeding or in multiple proceedings: "Courts would not, as *Halper* suggested, be free to impose any civil fines that are punitive simply because the imposition occurred in a single proceeding. Rather, all civil fines deemed criminal in nature could be analyzed under the excessive fines clause." Note, *United States v. Halper, Punitive Civil Fines, and the Double Jeopardy and Excessive Fines Clauses*, 66 N.Y.U. L. REV. 112, 146 (1991) (authored by Elizabeth S. Jahncke).

167. See *supra* note 166 (discussing *Whalers Cove* finding that drug abuse imposes tremendous cost on government and society).

168. See SMITH, *supra* note 22, § 11.03 (examining historical development of *in rem* forfeiture); *supra* notes 17-27 and accompanying text (same).

intangible property interest,¹⁶⁹ having value only for the tenants possessing the leasehold interest.¹⁷⁰ The right to continued tenancy in a public housing unit is a property interest in a benefit created by federal regulations promulgated by HUD, rules adopted by the local PHA, and state law governing contracts and landlord-tenant relationships.¹⁷¹ These various sources

169. Continued tenancy in public housing, an abstract and intangible interest, is a property interest protected by the due process clauses of the Fifth and Fourteenth Amendments. *See Thorpe v. Durham Hous. Auth.*, 393 U.S. 268 (1969) (holding that defendant housing authority must, before evicting tenants, give notice of reasons for eviction and opportunity to reply); *Escalera v. New York City Hous. Auth.*, 425 F.2d 853 (2d Cir.) (holding that government cannot deprive person of continued tenancy in public housing project without providing procedural safeguards), *cert. denied*, 400 U.S. 853 (1970); *Caulder v. Durham Hous. Auth.*, 433 F.2d 998 (4th Cir. 1970) (setting forth types of procedures necessary before public housing authority may evict tenant), *cert. denied*, 401 U.S. 1003 (1971). *See also Board of Regents v. Roth*, 408 U.S. 564 (1972) (defining scope of property interests protected by procedural due process); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding that welfare benefits are matter of statutory entitlement and notice and hearing required before government may terminate benefits).

170. *See United States v. Leasehold Interest in Property Known as 900 E. 40th St.*, 740 F. Supp. 540, 541 n.2 (E.D. Ill. 1990) (questioning rationale behind public housing leasehold forfeitures because extinction of low-income public housing lease provides no tangible benefit to government). In *900 East 40th Street*, the United States District Court for the Eastern District of Illinois, during the course of an *ex parte* probable cause hearing, addressed the federal government's motions for the issuance of a warrant of seizure and for leave to file the case under seal until execution of the warrant. *Id.* at 541. The district court granted both motions but not before voicing its concerns over HUD's use of § 881 in the Forfeiture Project. The district court questioned HUD's bypassing conventional and available remedies for eviction. *Id.* The district court also questioned the rationale behind the forfeitures of leasehold interests, noting that the extinction of a low-income public housing lease provides no tangible benefit to the United States. *Id.* n.2. The district court expressed concern about the possible punitive nature of such forfeitures. *Id.* Finally, the district court was troubled by its potential lack of subject matter jurisdiction, because a tenant's typical short-term occupancy right in a public housing project may not rise to the level of property mentioned within the forfeiture statute. *Id.* at 542. *See also Ex parte Baez*, 177 U.S. 378, 390 (1900) (holding that federal court lacks jurisdiction when there is no subject matter on which judgment of court can operate); *United States v. All Right, Title & Interest in Real Property & Appurtenances Known as 35 Fulling Ave.*, No. 91 Civ. 2569 (CLB), slip op. at 10 (S.D.N.Y. Sept. 18, 1991) (LEXIS, Genfed library, Dist. file) (noting that forfeiture of non-transferable leasehold interest presents courts with illusionary lawsuit because government can obtain no effective judicial relief of any value).

171. *See Board of Regents v. Roth*, 408 U.S. 564, 576-78 (1972) (listing criteria courts can use to determine whether constitutionally-protected property interest exists). In *Roth*, the Supreme Court addressed the issue of whether the refusal of a state university to rehire Roth, an untenured assistant professor, violated Roth's Fourteenth Amendment due process rights. *Id.* at 566-68. The Court held that Roth's rights were not violated, because the Fourteenth Amendment did not protect any property interest Roth may have had in continued employment. *Id.* at 578-79. In order to have a property interest in a benefit, the Court stated, an individual must have a legitimate claim of entitlement to the benefit. *Id.* at 577. The Court found a mere unilateral expectation of a benefit insufficient for establishing a property interest in the benefit. *Id.* The Court held that a person had to rely upon that property interest as necessary to daily survival. *Id.* The Court indicated that the basis for a claim of entitlement to a benefit is usually found not within the Constitution, but rather from an independent source, such as

of law create the legitimate claim and expectation to the entitlement by defining eligibility requirements.¹⁷²

The seizure of a public housing leasehold interest by the government is problematic because a public housing leasehold interest is by definition non-transferable.¹⁷³ Unlike an apartment or house,¹⁷⁴ which has physical substance, a public housing leasehold is an intangible interest that exists only by virtue of the tenant's written lease agreement. It is unclear exactly what benefit the government receives when it seizes a public housing leasehold interest.¹⁷⁵ The government could not occupy the unit or renew the lease

state law or the statute that actually defines eligibility for the benefit. *Id.* See also Reich, *The New Property*, 73 YALE L.J. 733 (1964) (arguing that courts should protect government-created interests such as welfare assistance, licenses, and services in same manner as more traditional forms of property); Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965) (arguing that entitlements of poor are not protected as effectively as other entitlements).

172. See generally 42 U.S.C. §§ 1437-1437j (1988) (setting forth statutory requirements defining eligibility for low-income housing assistance); 24 C.F.R. § 913 (1991) (defining income, income limits, and reexamination of family income for public housing program).

173. A public housing leasehold interest is non-transferable by definition because it is subject to various eligibility requirements. See generally 42 U.S.C. §§ 1437-1437j (1988) (setting forth statutory requirements defining eligibility for low-income housing assistance); 24 C.F.R. § 913 (1991) (defining income, income limits, and reexamination of family income for public housing program). A prospective tenant must be indigent in order to be eligible for a public housing leasehold interest. 24 C.F.R. § 913.103 (1991). Under the terms of the lease, HUD pays a portion of the fair market value of the rent to the owner, the local Public Housing Agency (PHA), after the PHA certifies the tenant's income for HUD. 42 U.S.C. § 1437f (1988); 24 C.F.R. §§ 913.107, 913.109 (1991).

174. If the government elected to seize the actual apartment that comprises a public housing rental unit, instead of the tenant's leasehold interest, the local Public Housing Agency (PHA), as owner of the rental unit, would have to file a claim to protect its interest and prove that it was an innocent owner. See *supra* note 46 and accompanying text (examining § 881(a)(7) innocent owner defense). Some PHAs might arguably have a difficult time proving their lack of knowledge or consent to alleged drug dealing in their rental units.

175. See *supra* note 170 and accompanying text (noting that government receives no tangible benefit when it seizes public housing leasehold interests). For an interesting case which one can use to see the difficulty of the government's position when it attempts to seize leases, see *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). In *Calero-Toledo*, the Supreme Court faced the question of whether the forfeiture of a yacht was unconstitutional because the lessor was innocent of any wrongdoing that initiated the forfeiture. *Id.* at 664-668. The Pearson Yacht Company leased a yacht to two Puerto Rican residents. *Id.* at 665. Government authorities found a single marijuana cigarette aboard the yacht and seized the vessel in accordance with the applicable forfeiture statute. *Id.* at 665-67. The Court examined the history and traditional rationales for civil forfeitures and held that the forfeiture statute in this instance was not unconstitutional simply because it applied to innocent owners. *Id.* at 680-90. The Court stated that the lessor voluntarily transferred possession of the yacht to the lessees and failed to prove that it had taken all reasonable precautions to prevent the yacht from being used for illegal activities. *Id.* at 689-90. In addition, the Court said that the forfeiture statute served legitimate government purposes and was not unduly oppressive. *Id.* One can highlight the conceptual problems that the forfeiture of leases raises using the facts from *Calero-Toledo*. If the government, in *Calero-Toledo*, had seized the lessees' leasehold interest in the yacht instead of the yacht itself, the Pearson Yacht Company would never have

upon its expiration because the government is not eligible for receipt of these benefits under the controlling statutes and regulations.¹⁷⁶ The government would have to pay rent at the full market rate because it is not indigent and not qualified for the HUD rent subsidy.¹⁷⁷ The government's leasehold interest would expire when the lease expires, and the PHA cannot renew the lease because the government is not eligible for the tenancy in the first place.¹⁷⁸ The government could not transfer its interest to a private third party, such as an eligible tenant, because section 881 does not permit such a transfer.¹⁷⁹ Nor does section 881 permit the government to return

brought suit. The government would have taken the same interest the lessees had in the vessel. The government would have had the use of the yacht for the same number of years as the lessees with the same option to buy at the end of the lease. In addition, the government would have been responsible for the lessees' obligations under the agreement. Most likely, this would have included the payment of rent, purchase of insurance, and use of the vessel in a safe and lawful manner. However, the Court would have had to order the Pearson Yacht Company to accept the government as a new, substitute party to the still-existing lease agreement with the original lessees. The lease agreement may not have permitted the original lessees to sublet; thus, the Court's task would have been a difficult if not impossible one. Unless the lease ran to the lessees and their forfeits, the lease should not be assignable through a forfeiture action.

The forfeiture of a driver's license provides another example of similar problems the government encounters when it attempts to seize public housing leaseholds. A driver's license, like the public housing lease, is an intangible property interest, unique to the individual. The holder of the license must satisfy eligibility requirements before the license is granted. If the government seizes the license under a forfeiture statute, it would gain nothing beneficial for itself or the public. The government would be unable to use the driver's license or give it to a deserving individual, because the license, by its very nature unique to the eligible individual, is non-transferable. Furthermore, the expiration of the license would render moot the government's grounds for bringing the civil forfeiture action.

176. See generally 42 U.S.C. §§ 1437-1437j (1988) (setting forth statutory requirements defining eligibility for low-income housing assistance); 24 C.F.R. § 913 (1991) (defining income, income limits, and reexamination of family income for public housing program).

177. 42 U.S.C. § 1437f (1988); 24 C.F.R. §§ 913.103, 913.107, 913.109 (1991).

178. See generally 42 U.S.C. §§ 1437-1437j (1988) (setting forth statutory requirements defining eligibility for low-income housing assistance); 24 C.F.R. § 913 (1991) (defining income, income limits, and reexamination of family income for public housing program).

179. 21 U.S.C. § 881(e)(1) (1988). Section 881(e)(1) provides for the disposition of forfeited property, allowing the Attorney General to:

(A) retain the property for official use or . . . transfer the property to any Federal agency or to any State or local law enforcement agency which participated directly in the seizure or forfeiture of the property;

(B) sell any forfeited property which is not required to be destroyed by law and which is not harmful to the public;

(C) require that the General Services Administration take custody of the property and dispose of it in accordance with law;

(D) forward it to the Bureau of Narcotics and Dangerous Drugs for disposition . . . or

(E) transfer the forfeited personal property or the proceeds of the sale of any forfeited personal or real property to any foreign country which participated directly or indirectly in the seizure or forfeiture of the property[.]

Id. Even if section 881(e)(1) did permit the government to transfer the leasehold interest to an eligible tenant, the Public Housing Agency would not be bound by the transferred lease because it leased the public housing unit only to the tenant signing the lease, and the terms of the lease specifically forbid subletting. 24 C.F.R. § 966.4(f)(1) (1991).

the property to another government agency, like the local PHA, that is not engaged in law enforcement and did not participate in the actual seizure of the property.¹⁸⁰

CONCLUSION

When used reasonably and for the purposes for which it is intended, section 881 places in the hands of law enforcement officials a powerful weapon for attacking the economic bases of drug trafficking. When used for purposes not justified by the history of *in rem* forfeiture,¹⁸¹ intended by Congress when enacting section 881,¹⁸² or compatible with the Constitution,¹⁸³ the civil forfeiture provision becomes a mechanism for inflicting excessively harsh punishment. The forfeiture of public housing leasehold interests presents courts with the latter characterization of section 881. Consequently, courts must recognize that no historical or statutory justifications exist for the forfeiture of these interests and that grave constitutional concerns arise when persons are not afforded the full range of substantive and procedural criminal protections in a civil proceeding imposing a sanction that is punitive in nature.

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180. 21 U.S.C. § 881(e)(1)(A) (1988); see *supra* note 179 (setting out language of § 881(e)(1)).

181. See *supra* notes 17-27 and accompanying text (examining historical justification for *in rem* forfeiture).

182. See *supra* notes 99-106 and accompanying text (examining congressional intent in passage of § 881).

183. See *supra* notes 51-167 and accompanying text (noting potential constitutional problems associated with forfeiture of public housing leasehold interests under § 881).

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