NOTE

Due Process for Cash Civil Forfeitures in Structuring Cases

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Introduction

On January 22, 2013, Tarik "Terry" Dehko sat down to pay the bills for his small Michigan grocery store when a federal agent entered his office.[1] The agent told Dehko that the Internal Revenue Service (IRS) had executed a seizure warrant and taken the market's entire bank account—more than

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1. *See* Claimants' Motion for Prompt Post-Seizure Hearing and Return of Property at 2, United States v. $35,651.11 in U.S. Currency, No. 4:13-cv-13118 (E.D. Mich. Sept. 25, 2013) [hereinafter Dehko Motion for Prompt Post-Seizure Hearing]; Terry Dehko, Commentary, *Bullied by the IRS*, Wash. Times, Sept. 26, 2013, at B1, http://www.washingtontimes.com/news/2013/sep/26/dehko-bullied-by-the-irs/print/.

$35,000.[2] When Dehko asked how he could run his business without its bank account, the agent replied, "I don't care."[3]

The government did not charge Dehko with a crime that day.[4] In fact, Dehko had never been charged with any crime in his life.[5] Instead, the government waited until July 19 to bring a civil forfeiture action against Dehko—ninety-one days after Dehko filed a claim with the IRS asserting his property interest in the seized money.[6] During that time, Dehko could not access those funds to pay his employees, rent, utility bills, or vendors. For the first time, Dehko was late on his payments.[7]

The government's action alleged that Dehko violated federal structuring law.[8] Federal law establishes reporting requirements for bank deposits over $10,000.[9] But the law also bans "structuring" deposits—making more than one deposit arising from the same transaction in amounts less than $10,000 to avoid the reporting requirement.[10] The ban prevents both money laundering and spreading profits from criminal enterprises.[11] But Dehko had a legitimate business reason for regularly depositing less than $10,000 into his business's bank account: like many small businesses, the grocery's insurance policy limited cash losses to $10,000 out of risk.[12] Thus Dehko did not need to report his deposits, because he was not "structuring."[13] On top of that, the IRS had examined Dehko for potential structuring violations just nine months earlier and concluded that "no violations were identified."[14] Ultimately, the government voluntarily dismissed the forfeiture action against Dehko on November 15.[15] But not without harm to Dehko and his market.

2. Dehko Motion for Prompt Post-Seizure Hearing, *supra* note 1, at 2; Dehko, *supra* note 1.

3. Dehko, *supra* note 1.

4. Dehko Motion for Prompt Post-Seizure Hearing, *supra* note 1, at 2.

5. *Id.*; Dehko, *supra* note 1.

6. Dehko Motion for Prompt Post-Seizure Hearing, *supra* note 1, at 2.

7. *Id.* at 4–5; Dehko, *supra* note 1.

8. Plaintiff's Response in Opposition to Claimant's Motion for Prompt Post-Seizure Hearing and Return of Property at 1–3, United States v. $35,651.11 in U.S. Currency, No. 4:13-cv-13118 (E.D. Mich. Oct. 9, 2013) [hereinafter Government's Response] (citing 31 U.S.C. § 5324 (2012)).

9. Bank Secrecy Act, 31 U.S.C. § 5313(a) (2012); 31 C.F.R. § 1010.311 (2014).

10. 31 U.S.C. § 5324.

11. *See* Ratzlaf v. United States, 510 U.S. 135, 144 & n.11 (1994) (noting purposes of § 5324).

12. Dehko Motion for Prompt Post-Seizure Hearing, *supra* note 1, at 3; Dehko, *supra* note 1.

13. Dehko Motion for Prompt Post-Seizure Hearing, *supra* note 1, at 3.

14. *Id.* Ex. 4 (letter from IRS to Dehko Foods, Inc).

15. Press Release, Inst. for Justice, IRS Backs Down: Michigan Forfeiture Cases Voluntarily Dismissed (Nov. 15, 2013), http://ij.org/michigan-civil-forfeiture-release-11-15-2013. By contrast, the government insists that it dismissed the action because it filed the forfeiture complaint too late. Dehko v. Holder, No. 13-14085, 2014 WL 2605433, at *1 (E.D. Mich. June 11, 2014).

Law enforcement seized Dehko's bank account through civil forfeiture. Civil forfeiture statutes authorize the government to seize and keep property it suspects is involved in criminal activity, without prosecuting an underlying offense.[16] Forfeiture proceedings are technically in rem actions against property, not its owner.[17] To join the lawsuit, the owner must file a claim opposing forfeiture and asserting her interest in the property, or else forfeit the property.[18] This process is similar to intervention in a civil suit. The alleged conduct used to justify the forfeiture—here, structuring—is criminal. But civil forfeitures are civil: the higher burdens of criminal proceedings, like proof beyond a reasonable doubt, do not apply.[19] The government can seize and keep property without ever securing a criminal conviction in the related offense.[20]

Terry Dehko is not alone: many others face cash seizures by the IRS for alleged structuring. Months after Dehko's seizure, the IRS seized $33,244.85 from Mark Zaniewski, the owner of a gas station in Michigan.[21] As a result, a vendor refused to supply gasoline, causing the station to close for two weeks. Zaniewski then had to assign receipts directly to the supplier and pay a higher rate due to his newly bad credit.[22] The same year, the IRS seized the

16. *E.g.*, 18 U.S.C. § 981 (2012) (federal general civil forfeiture statute); 21 U.S.C. § 881 (2012) (federal drug trafficking civil forfeiture statute). This Note focuses on one particular issue in federal general civil in rem forfeiture: procedural due process for civil forfeitures of currency seized for alleged structuring. In addition to federal civil forfeiture statutes, forty-seven states and the District of Columbia have laws providing for civil in rem forfeiture. Dee R. Edgeworth, Asset Forfeiture: Practice and Procedure in State and Federal Courts 9–10 tbls. 1, 2 & 3 (3d ed. 2014). *See generally* Marian R. Williams et al., Inst. for Justice, Poli¢ing for Profit: The Abuse of Civil Asset Forfeiture (2010), http://ij.org/images/pdf_folder/other_pubs/assetforfeituretoemail.pdf (grading the civil forfeiture laws of all fifty states).

17. *See infra* note 50. In an in rem suit, a party brings an action against a piece of property rather than against its owner. For this reason, civil forfeiture cases often have names like *United States v. One-Sixth Share of James J. Bulger in All Present and Future Proceeds of Mass Millions Lottery Ticket No. M246233*, 326 F.3d 36 (1st Cir. 2003), *United States v. Real Property Located at 1 Mile up Hennessey Road*, No. 2:09-cv-1940-GEB-KJM, 2010 WL 456922 (E.D. Cal. Feb. 3, 2010), *United States v. Approximately 600 Sacks of Green Coffee Beans Seized from Café Rico, Inc.*, 381 F. Supp. 2d 57 (D.P.R. 2005)—or, in Dehko's case, *United States v. $35,651.11 in U.S. Currency Seized from PNC Bank Account Number XXXXXX6937*, Dehko Motion for Prompt Post-Seizure Hearing, *supra* note 1.

18. *See infra* Section I.A.

19. Edgeworth, *supra* note 16, at 8; Williams et al., *supra* note 16, at 6; *cf.* 18 U.S.C. § 982 (federal general criminal forfeiture statute); 18 U.S.C. § 1963(b) (federal Racketeer Influenced and Corrupt Organizations (RICO) Act criminal forfeiture statute); 21 U.S.C. § 853 (federal narcotics criminal forfeiture statute).

20. Edgeworth, *supra* note 16, at 8; Williams et al., *supra* note 16, at 9 ("Under this power, it is not necessary for the government to demonstrate that a property owner is guilty of criminal misconduct. Indeed, civil forfeiture can take place even when criminal charges are never filed against a property owner.").

21. Claimant's Motion for Prompt Post-Seizure Hearing and Return of Property at 2–3, United States v. $33,244.86 in U.S. Currency, No. 13-13990 (E.D. Mich. Nov. 14, 2013) [hereinafter Zaniewski Motion for Prompt Post-Seizure Hearing].

22. *Id.* at 4.

$33,000 checking account of Carole Hinders, the owner of a cash-only restaurant in Iowa, after she deposited less than $10,000 into the account.[23] The IRS also seized a $66,000 account from Army Sgt. Jeff Cortazzo, who, on the advice of a bank teller, made several sub-$10,000 deposits into a safe-deposit box to save for his daughter's college education.[24] There, the government settled—at a $21,000 cost to Cortazzo. That settlement caused his daughter to delay college for a year.[25]

Current seizure practices extend well beyond anecdote. The government regularly seizes cash without prosecuting the underlying structuring offense. While IRS seizures for alleged structuring increased fivefold over seven years, to 639 seizures in 2012, law enforcement criminally prosecuted only one in five cases.[26] The overenforcement of seizures, notwithstanding the underprosecution of alleged structuring, can be expected when an agency has a direct pecuniary interest in the assets seized.[27] In many cases, local law enforcement can spend assets however it chooses: officers can not only start a new college savings fund from Sgt. Cortazzo's old one, but can buy sports cars[28] or even a margarita machine for the office.[29] In the case of federal seizures, seized assets go into a dedicated fund that supplements the agency's budget, further encouraging civil forfeiture.[30]

These forfeiture practices led to increased media scrutiny, from the *Washington Post* to comedian John Oliver, which pressured executive branch agencies to change their policies.[31] After a *New York Times* investigation, the

23. Dick M. Carpenter II & Larry Salzman, Inst. for Justice, Seize First, Question Later: The IRS and Civil Forfeiture 16–17 (2015), http://ij.org/images/pdf_folder/private_property/seize-first-question-later.pdf; Shaila Dewan, *Law Lets I.R.S. Seize Accounts on Suspicion, No Crime Required*, N.Y. Times, Oct. 26, 2014, at A1, http://www.nytimes.com/2014/10/26/us/law-lets-irs-seize-accounts-on-suspicion-no-crime-required.html?_r=0.

24. Dewan, *supra* note 23.

25. *Id.*

26. Carpenter & Salzman, *supra* note 23, at 12 tbl.2, 15 tbl.4.

27. Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 Harv. L. Rev. 853, 895–98 (2014) (explaining that more enforcement is a consequence of an agency's pecuniary interest in the assets seized); *see also id.* at 868–70 (discussing asset forfeiture). For an explanation of the government's pecuniary interest in civil forfeiture, see *infra* text accompanying notes 152–159.

28. Shaila Dewan, *Police Use Department Wish List when Deciding Which Assets to Seize*, N.Y. Times, Nov. 9, 2014, at A12, http://www.nytimes.com/2014/11/10/us/police-use-department-wish-list-when-deciding-which-assets-to-seize.html?_r=0.

29. *Last Week Tonight with John Oliver: Civil Forfeiture* (HBO television broadcast Oct. 5, 2014), http://www.hbo.com/last-week-tonight-with-john-oliver/episodes/01/20-october-5-2014/video/ep-20-clip-civil-forfeiture.html?autoplay=true.

30. The Comprehensive Crime Control Act of 1984 created the Assets Forfeiture Fund. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 310, 98 Stat. 1837, 2052 (codified at 28 U.S.C. § 524(c) (2012)). The Act requires the Attorney General to report the revenue from forfeiture of property enforced by the U.S. Department of Justice. 28 U.S.C. § 524(c)(6) (2012).

31. *E.g.*, Dewan, *supra* note 23; Robert O'Harrow Jr. & Michael Sallah, *They Fought the Law. Who Won?*, Wash. Post, Sept. 9, 2014, at A1, http://www.washingtonpost.com/sf/investigative/2014/09/08/they-fought-the-law-who-won; Sarah Stillman, *Taken*, New Yorker, Aug.

IRS announced it would no longer seize and seek forfeiture of funds in suspected structuring cases "unless there are exceptional circumstances justifying the seizure and forfeiture."[32] And, after a congressional subcommittee hearing,[33] the Department of Justice (DOJ) announced a new policy requiring prosecutors to develop probable cause for additional federal criminal activity, subject to supervisor approval, before seizing property.[34]

But the policy changes do not eliminate the overenforcement problem. First, the policies do not change existing law. The IRS announcement, for example, insists that structuring is itself illegal and does not define "exceptional circumstances," reserving the IRS's right to seize property in structuring prosecutions.[35] In a congressional subcommittee hearing investigating IRS seizures in structuring cases, the IRS commissioner apologized for seizing assets from innocent people, but insisted that IRS agents followed the law.[36] Despite the policy change, prosecutors still waited a month and a half, and even held a deposition, before dropping the forfeiture case against Carole Hinders.[37] Moreover, future agency leadership could simply change the policies and return to seizing property without prosecuting for structuring. Second, the agencies' pecuniary interests remain.

Other than waiting for a civil forfeiture trial to play out, claimants have few options to challenge the government's continued control of their property when it comes to cash assets. That control is real: on average, civil forfeitures for structuring take more than a year after the seizure.[38] Both Dehko

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12, 2013, at 48, http://www.newyorker.com/magazine/2013/08/12/taken; *Last Week Tonight with John Oliver*, *supra* note 29.

32. *Statement of Richard Weber, Chief of I.R.S. Criminal Investigation*, N.Y. Times (Oct. 25, 2014), http://www.nytimes.com/2014/10/26/us/statement-of-richard-weber-chief-of-irs-criminal-investigation.html?_r=0.

33. *See* Press Release, H. Comm. on Ways and Means, Ways and Means Oversight Forces DOJ Response on Civil Asset Forfeiture (Apr. 2, 2015), http://waysandmeans.house.gov/ways-and-means-oversight-forces-doj-response-on-civil-asset-forfeiture/.

34. Memorandum for Heads of Dep't Components U.S. Attorneys from Attorney Gen. Eric Holder, Guidance Regarding the Use of Asset Forfeiture Authorities in Connection with Structuring Offenses (Mar. 31, 2015), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/31/ag-memo-structuring-policy-directive.pdf. The new DOJ policy also requires a prosecutor to direct an agency to return seized money if the prosecutor does not have enough admissible evidence in a civil or criminal trial and imposes a 150-day deadline for filing charges against the seized money. *Id.* But current law, *see infra* Part I, already requires the government to bring an action against the seized money within ninety days after a property owner files a claim opposing forfeiture. Thus, while the policy could provide new help for the many property owners who never file civil forfeiture actions, it leaves current law unchanged for those who do file.

35. *See Statement of Richard Weber, Chief of I.R.S. Criminal Investigation*, *supra* note 32.

36. Rachael Bade, *IRS Under a Spotlight for Freezing Assets*, Politico (Feb. 11, 2015, 8:01 AM), http://www.politico.com/story/2015/02/irs-under-a-spotlight-for-freezing-assets-115091.html.

37. Shaila Dewan, *I.R.S. Asset Seizure Case Dropped by Prosecutors*, N.Y. Times, Dec. 13, 2014, at A34, http://www.nytimes.com/2014/12/14/us/irs-asset-forfeiture-case-is-dropped-.html?_r=0.

38. Carpenter & Salzman, *supra* note 23, at 18.

and Zaniewski filed motions for prompt postseizure hearings and return of property before the government voluntarily dismissed the civil forfeiture actions against them.[39] In Zaniewski's case, the government dismissed the case one day after Zaniewski filed.[40] After the dismissals, Dehko and Zaniewski sought declaratory judgments for postseizure hearings in federal court in case the government executed seizure warrants for the same conduct in the future.[41] Because they already had control of their cash by that time, the court dismissed their claims as moot.[42]

Cash seizures for alleged structuring, as compared to other crimes, are particularly worrisome. Not only can the government seize and keep cash with a low burden of proof, but innocent conduct often underlies structuring cases because a person can make several sub-$10,000 deposits for legitimate reasons.

This Note argues that the temporary deprivation of cash warrants increased due process protection and should thus be analyzed under the *Mathews v. Eldridge* balancing test for civil due process. Part I walks through current forfeiture procedure from the perspective of an owner of seized cash, elucidating the burdens that owners face in real practice.[43] It concludes that the process a claimant of seized cash must follow is inadequate, potentially exposing federal law to a due process challenge. Part II argues that the deprivation and detention of cash for alleged structuring violates due process. Applying *Mathews* in structuring cases, the strong private interest in cash—an owner's most important asset for essential payments or running a business—will ultimately outweigh the government's interest in avoiding additional procedures. Part III considers possible reforms by each branch of government, ultimately offering a judicial remedy. It concludes that—unless Congress amends federal law to provide better procedural alternatives for claimants of seized cash—due process demands postseizure hearings under *Mathews* for cash seizures in structuring cases.

I. Inadequate Pretrial Procedures

This Part examines how the federal government can seize and keep cash, and what owners can do about it. The Civil Asset Forfeiture Reform Act of

39. Dehko Motion for Prompt Post-Seizure Hearing, *supra* note 1; Zaniewski Motion for Prompt Post-Seizure Hearing, *supra* note 21.

40. Zaniewski filed a Motion for Prompt Post-Seizure Hearing and Return of Property on November 14, 2013. Zaniewski Motion for Prompt Post-Seizure Hearing, *supra* note 21. The next day, the government voluntarily dismissed the case. Plaintiff's Unopposed Motion for Voluntary Dismissal of Its Complaint, United States v. $33,244.86 in U.S. Currency, No. 13-13990 (E.D. Mich. Nov. 15, 2013).

41. Amended Complaint for Declaratory and Injunctive Relief, Dehko v. Holder, No. 13-14085 (E.D. Mich. Dec. 12, 2013).

42. Dehko v. Holder, No. 13-14085, 2014 WL 2605433 (E.D. Mich. June 11, 2014).

43. *Cf.* Howard E. Williams, Asset Forfeiture: A Law Enforcement Perspective (2002).

2000 (CAFRA)[44] significantly amended federal civil forfeiture laws. CAFRA's proponents sought to reform the civil forfeiture process by increasing protections for property owners.[45] Reforms included, for example, time limits for the government to provide notice and file forfeiture actions, an innocence defense, and hardship exemptions.[46] But CAFRA's critics continue to assert it does not go far enough to protect property owners.[47]

In particular, CAFRA includes fewer protections for cash seizures than for seized physical property.[48] CAFRA creates a maze of claims, petitions, motions, and requests for the diligent claimant to exercise her rights and contest her money's seizure. Section I.A evaluates claims opposing forfeiture. Section I.B considers petitions for remission or mitigation. Section I.C discusses motions to return property. Section I.D evaluates hardship release. At least one commentator argues that, due to other protections for property owners—notice and filing deadlines, the innocence defense, and hardship exemptions—CAFRA "may not be as vulnerable to a due process challenge."[49] But as demonstrated *infra*, these "protections" are inadequate for cash seizures and leave CAFRA open to a due process challenge under the framework discussed in Part II.

A. *Claim Opposing Forfeiture*

Civil forfeiture is typically an in rem procedure against a piece of property, not its owner.[50] A federal agency need not file a forfeiture action to

44. Pub. L. No. 106-185, 114 Stat. 202 (codified as amended in scattered sections of the U.S. Code).

45. For example, in his first year as chairman of the U.S. House of Representatives Committee on the Judiciary, U.S. Representative Henry Hyde published a book advocating for civil forfeiture reform. Henry Hyde, Forfeiting Our Property Rights: Is *Your* Property Safe from Seizure? (1995).

46. 18 U.S.C. § 983(a), (d), (f) (2012); *see also* Edgeworth, *supra* note 16, at 68–69, 105, 175–77.

47. David Pimentel, *Forfeitures Revisited: Bringing Principle to Practice in Federal Court*, 13 Nev. L.J. 1, 23–32 (2012) (surveying criticisms of CAFRA); *see also* Jordan Richardson, *Civil Asset Forfeiture Reform Goes Mainstream*, Issue Brief (Heritage Found., Wash. D.C.), Nov. 17, 2014, at 3, http://thf_media.s3.amazonaws.com/2014/pdf/IB4301.pdf (discussing congressional proposals for ending equitable sharing and increasing the government's burden of proof).

48. Many forms of physical property other than money are subject to forfeiture. *See* 18 U.S.C. § 981(a)(1) (listing property subject to forfeiture).

49. Edgeworth, *supra* note 16, at 107.

50. For the history of civil forfeiture and its development as an in rem procedure, see Leonard W. Levy, A License to Steal: The Forfeiture of Property 7–20, 39–61 (1996), and Donald J. Boudreaux & A.C. Pritchard, *Civil Forfeiture and the War on Drugs: Lessons from Economics and History*, 33 San Diego L. Rev. 79, 93–98 (1996). In tracing the origins of civil forfeiture law, both sets of authors begin with deodand, an object (such as a knife, pistol, or runaway carriage) forfeited to the English Crown on the theory that the object caused a person's death. Levy, *supra*, at 7–20; Boudreaux & Pritchard, *supra*, at 94. But Professors Boudreaux and Pritchard note that modern American forfeiture law descended not from deodand, but from admiralty forfeitures in the seventeenth-century Navigation Acts. Boudreaux & Pritchard, *supra*, at 94–95 (citing Michael Schechter, Note, *Fear and Loathing and the Forfeiture*

seize property. Instead, the federal general civil forfeiture statute allows a federal agency like the IRS to seize property with a seizure warrant.[51] The agency asks for a seizure warrant in the same manner as a search warrant: in an ex parte proceeding before a federal magistrate to determine probable cause that property is subject to forfeiture.[52] The property owner has no right to a hearing before the seizure, and thus cannot challenge it on that basis.[53] CAFRA does, however, impose notice requirements for seizures. The seizing agency has sixty days from the date of the seizure to provide written notice to all parties potentially interested in the property.[54] Even under CAFRA, the seizing agency can retain seized property for two months without notifying the owner.

Only after receiving notice may owners take their first actions to reclaim seized cash. First and foremost, an owner should file a claim opposing the forfeiture.[55] CAFRA also subjects owners to deadlines: an owner must file a claim opposing forfeiture within thirty-five days after the seizing agency mails a notice letter or within thirty days after final publication of the notice.[56] In an IRS seizure, if no claim is timely filed, the IRS will sell seized property without declaring a forfeiture.[57] After filing the claim, the property owner becomes the claimant. In this sense, filing a claim in opposition to a forfeiture is like intervening in an in rem suit against the property.[58]

By filing a claim opposing forfeiture, however, the claimant preserves only her right to a judicial determination of the forfeiture. To try to reclaim the seized property, the owner must go through a potentially long, expensive trial.[59] The deprivation of property for several months surely harmed Dehko, Zaniewski, Hinders, and their businesses, though the government voluntarily dismissed the forfeiture claims against them without even going

Laws, 75 Cornell L. Rev. 1151, 1154 (1990); then citing James R. Maxeiner, Note, *Bane of American Forfeiture Law—Banished at Last?*, 62 Cornell L. Rev. 768, 772 (1977)). For an analogy of early American admiralty and customs forfeiture laws to cash civil forfeitures, see *infra* note 174.

51. 18 U.S.C. § 981(b)(2). The statute also provides exceptions to the warrant requirement. An arrest warrant in rem allows seizure after the government files a forfeiture claim in federal court. *Id.* § 981(b)(2)(A). In addition, the statute provides for seizure without a warrant much like criminal searches and seizures: the government may seize if it has "probable cause to believe that the property is subject to forfeiture" and the government seized the property "pursuant to a lawful arrest or search" or "another exception to the Fourth Amendment warrant requirement." *Id.* § 981(b)(2)(B).

52. *See id.* § 981(b)(2); *see also* United States v. Approximately 600 Sacks of Green Coffee Beans Seized From Café Rico, Inc., 381 F. Supp. 2d 57, 60, 63–64 (D.P.R. 2005).

53. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 679–80 (1974).

54. 18 U.S.C. § 983(a)(1)(A)(i).

55. *See id.* § 983(a)(2)(A).

56. *Id.* § 983(a)(2)(A)–(B).

57. 26 U.S.C. § 7325(4) (2012).

58. *See* Fed. R. Civ. P. 24 (intervention).

59. *See supra* text accompanying note 38.

to trial. Moreover, a trial contains its own risks. Litigation could draw attention, leading to a criminal prosecution, and could expose the claimant to civil discovery, including depositions.[60] To try to reclaim property post-seizure but pretrial, the claimant must look to other strategies.

B. *Petition for Remission or Mitigation*

In addition to filing a claim opposing the forfeiture, the property owner may seek administrative relief outside of trial by submitting a petition for remission or mitigation. Remission refers to the complete release of the seized property, while mitigation refers to something less: returning some, but not all, of the property.[61] Remission and mitigation were intended to alleviate the harshness of seizure and forfeiture.[62] But both options fail to adequately protect owners from cash civil forfeitures because the procedures lack procedural safeguards.[63] Moreover, a property owner can lose her right to a full judicial determination if she files only for remission and neglects to file a claim opposing the forfeiture as well.[64]

Customs laws provide the statutory authority for remission or mitigation,[65] but each seizing agency has its own regulations governing the procedure.[66] For example, the IRS requires that an owner file a petition for remission or mitigation within three months after the IRS sells or disposes of the property seized.[67] The DOJ, on the other hand, advises "any persons who may have a present ownership interest" to file petitions within thirty days after receiving a seizure notice.[68] But as previously discussed, owners must file claims opposing the forfeiture within thirty-five days of a notice letter's mailing.[69] Thus, if a property owner only files a petition for remission or mitigation, or waits to hear the result of that petition, she will miss the deadline to file an opposition in the trial. The owner then loses the right to a judicial determination. An owner may, however—and probably

60. 1 David B. Smith, Prosecution and Defense of Forfeiture Cases ¶ 6.02(3)(a) (2015).

61. *See* Edgeworth, *supra* note 16, at 72 (discussing eligibility for remission or mitigation under DOJ regulations).

62. 2 Smith, *supra* note 60, ¶ 15.01 ("The reach of the civil forfeiture laws, in particular, would be intolerable were it not for the fact that administrative relief is available to innocent persons whose property is used by others for criminal purposes.").

63. *Cf.* Willis v. United States, 787 F.2d 1089, 1094 (7th Cir. 1986) (holding that due process does not require hearings on remission petitions).

64. *See* Edgeworth, *supra* note 16, at 71; 1 Smith, *supra* note 60, ¶ 6.02(3).

65. 19 U.S.C. § 1618 (2012).

66. *E.g.*, Treas. Reg. §§ 403.35–.45, .50 (2015) (IRS); 28 C.F.R. §§ 9.1–.9 (2014) (DOJ, including the FBI, Drug Enforcement Administration, and Bureau of Alcohol, Tobacco, Firearms, and Explosives).

67. Treas. Reg. § 403.39.

68. 28 C.F.R. § 9.3(a).

69. *See supra* note 56 and accompanying text.

should—file both a claim opposing forfeiture and a petition for remission or mitigation.

But administrative relief is not easy to secure. DOJ's criteria for granting remission or mitigation are phrased in the negative: "the ruling official shall not grant remission of a forfeiture unless" the owner meets the criteria.[70] Even then, DOJ retains discretion to withhold relief.[71] This discretion is especially precarious for cash seizures. Under DOJ regulations, the seizing agency presumes the validity of the seizure and may not consider the sufficiency of the evidence to support the forfeiture.[72] Many agencies are "very likely to deny the petition regardless of whether there is *any* evidence to show that the money is tainted."[73] In addition, a petitioner has no right to a hearing.[74] Moreover, judicial review of the agency's administrative determination is very limited and is usually confined to review of the process rather than the merits.[75] Thus, a petition for remission or mitigation remains "a matter of administrative grace."[76]

In sum, features of the remission or mitigation process—including the agency's discretion, absence of a hearing, and limited judicial review—limit protections for owners in cash seizures, especially when agencies are particularly likely to deny petitions involving seized cash. Therefore, the ability to seek a petition for remission or mitigation is unlikely to dispel a due process challenge.

C. *Motion to Return Property*

In limited circumstances, a claimant can challenge the continued detention of seized cash by filing a motion to return property. Federal Rule of Criminal Procedure 41(g) provides for that motion, originally intended to challenge an unlawful seizure.[77] In 1989, Congress extended the rule to cover any "deprivation of property," including seizures for civil forfeiture.[78] The motion requires the government to show probable cause that the property is subject to forfeiture at the time of the motion hearing—not at the time of

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70. 28 C.F.R. § 9.5(a)(1). A petitioner must establish a "valid, good faith, and legally cognizable interest in the seized property" and "the basis for granting a petition." *Id.* § 9.5(a)(1), (3).

71. *See id.* § 9.5 (providing minimum criteria for petitioners including establishing innocence); 2 Smith, *supra* note 60, ¶ 15.02(2)(i).

72. 28 C.F.R. § 9.5(a)(4).

73. 2 Smith, *supra* note 60, ¶ 15.02(2)(e).

74. 28 C.F.R. § 9.3(g).

75. *See* 2 Smith, *supra* note 60, ¶ 15.03.

76. 1 Smith, *supra* note 60, ¶ 6.02(3).

77. *See* Fed. R. Crim. P. 41(g).

78. *See* Fed. R. Crim. P. 41 advisory committee' notes on 1989 amendments; *see also* 1 Smith, *supra* note 60, ¶ 10.05A (explaining the 1989 amendments). The advisory committee notes refer to Rule 41(e); in 2002, Rule 41(e) was amended to become Rule 41(g). 1 Smith, *supra* note 60, ¶ 10.05A.

the seizure. If the government cannot meet that burden, it must return the property to the movant.[79]

Perhaps paradoxically, the time limits CAFRA sets for the government to file civil forfeiture actions have largely gutted Rule 41(g)'s protections.[80] CAFRA created time limits to benefit property owners by limiting long seizures by the government.[81] As a result, courts have less time to grant motions to return property before the government files a civil forfeiture action. Instead, the claimant must seek relief in the trial itself.[82] Today a court will only grant relief under Rule 41(g) before the government files a forfeiture action or if the government detains property after the filing deadline. After the government files the forfeiture action, the claimant must use motions to dismiss and for summary judgment to secure early release of the property.[83] These motions require time and resources, bringing innocent claimants deeper into litigation.

D. *Hardship Release*

Claimants have one last opportunity to secure pretrial return of seized *property*: hardship release. CAFRA created a new provision that entitles claimants to "immediate release of seized property" pending the outcome of the trial.[84] But hardship release—one of the safeguards that supposedly makes CAFRA less vulnerable to a due process challenge[85]—specifically exempts seized *cash* from eligibility for release.[86] CAFRA provides five criteria for hardship release: (1) a possessory interest in the money; (2) sufficient ties to the community; (3) substantial hardship; (4) that the hardship "outweighs the risk that the property will be destroyed, damaged, lost, concealed, or transferred"; and (5) that no condition in paragraph (8) applies.[87] At first, these criteria seem to apply to claimants of seized cash like Dehko, Zaniewski, and Hinders. But paragraph (8) provides that "[t]his subsection shall not apply if the seized property . . . is . . . currency . . . unless such currency . . . constitutes the assets of a legitimate business which has been seized."[88] In

79. 1 Smith, *supra* note 60, ¶ 10.05A.

80. *See* 18 U.S.C. § 983(a)(3)(A) (2012) (requiring the government to bring a civil forfeiture action within ninety days after the owner files a claim opposing forfeiture); *supra* notes 45–46 and accompanying text.

81. *See supra* notes 45–46.

82. *See, e.g.*, United States v. U.S. Currency $83,310.78, 851 F.2d 1231, 1235 (9th Cir. 1988) ("[W]hen a civil forfeiture proceeding is pending, there is no need to fashion an equitable remedy to secure justice for the claimant."). Before CAFRA, Rule 41(g) "was used to force the government's hand to file the forfeiture case." Edgeworth, *supra* note 16, at 103.

83. 1 Smith, *supra* note 60, ¶ 10.05A.

84. 18 U.S.C. § 983(f) (2012).

85. *See supra* note 49 and accompanying text.

86. 18 U.S.C. § 983(f)(8)(A).

87. *See id.* § 983(f)(1)(A)–(E).

88. *Id.* § 983(f)(8)(A). The Senate added criteria for hardship release as part of an amendment to the House bill at the DOJ's request:

other words, courts will not order the release of seized cash unless the government seized all assets of the business.[89] If not all assets of a business have been seized—like Dehko's grocery store, Zaniewski's gas station, or Hinders's restaurant themselves—hardship release is unavailable.

In short, the options for an owner of seized cash to reclaim the property before trial are limited. In some cases—like remission or mitigation, and hardship release—safeguards exist for seizures of other property, but not cash. And preserving the right to a judicial determination of a forfeiture or a motion to return property cannot provide relief until the end of the trial. Accordingly, courts have started to take a harder look at due process in civil forfeiture. Given the current law, due process requires greater protections for claimants.

II. Due Process for Cash Seizures in Structuring Cases

This Part builds on CAFRA's different treatment for seized cash than other property to explain how due process requires protecting seized cash in structuring cases. Section II.A lays out the current governing framework and argues that courts now apply the *Mathews v. Eldridge* balancing test even to temporary deprivations of an increasingly wide range of property. Section II.B collects the factors that courts consider in *Mathews* balancing in these cases and applies them to cash seizures. This Part concludes that cash seizures in structuring cases merit due process protection under *Mathews*.

A. *Due Process in Civil Forfeiture*

The current governing framework for due process in civil forfeiture provides preseizure hearings for deprivations of real property, postseizure hearings for deprivations of vehicles, and perhaps postseizure hearings for deprivations of cash as well. The Supreme Court has recognized the right to a hearing "at a meaningful time"[90] for the deprivation of property, but that standard does not guarantee a hearing *before* the government seizes property.[91] In fact, the Court has never explicitly held a right to a pre-[92] or

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> Unlike H.R. 1658, the substitute adopts the primary safeguards that the Justice Department wanted added to the provision—that property owners must have sufficient ties to the community to provide assurance that the property will not disappear, and that certain property, such as currency and property particularly outfitted for use in illegal activities, shall not be returned.

146 Cong. Rec. 3656 (2000) (statement of Sen. Patrick Leahy). This Note evaluates the government's interest *infra* Section II.B.3.

89. *E.g.*, Kaloti Wholesale, Inc. v. United States, 525 F. Supp. 2d 1067, 1070 n.2 (E.D. Wis. 2007).

90. Fuentes v. Shevin, 407 U.S. 67, 80 (1972) (holding that state replevin statutes violated the Fourteenth Amendment by denying the right to a hearing before goods' seizure).

91. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 679–80 (1974).

92. *See id.*

postseizure hearing[93] in civil forfeiture. Rather, in civil forfeiture cases, government interests—preventing the continued illicit use of cash, enforcing criminal law, and preventing the movement, concealment, and destruction of cash—counsel against preseizure hearings because they warn owners about coming enforcement actions.[94]

Under current case law, courts apply the *Mathews v. Eldridge* balancing test to weigh the competing private and government interests in civil forfeiture cases.[95] In *Mathews*, George Eldridge challenged the termination of his social security disability benefits without a hearing.[96] The government argued that the decision to terminate benefits was an objective determination made in accordance with valid administrative procedures.[97] The Court considered three factors based on precedent: (1) the private interest affected, (2) the risk of erroneous deprivation, and (3) the government interest, including the burden of implementing new procedures.[98] After weighing the three factors, the Court concluded that, although Eldridge raised a colorable claim,[99] he was not entitled to a hearing before the termination of his disability benefits.[100]

The Court first applied *Mathews* balancing to civil forfeiture of real property in *United States v. James Daniel Good Real Property*.[101] In 1985, James Daniel Good pleaded guilty in Hawaii state court to violating *state* drug law after the police uncovered eighty-nine pounds of marijuana and $3,187 in cash.[102] Four years later, in an ex parte proceeding, the United States argued that probable cause existed that Good's home and land were subject to forfeiture due to their role in violating *federal* drug law. To make their case, however, federal agents relied on the search by Hawaii police four years earlier.[103]

93. *See* United States v. $8,850 in U.S. Currency, 461 U.S. 555, 569 (1983) (enumerating means by which a property owner could commence civil forfeiture proceedings).

94. *Calero-Toledo*, 416 U.S. at 679.

95. United States v. James Daniel Good Real Prop., 510 U.S. 43, 53 (1993). Until *Good*, the Court applied the Sixth Amendment right-to-speedy-trial test to evaluate a property owner's claim of a Fifth Amendment deprivation of property—and held no constitutional violation occurred. *$8,850*, 461 U.S. at 564. Justice Stevens dissented: "[i]n my opinion a rule that allows the Government to dispossess a citizen of her property for more than 18 months without her consent and without a hearing is a flagrant violation of the Fifth Amendment." *Id.* at 570 (Stevens, J., dissenting).

96. Mathews v. Eldridge, 424 U.S. 319, 324–25 (1976).

97. *Id.* at 325.

98. *Id.* at 335.

99. *Id.* at 331–32.

100. *Id.* at 349.

101. 510 U.S. 43, 52–53 (1993).

102. *Good*, 510 U.S. at 46.

103. *Id.* at 46–47.

Due to the interests implicated by a dwelling, the Court required preseizure hearings before agents could seize Good's home.[104] Under *Mathews* balancing, the "right to maintain control over [the] home, and to be free from governmental interference, is a private interest of historic and continuing importance."[105] The ex parte seizure creates an "unacceptable risk" of erroneous deprivation.[106] And the government's interest in ensuring that property is not destroyed or concealed is low for real property.[107] Thus, absent exigent circumstances, the government must provide "notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture."[108]

After *Good*, courts have applied the *Mathews* balancing test to determine if postseizure hearings are required for temporary deprivations of property other than homes. In the vehicle context, the answer has been yes.[109] In *Krimstock v. Kelly*, the Second Circuit, in an opinion by then-Circuit Judge Sotomayor, required a "prompt postseizure retention hearing" for vehicles seized in connection with a New York City driving-while-intoxicated violation.[110] The court's holding is particularly noteworthy because it protects seizures of vehicles in civil forfeiture, even as the Fourth Amendment provides fewer protections for vehicles than for homes.[111] Thus the decision supports broader protections for seizures in civil forfeiture under Fifth Amendment due process than under Fourth Amendment searches and seizures. Applying *Mathews* balancing, the Second Circuit reasoned that the private interest in vehicles was "particular[ly] importan[t]" because vehicles are "use[d] as a mode of transportation and, for some, the means to earn a livelihood."[112] Moreover, city code provided no exemption when seizures "would cause particular hardship."[113]

A district court reached a similar conclusion in *Simms v. District of Columbia*.[114] There, the District charged Frederick Simms with weapons violations and seized his vehicle as an instrumentality, but waited until six

104. *Id.* at 62.

105. *Id.* at 53–54 (first citing Fourth Amendment cases United States v. Karo, 468 U.S. 705 (1984); then citing Payton v. New York, 445 U.S. 573 (1980)).

106. *Id.* at 55.

107. *Id.* at 58–59.

108. *Id.* at 62.

109. Smith v. City of Chicago, 524 F.3d 834 (7th Cir. 2008), *vacated as moot sub. nom* Alvarez v. Smith, 558 U.S. 87 (2009); Krimstock v. Kelly, 306 F.3d 40 (2d Cir. 2002) (Sotomayor, J.), *cert. denied*, 539 U.S. 969 (2003); Simms v. District of Columbia, 872 F. Supp. 2d 90 (D.D.C. 2012).

110. *Krimstock*, 306 F.3d at 68–69.

111. *See, e.g.*, Carroll v. United States, 267 U.S. 132 (1925) (upholding warrantless searches of vehicles because of their mobility); *see also* California v. Carney, 471 U.S. 386 (1985) (treating mobile homes as vehicles rather than homes for searches).

112. *Krimstock*, 306 F.3d at 61.

113. *Id.*

114. *Simms*, 872 F. Supp. 2d at 100–04, 107.

months after his acquittal to initiate a civil forfeiture action.[115] The district court analyzed the case much like the Second Circuit had. The court granted Simms's preliminary injunction, prohibiting the District from holding Simms's car without giving him an opportunity to be heard, pending the outcome of the civil forfeiture action.[116]

Finally, the Seventh Circuit also required a prompt postseizure hearing to test the validity of the continued retention of a seized vehicle—and cash—in *Smith v. City of Chicago*.[117] The case is especially interesting for two reasons. First, the Seventh Circuit required a postseizure hearing for a seizure of both the vehicle and cash.[118] As in *Krimstock*, the court noted the strong private interest in vehicles.[119] Second, the Supreme Court granted certiorari and heard oral argument.[120] Before argument, however, both sides confirmed that the case had settled.[121] The Court held the case moot and declined to rule on the merits, eliminating an opportunity to address the extent of due process in civil forfeiture.[122] A decision affirming the Seventh Circuit would have required prompt postseizure hearings to test the continued deprivation of personal property like vehicles and cash as a constitutional matter.

B. *Due Process Balancing for Cash Seizures*

To determine whether depriving owners of their property violated due process, the courts in *Good*, *Krimstock*, *Simms*, and *Smith* balanced three *Mathews v. Eldridge* factors: (1) the private interest affected, (2) the risk of erroneous deprivation, and (3) the government interest, including the burden of implementing new procedures.[123] These concerns are particularly difficult to balance when the property is cash: liquid cash can be a person's most valuable asset, yet it is also the easiest to destroy or conceal. This Note argues that in structuring cases the strong private interest in cash outweighs the government's interest, particularly because the availability of *post*seizure hearings undercuts the government's strong interest in avoiding *pre*seizure hearings.

115. *Id.* at 91–92.

116. *Id.* at 100–04, 107.

117. 524 F.3d 834 (7th Cir. 2008), *vacated as moot sub. nom* Alvarez v. Smith, 558 U.S. 87 (2009).

118. *Smith*, 524 F.3d at 838.

119. *Id.*

120. Alvarez v. Smith, 558 U.S. 87, 89 (2009).

121. *Id.* at 92. The City of Chicago returned three vehicles to plaintiffs; two plaintiffs defaulted on claims to cash seized by the city; and the city returned by agreement some, but not all, cash to a final plaintiff. *Id.*

122. *Id.* at 94.

123. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

1. Private Interest Affected

The strong private interest in homes and vehicles also applies to cash. First, as then-Judge Sotomayor noted in *Krimstock*, "[t]he deprivation of real *or personal* property involves substantial due process interests."[124] In particular, vehicles are "central to a person's livelihood or daily activities"[125]—even though vehicles are treated differently than homes for Fourth Amendment searches and seizures.[126] The Seventh Circuit agreed in *Smith*: "The private interest involved . . . is great. . . . The hardship posed by the loss of one's means of transportation . . . can result in missed doctor's appointments, missed school, and perhaps most significant of all, loss of employment."[127] And even in the case of the home, the Supreme Court in *Good* added an economic consideration into *Mathews* balancing: Good rented out the house, so the rent he received weighed in favor of a private interest.[128] The second justification that applies in the cash context is the "availability of hardship relief under the applicable law."[129] In *Krimstock*, New York City code made no provision for particular hardship caused by retention of a seized car.[130] Third, "the length of deprivation . . . increases the weight of an owner's interest in possessing the vehicle."[131]

Smith, perhaps most on point, adds a note of caution about procedural difficulties when the personal property is cash. Considering the possibility of posting bond to return physical property like a vehicle, the Seventh Circuit added, "[t]he person from whom cash is seized also has a strong interest in a hearing, though obviously the posting of a cash bond for cash is an absurdity."[132] While it may be absurd to post a cash bond for the release of cash pending the outcome of a civil forfeiture action, there are other options. CAFRA gives courts broad authority to enter orders preserving property's availability for trial, including restraining orders or appointing receivers, conservators, or other custodians.[133] While courts appear reluctant to use such a resource-intense remedy, they could appoint a receiver—a judicially

124. Krimstock v. Kelly, 306 F.3d 40, 61 (2d Cir. 2002) (emphasis added) (first citing United States v. James Daniel Good Real Prop., 510 U.S. 43, 53–54 (1993); then citing *id.* at 81 (Thomas, J., concurring in part and dissenting in part); then citing Connecticut v. Doehr, 501 U.S. 1, 11 (1991); and then citing Fuentes v. Shevin, 407 U.S. 67, 70–71 (1972)).

125. *Id.* at 44.

126. *See supra* note 111 and accompanying text.

127. Smith v. City of Chicago, 524 F.3d 834, 838 (7th Cir. 2008), *vacated as moot sub nom.* Alvarez v. Smith, 558 U.S. 87 (2009).

128. United States v. James Daniel Good Real Prop., 510 U.S. 43, 54 (1993) ("[R]ent represents a significant portion of the exploitable economic value of [the claimant's] home.").

129. *Krimstock*, 306 F.3d at 61.

130. *Id.*

131. *Id.*

132. *Smith*, 524 F.3d at 838.

133. 18 U.S.C. § 983(j)(1) (2012).

appointed custodian over another's property—pending the outcome of proceedings to oversee claimants' legitimate business use of the cash.[134] That process, however, would be unlikely to satisfy due process.[135] As then-Judge Sotomayor emphasized, "the importance of the claimant's possessory interest post-seizure and pre-judgment is not diminished by the likelihood that the government will eventually prevail in forfeiture proceedings."[136]

For claimants like Dehko, Zaniewski, and Hinders, the private interest in liquid cash is especially great:[137] it serves as the "means to earn a livelihood."[138] After the IRS seized the bank account of Dehko's grocery store, Dehko had no funds to pay employees, rent, utility bills, or vendors.[139] And after the IRS seized the bank account of Zaniewski's gas station, his checks bounced and his vendors charged higher rates.[140] The retention of cash had real consequences for Dehko, Zaniewski, and Hinders, from harming their credit to creating a risk of bankruptcy or loss of the goodwill of their enterprises. In addition, seized-*cash* claimants' interests are heightened, because alternate procedures like hardship release are unavailable for seized cash.[141] Moreover, the government deprived Dehko, Zaniewski, and Hinders access to their cash for around the same length of time as in *Simms*, when the court allowed the owner access to his property.[142] In sum, in considering the first *Mathews* factor, procedural difficulties cannot diminish claimants' otherwise strong interest in hearings testing the retention of seized cash.

2. Risk of Erroneous Deprivation

In a due process analysis, "[t]he particular deprivation with which we are concerned . . . is the . . . post-seizure, pre-judgment retention"[143] of cash. The risks of erroneous deprivation generally fall into three categories: (1) lack of protections for innocent owners, (2) the government's pecuniary interest in forfeiture, and (3) the value of additional protections. For cash seizures, the risks of erroneous deprivation of cash weigh in favor of owners.

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134. *Id.*

135. *See* United States v. James Daniel Good Real Prop., 510 U.S. 43, 54–55 (1993) ("The practice of *ex parte* seizure . . . creates an unacceptable risk of error.").

136. Krimstock v. Kelly, 306 F.3d 40, 62 (2d Cir. 2002).

137. *Cf.* Goldberg v. Kelly, 397 U.S. 254, 264 (1970) (holding that a recipient's interest in uninterrupted welfare payments, which "provide[ ] the means to obtain essential food, clothing, housing, and medical care," outweighed government interests and required an opportunity to be heard).

138. *Cf. Krimstock*, 306 F.3d at 61 (retention of vehicles).

139. Dehko Motion for Prompt Post-Seizure Hearing, *supra* note 1, at 4; Dehko, *supra* note 1.

140. Zaniewski Motion for Prompt Post-Seizure Hearing, *supra* note 21, at 4.

141. *See supra* Section I.D.

142. *See* Simms v. District of Columbia, 872 F. Supp. 2d 90, 91–92 (D.D.C. 2012).

143. *Cf. Krimstock*, 306 F.3d at 62 (retention of vehicles).

First, courts must protect innocent owners from erroneous deprivation.[144] Congress "did not intend to deprive innocent owners of their property."[145] Yet the innocence defense CAFRA established for trials[146] is probably not enough, because "the ultimate judicial decision . . . that the claimant was an innocent owner . . . 'would not cure the temporary deprivation that an earlier hearing might have prevented.' "[147] Courts have also expressed concern for net present value: "an owner cannot recover the lost use of a vehicle by prevailing in a forfeiture proceeding. The loss is felt in the owner's inability to use a vehicle that continues to depreciate in value as it stands idle in the police lot."[148] Thus the current "*ex parte* preseizure proceeding affords little or no protection to the innocent owner."[149]

The risk of depriving innocent owners of property pending the outcome of a civil forfeiture trial is especially high in structuring cases because the government so rarely pursues criminal trials. Even though IRS seizures tied to structuring increased fivefold from 2005 to 2012, the government ultimately prosecuted only one in five as a criminal structuring case.[150] For example, Dehko, Zaniewski, and Hinders all lost access to their bank accounts for months, only to have the government voluntarily dismiss the suits against them.[151]

Second, an adversarial hearing is "of particular importance here, where the Government has a direct pecuniary interest in the outcome of the proceeding."[152] The government's strong pecuniary interest in cash civil forfeitures increases incentives to seize cash from innocent owners. Civil forfeiture has become big business for government budgets.[153] Federal law encourages the government's pecuniary interest through a process called "equitable sharing," by which the federal government shares the proceeds of assets with assisting state and local law enforcement agencies.[154] This pecuniary interest can be expected to increase the number of forfeitures—and the size of forfeitures—pursued.[155] Indeed, Congress created the Assets Forfeiture Fund,

144. *See id.* at 55–56 (citing United States v. James Daniel Good Real Prop., 510 U.S. 43, 55 (1993)).

145. United States v. James Daniel Good Real Prop., 510 U.S. 43, 55 (1993) (pointing to an innocence defense in the federal narcotics forfeiture statute).

146. 18 U.S.C. § 983(d) (2012).

147. *Good*, 510 U.S. at 56 (quoting Connecticut v. Doehr, 501 U.S. 1, 15 (1991)).

148. Simms v. District of Columbia, 872 F. Supp. 2d 90, 103 (D.D.C. 2012) (quoting *Krimstock*, 306 F.3d at 64).

149. *Good*, 510 U.S. at 55.

150. Dewan, *supra* note 23.

151. Dewan, *supra* note 37; Press Release, Inst. for Justice, *supra* note 15 .

152. *Good*, 510 U.S. at 55–56.

153. *See* Williams et al., *supra* note 16 (describing how law enforcement benefits from civil forfeiture); *see also* Samuel R. Gross, *The Rhetoric of Racial Profiling*, *in* Social Consciousness in Legal Decision Making 35, 43–44 (Richard L. Wiener et al. eds., 2007); Lemos & Minzner, *supra* note 27, at 868–70.

154. *See* 18 U.S.C. § 981(e) (2012).

155. Lemos & Minzner, *supra* note 27, at 869, 895–98.

which allows DOJ to keep forfeiture proceeds rather than require them to be deposited in the general fund. This change encourages DOJ to use asset forfeiture as a law enforcement tool more often.[156] The results are clear. In 1985, the first year of reported revenue, the DOJ took in $27 million from the proceeds of forfeited property.[157] In 2008, the Assets Forfeiture Fund's net position—revenues from forfeited property minus expenses—exceeded $1 billion.[158] By 2013, the fund's net position rose to $1.85 billion.[159] But DOJ may be overusing civil forfeiture, especially given that few cash seizure cases lead to prosecution.[160]

Third, "the probable value of additional procedural safeguards is high."[161] Both *Krimstock* and *Smith* pointed to state statutes that "provide an early opportunity to challenge the retention of seized property" to illustrate different possible procedures for handling civil forfeitures.[162] *Krimstock* noted a Florida statute that provides a postseizure hearing within ten days after a claimant's request.[163] *Smith* noted an Arizona statute that allows claimants to seek an order that requires the seizing agency to show cause.[164] And, after *Smith*, Illinois amended its drug forfeiture statute to provide for a postseizure hearing.[165] Federal law includes no similar statutory provision to challenge the detention of seized property.

Despite these concerns, then-Judge Sotomayor concluded in *Krimstock* that the risk of erroneous deprivation narrowly weighed in favor of the government.[166] In that case, forfeiture was based on driving while intoxicated; officers are well trained in assessing a driver's level of intoxication, so the driver was most likely not innocent.[167] But *Simms* reached the opposite conclusion. The court concluded that "there is an inherent risk of error when a seizure is based [on] a traffic stop: namely, its validity rests solely on the

156. *Id.* at 868 (citing S. Rep. No. 98-225, at 191 (1983)).

157. Eric Moores, Note, *Reforming the Civil Asset Forfeiture Reform Act*, 51 Ariz. L. Rev. 777, 783 (2009).

158. U.S. Dep't of Justice, Audit Div., Audit Report No. 09-19, Assets Forfeiture Fund and Seized Asset Deposit Fund Annual Financial Statement Fiscal Year 2008, at 7 (2009), http://www.justice.gov/jmd/afp/01programaudit/fy2008/fy2008_afs_report.pdf.

159. U.S. Dep't of Justice, Audit Div., Audit Report No. 14-08, Audit of the Assets Forfeiture Fund and Seized Asset Deposit Fund Annual Financial Statements Fiscal Year 2013, at 7 (2014), http://www.justice.gov/oig/reports/2014/a1408.pdf.

160. *See supra* note 26 and accompanying text.

161. Simms v. District of Columbia, 872 F. Supp. 2d 90, 101 (D.D.C. 2012).

162. Smith v. City of Chicago, 524 F.3d 834, 838 (7th Cir. 2008), *vacated as moot sub nom.* Alvarez v. Smith, 558 U.S. 87 (2009).

163. Krimstock v. Kelly, 306 F.3d 40, 54–55 (2d Cir. 2002) (citing Fla. Stat. § 932.703(2)(a)).

164. *Smith*, 524 F.3d at 838 (citing Ariz. Rev. Stat. Ann. § 13-4310).

165. Edgeworth, *supra* note 16, at 106 (citing 720 Ill. Comp. Stat. 550/12(c); then citing 725 Ill. Comp. Stat. 150/3.5).

166. *Krimstock*, 306 F.3d at 64.

167. *Id.* at 62–63.

arresting officer's unreviewed probable cause determination."[168] In the case of seized cash, documented examples of erroneous deprivations for innocent owners, the overuse of seizures for alleged structuring, the government's strong pecuniary interest, and examples of other procedures combine to tilt the second *Mathews* factor in favor of claimants of seized cash like Dehko, Zaniewski, and Hinders.

3. Government Interest

The third *Mathews* factor weighs the government's interest in maintaining current procedures, including the burdens of implementing alternative procedures.[169] In this case, "[t]he question in the civil forfeiture context is whether *ex parte* seizure is justified by a pressing need for prompt action."[170]

First, the government has a legitimate interest in ensuring that cash is not concealed, moved, or used for illegal activity before judgment.[171] This is the government's "most compelling" interest.[172] The real purpose of retaining property is to prevent its use as an instrumentality in future criminal activity when the "threat to the public [is] immediate."[173] In fact, many of the reasons underlying the earliest civil forfeiture laws still apply to cash.[174] Because cash is easier to hide—whether in offshore accounts or in Sgt. Cortazzo's safe-deposit box[175]—than a home or car, the rationale for forfeiture laws might be especially apt here. If law enforcement cannot retain seized cash, courts may never have the chance to adjudicate the forfeiture.

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168. Simms v. District of Columbia, 872 F. Supp. 2d 90, 101–02 (D.D.C. 2012).

169. Mathews v. Eldridge, 424 U.S. 319, 319, 324 (1976).

170. United States v. James Daniel Good Real Prop., 510 U.S. 43, 56 (1993).

171. *Id.* at 56, 58.

172. *See, e.g.*, *Krimstock*, 306 F.3d at 64 (addressing the government's interest "to prevent a vehicle from being sold or destroyed before a court can render judgment in future forfeiture proceedings").

173. *Id.* at 66 (noting "the examples of summary seizures during wartime, seizures of contaminated food, and, formerly, the collection of taxes when the very existence of the government depended upon them").

174. Until the seventeenth-century English Navigation Acts, "[i]f the owner was available, the forfeiture evidently was imposed only upon confession or adjudication of his guilt." James R. Maxeiner, Note, *Bane of American Forfeiture Law—Banished at Last?*, 62 Cornell L. Rev. 768, 775 (1977). But the Navigation Acts provided for forfeiture of an entire ship involved in smuggling contraband, even without the knowledge of the ship master or owner. *Id.* at 774. The Acts' strictness was meant to "strengthen England's naval prowess." Boudreaux & Pritchard, *supra* note 50, at 95; *see also* Mitchell v. Torup, (1766) 145 Eng. Rep. 764 (Exch.) 766; Park. 227, 232–33 (explaining how in rem forfeiture assisted "the increase of the navigation").

With this background, the First Congress adopted civil forfeiture laws as a way to collect important revenue for the fledgling republic. *See* Boudreaux & Pritchard, *supra* note 50, at 96–97. For customs, in rem "forfeiture was the government's only means for collecting the tax" because "[t]he owner of the goods was often beyond the Court's *in personam* jurisdiction." Donald J. Boudreaux & A.C. Pritchard, *Innocence Lost:* Bennis v. Michigan *and the Forfeiture Tradition*, 61 Mo. L. Rev. 593, 620 (1996).

175. *See supra* note 24 and accompanying text.

Because cash is so easily moved or concealed, the government's interest would likely outweigh other considerations in *Mathews* balancing for notice or hearing before cash is seized. Here, the appropriate procedural safeguard for seized cash is a *postseizure*, not a *preseizure*, hearing: giving the claimant an opportunity to be heard and test the validity of the detention of cash after federal agents seize it. A court can then turn to other procedures to ensure the availability of cash for a forfeiture proceeding, such as appointing a conservator or receiver.[176]

Second, the *Good* Court noted the concern in another case that "immediate seizure was necessary to establish the court's jurisdiction over the property."[177] The Court rejected that concern, however, due to the inability to steal or hide a home and a court's ability to prevent the sale of real property.[178]

Finally, the government has an "interest in avoiding additional procedural safeguards."[179] But "due process always imposes some burden on a governing entity."[180] And as the *Good* Court concluded, "[r]equiring the Government to postpone seizure until after an adversary hearing creates no significant administrative burden."[181] The government must already show probable cause to seize cash. The only difference now is that the government must prove probable cause in a postseizure, adversarial hearing rather than ex parte.

In sum, claimants have a strong interest in a postseizure hearing. Existing procedures do not adequately protect innocent owners during the deprivation of cash, and other procedures are available. And the government has a lesser interest in a postseizure—rather than preseizure—hearing, so the private interests of the owner triumph. Thus, each *Mathews* factor weighs toward requiring a postseizure hearing to test the validity of continued cash retention.

III. The Demands of Due Process

Adequate due process can take many forms.[182] This Part considers possible alternatives for government actors to protect the interests of owners of seized cash and avoid a constitutional problem. Section III.A presents options for Congress to defeat the need for a constitutional remedy by

176. 18 U.S.C. § 983(j) (2012).

177. United States v. James Daniel Good Real Prop., 510 U.S. 43, 57 (1993) (citing Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 679 (1974)).

178. *Id.* at 57–58.

179. Simms v. District of Columbia, 872 F. Supp. 2d 90, 103 (D.D.C. 2012).

180. Smith v. City of Chicago, 524 F.3d 834, 838 (7th Cir. 2008), *vacated as moot sub nom.* Alvarez v. Smith, 558 U.S. 87 (2009).

181. *Good*, 510 U.S. at 59.

182. *See* Fuentes v. Shevin, 407 U.S. 67, 96 (1972) ("The nature and form of such prior hearings, moreover, are legitimately open to many potential variations . . . ."); Krimstock v. Kelly, 306 F.3d 40, 69 (2d Cir. 2002) ("There is no universal approach to satisfying the requirements of meaningful notice and opportunity to be heard in a situation such as this.").

providing additional safeguards that reduce the risk of erroneous deprivation.[183] In addition, the executive branch, through agencies like the IRS and DOJ, can continue to enact policy changes in the civil forfeiture arena by eschewing cash seizures entirely in structuring cases, but future administrations can easily change those policies. Section III.B argues that, absent legislative reforms, the temporary detention of seized cash requires a constitutional remedy. Section III.B then discusses the characteristics of one potential remedy: postseizure hearings. Thus—unless Congress amends federal law to provide better procedural alternatives—due process requires protection under *Mathews* for cash seizures in structuring cases.

A. *Legislative and Executive Proposals*

Commentators continue to criticize CAFRA for failing to protect property owners, often on the grounds that the government's burden of proof remains too low, the innocent-owner defense is too limited, or law enforcement's financial incentives to seize property are still too powerful.[184] A number of proposals could meet the demands of due process by reducing the risk of erroneous deprivation. These include raising the government's burden of proof,[185] eliminating seizing agencies' pecuniary interests in the property they seize,[186] requiring proportionality between the forfeiture and the underlying offense,[187] or even tailoring new procedures and burdens for different types of forfeitures.[188] Indeed, IRS seizure and forfeiture practices have interested Congress and led to a subcommittee hearing on the issue.[189] Member statements suggest a rare opportunity for bipartisanship.[190]

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183. *See* Mathews v. Eldridge, 424 U.S. 319, 343 (1976) (considering "the fairness and reliability of the existing pretermination procedures, and the probable value, if any, of additional procedural safeguards" as the second factor in civil due process balancing).

184. *See supra* note 47 and accompanying text.

185. Barclay Thomas Johnson, Note, *Restoring Civility—The Civil Asset Forfeiture Reform Act of 2000: Baby Steps Toward a More Civilized Civil Forfeiture System*, 35 Ind. L. Rev. 1045, 1075–79 (2002); *see also* Fifth Amendment Integrity Restoration (FAIR) Act of 2015, S. 255, H.R. 540, 114th Cong. § 2 (2015) (replacing proof by "a preponderance of the evidence" with "clear and convincing evidence").

186. *See* David Benjamin Ross, Note, *Civil Forfeiture: A Fiction that Offends Due Process*, 13 Regent U. L. Rev. 259, 270–75 (2000); *see also* S. 255, H.R. 540, § 3 (redirecting forfeiture assets from the U.S. Department of Justice Assets Forfeiture Fund to the General Fund of the Treasury of the United States).

187. Owen Sucoff, Note, *From the Courthouse to the Police Station: Combating the Dual Biases that Surround Federal Money-Laundering Asset Forfeiture*, 46 New Eng. L. Rev. 93, 117–21 (2011).

188. Pimentel, *supra* note 47, at 54–59.

189. *Protecting Small Businesses from IRS Abuse: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways and Means*, 114th Cong. (2015) (statement of Rep. Peter Roskam, Chairman, Subcomm. on Oversight of the H. Comm. on Ways and Means), http://waysandmeans.house.gov/roskam-opening-statement-protecting-small-businesses-from-irs-abuse/.

190. According to Oversight Subcommittee Chairman Roskam, a Republican, "[t]here is strong indication that the IRS has been involved in civil forfeiture that has hurt innocent

Congress could look to state laws that offer more protection than federal law to statutorily safeguard due process rights. For example, the *Krimstock* court consulted a Florida statute to determine how New York City Code could provide an opportunity to challenge government retention of seized property.[191] Upon seizure, the Florida law required authorities to give an owner notice that she may request an adversarial hearing within fifteen days after receiving notice.[192] The *Smith* court turned to an Arizona statute to show how Illinois could provide an opportunity to challenge retention of seized property.[193] Rather than providing a hearing, Arizona law required authorities to show cause on an owner's request.[194] After *Smith*, Illinois provided for a postseizure hearing within fourteen days of a seizure.[195] And in April 2015, New Mexico restricted civil forfeiture to cases in which the owner is convicted of a crime and clear and convincing evidence exists that property is subject to forfeiture.[196] These state policies, if adopted by Congress, could reduce the risk of erroneous deprivation of property and thus reduce the risk of a successful constitutional challenge.

Looking at the problem through the lens of prosecutorial discretion, Congress could also consider reforming CAFRA's attorney-fee provision.[197] Under current law, a court can award attorney fees in any case in which the claimant "substantially prevails."[198] But courts have held that a claimant does not meet that standard if the government voluntarily dismisses the case,[199] leaving claimants like Dehko, Zaniewski, and Hinders ineligible for attorney fees. Since the government is more likely to voluntarily dismiss a forfeiture case than prosecute and lose, awarding fees even when the government dismisses cases would have a significant impact. Here, too, legislators could look to state law for solutions. Three years after an influential Pulitzer Prize-winning series in the *Orlando Sentinel* revealed systemic forfeiture practices by Florida police along I-95,[200] the Florida legislature enacted a law

people." Bade, *supra* note 36. Representative Rangel, a Democrat, added, "[w]hether or not it is within the law, it is wrong to, without any criminal evidence, seize somebody's property." *Id.*

191. Krimstock v. Kelly, 306 F.3d 40, 54–55 (2d Cir. 2002).

192. Fla. Stat. Ann. § 932.703(2)(a) (West 2015).

193. Smith v. City of Chicago, 524 F.3d 834, 838 (7th Cir. 2008), *vacated as moot sub nom.* Alvarez v. Smith, 558 U.S. 87 (2009).

194. *See* Ariz. Rev. Stat. Ann. § 13-4310 (West 2010).

195. 725 Ill. Comp. Stat. 150/3.5 (2012); *see also* Edgeworth, *supra* note 16, at 106 ("The State of Illinois has subsequently [after *Smith*] amended the state drug forfeiture statute, adding a new provision for a contested probable cause hearing within 14 days of the seizure."); *cf.* 720 Ill. Comp. Stat. 550/12(c) (2012).

196. N.M. Stat. Ann. § 31-27-4 (LexisNexis 2014).

197. 28 U.S.C. § 2465(b)(1)(A) (2012).

198. *Id.* § (b)(1).

199. 1 Smith, *supra* note 60, ¶ 10.08(2).

200. Jeff Brazil & Steve Berry, *Tainted Cash or Easy Money?*, Orlando Sentinel (June 14, 1992), http://articles.orlandosentinel.com/1992-06-14/news/9206131060_1_seizures-kea-drug-squad; *see also* Hyde, *supra* note 45, at 38–40 (discussing the investigation's findings).

that awards up to $1,000 in attorney fees to claimants if a seizing agency fails to show probable cause for forfeiture at a preliminary hearing.[201] Strengthening attorney fees could disincentivize prosecutors from seizing Dehko's, Zaniewski's, and Hinders's bank accounts only to voluntarily dismiss the civil forfeiture actions later.

Outside Congress, the executive branch has recently taken action to curb abuses in civil asset forfeiture. For example, the IRS announced that it would stop seeking the forfeiture of funds seized for alleged structuring without undefined "exceptional circumstances."[202] In January 2015, DOJ suspended a program that allowed use of federal law to forfeit assets seized by state and local law enforcement.[203] And in March, DOJ announced a new policy requiring prosecutors to develop probable cause of additional federal criminal activity, which is then subject to supervisor approval.[204] But these policies still allow federal agents to seize cash for alleged structuring under federal law. And the constitutional problem is not eliminated when future executive branch officials can simply reverse those policies.

Legislative reforms might provide adequate procedures to meet the demands of due process. But they require action. Without such reforms, the process owed to claimants of seized cash in structuring cases presents courts with a constitutional problem.

B. *Judicial Remedies*

Once a court finds that *Mathews* balancing weighs in favor of a claimant of seized cash, it must craft a constitutional remedy. The question that remains is what process is due to claimants. For example, under *Gerstein v. Pugh*, the extended restraint of liberty in a criminal arrest requires a judicial determination of probable cause—which can occur in an ex parte proceeding.[205] In civil forfeiture, however, the Supreme Court has counseled that "[t]he practice of *ex parte* seizure . . . creates an unacceptable risk of error" for innocent owners.[206] Moreover, the Court concluded that the deprivation of property pending the outcome of a civil forfeiture proceeding must meet

201. Fla. Stat. Ann. § 932.704(10) (West 2015); *see also* Michael Griffin, *Forfeiture Reform Bill Becomes Law*, Orlando Sentinel (June 14, 1995), http://articles.orlandosentinel.com/1995-06-14/news/9506140140_1_seize-property-law-enforcement-requires-law.

202. *See Statement of Richard Weber, Chief of I.R.S. Criminal Investigation*, *supra* note 32.

203. Order from Attorney Gen. Eric Holder, *Prohibition on Certain Federal Adoptions of Seizures by State and Local Law Enforcement Agencies* (Jan. 16, 2015), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/01/16/attorney_general_order_prohibiting_adoptions.pdf; *see also* Robert O'Harrow Jr. et al., *Holder Limits Seized-Asset Sharing Process that Split Billions with Local, State Police*, Wash. Post (Jan. 16, 2015), http://www.washingtonpost.com/investigations/holder-ends-seized-asset-sharing-process-that-split-billions-with-local-state-police/2015/01/16/0e7ca058-99d4-11e4-bcfb-059ec7a93ddc_story.html?hpid=z1.

204. Memorandum for Heads of Department Components U.S. Attorneys from Attorney Gen. Eric Holder, *supra* note 34.

205. 420 U.S. 103 (1975).

206. United States v. James Daniel Good Real Prop., 510 U.S. 43, 55 (1993).

both Fourth Amendment seizure and Fifth Amendment due process requirements.[207] To meet these constitutional requirements, courts can simply provide a postseizure, adversarial probable cause hearing.

Krimstock hearings provide insight into the appropriate process for claimants of seized cash. After several appeals and remands testing the need to protect law enforcement interests,[208] a *Krimstock* hearing provides an adversarial process in which the claimant can contest that probable cause exists on three grounds: (1) whether probable cause existed for the offense underlying the forfeiture, (2) whether the government is likely to prevail in a forfeiture action, and (3) whether the government needs to detain the cash pending the forfeiture action.[209] The hearing is not weighed down by all of the procedural safeguards that come with a trial.[210] As long as the claimant can meaningfully test whether probable cause exists, due process is satisfied. The hearing need be no more than a postseizure, adversarial *Gerstein* hearing. Because law enforcement must already demonstrate probable cause to seize property, the additional burden on law enforcement is small.

The question remains whether a *Krimstock* hearing for claimants of seized cash would actually benefit claimants in practice. After all, probable cause is an amorphous standard,[211] and prosecutors tend to easily meet the low bar required for a *Gerstein* hearing. Prosecutors will be able to present enough evidence that cash is subject to forfeiture by probable cause in many, probably most, cases. But the low rate of prosecution in criminal structuring cases after cash seizures might suggest otherwise.[212]

Moreover, critics ignore the reputational costs prosecutors would pay by requesting the continued detention of seized cash in weak cases. Providing *Krimstock* hearings for most cash seizures would bring the same prosecutors

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207. *Id.* at 52.

208. In *Krimstock*, the Second Circuit held "that, at a minimum, the hearing must enable claimants to test the probable validity of continued deprivation" of the property. Krimstock v. Kelly (*Krimstock I*), 306 F.3d 40, 69 (2d Cir. 2002). But, on remand to the district court to create a "*Krimstock* hearing," for the first time the city raised the issue of retaining seized property as arrest evidence—which conflicted with the Second Circuit's remand to develop a procedure allowing claimants to challenge vehicles' detention. Jones v. Kelly (*Krimstock II*), 378 F.3d 198, 200 (2d Cir. 2004). The district court then held a hearing on law enforcement concerns, and the Second Circuit upheld the new order. Krimstock v. Kelly (*Krimstock III*), 464 F.3d 246 (2d Cir. 2006).

209. Third Amended Order & Judgment, Krimstock v. Kelly (*Krimstock IV*), 506 F. Supp. 2d 249 (S.D.N.Y. 2007) (No. 99 Civ. 12041 (HB)), 2007 U.S. Dist. LEXIS 82612, at *2.

210. *See Krimstock IV*, 506 F. Supp. 2d at 256 ("Although a 'full-dress adversarial hearing' is not required to test the District Attorney's initial application to retain the vehicle, given the deprivation of a vehicle here—frequently, the only way in which the claimant can earn a living—claimants must be provided at some point with some opportunity to be heard.").

211. *Cf., e.g.*, Texas v. Brown, 460 U.S. 730, 742 (1983) ("As the Court frequently has remarked, probable cause is a flexible, common-sense standard. . . . [I]t does not demand any showing that that such a belief be correct or more likely true than false. A 'practical, nontechnical' probability that incriminating evidence is involved is all that is required.").

212. *See* Dewan, *supra* note 23.

before the same magistrates over and over again, putting prosecutors' reputations in play. If prosecutors repeatedly ask magistrates to retain seized cash and then voluntarily dismiss cases—as with Dehko, Zaniewski, and Hinders—or lose the forfeiture actions, the magistrates will be more skeptical of government claims in future *Krimstock* hearings. Skeptical magistrates, in turn, incentivize prosecutors to pursue only stronger cases, resulting in less forfeiture. Even if certain legislative reforms would more rigorously protect claimants' interests, due process requires at least *Krimstock* hearings for cash seizures in structuring cases. And, as this Note demonstrates, in the absence of congressional action, courts must provide *Krimstock* hearings to protect innocent owners from improper government seizures.

Conclusion

This Note demonstrates that seizing and detaining cash in structuring cases violates due process. Under current law, cash seizures do not have adequate procedural safeguards. And, at least in structuring cases, the private interest in cash seizures likely outweighs the government interest. With no legislative reforms pending, courts should not wait for Congress to craft alternative procedures for claimants of seized cash to test the validity of the detention. Future innocent claimants like Terry Dehko, Mark Zaniewski, Carole Hinders, and Jeff Cortazzo could suffer less harm if given the opportunity to make their case in an adversarial hearing before a magistrate—a hearing that due process demands.

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