SUPREME COURT OF THE UNITED STATES

No. 92–1180

UNITED STATES, PETITIONER *v.* JAMES DANIEL GOOD REAL PROPERTY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[December 13, 1993]

JUSTICE O'CONNOR, concurring in part and dissenting in part.

Today the Court declares unconstitutional an act of the Executive Branch taken with the prior approval of a federal magistrate in full compliance with the laws enacted by Congress. On the facts of this case, however, I am unable to conclude that the seizure of Good's property did not afford him due process. I agree with the Court's observation in an analogous case more than a century ago: "If the laws here in question involved any wrong or unnecessary harshness, it was for Congress, or the people who make congresses, to see that the evil was corrected. The remedy does not lie with the judicial branch of the government." *Springer* v. *United States*, 102 U. S. 586, 594 (1881).

With respect to whether 19 U. S. C. §§1602–1604 impose a timeliness requirement over and above the statute of limitations, I agree with the dissenting judge below that the Ninth Circuit improperly "converted a set of housekeeping rules for the government into statutory protection for the property of malefactors." 971 F. 2d 1376, 1384 (1992). I therefore join Parts I and III of the Court's opinion.

I cannot agree, however, that under the circumstances of this case—where the property owner was previously convicted of a drug offense involving the property, the Government obtained a warrant before

seizing it, and the residents were not dispossessed—there was a due process violation simply because Good did not receive preseizure notice and an opportunity to be heard. I therefore respectfully dissent from Part II of the Court's opinion; I also join Parts II and III of the opinion of THE CHIEF JUSTICE.

My first disagreement is with the Court's holding that the Government must give notice and a hearing before seizing *any* real property prior to forfeiting it. That conclusion is inconsistent with over a hundred years of our case law. We have already held that seizure for purpose of forfeiture is one of those "extraordinary situations," *Fuentes* v. *Shevin*, 407 U. S. 67, 82 (1972) (internal quotation marks omitted), in which the Due Process Clause does not require predeprivation notice and an opportunity to be heard. *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U. S. 663, 676–680 (1974). As we have recognized, *Calero-Toledo* "clearly indicates that due process does not require federal [agents] to conduct a hearing before seizing items subject to forfeiture." *United States* v. *$8,850*, 461 U. S. 555, 562, n. 12 (1983); see also *United States* v. *Von Neumann*, 474 U. S. 242, 249, n. 7 (1986). Those cases reflect the common-sense notion that the property owner receives all the process that is due at the forfeiture hearing itself. See *id.*, at 251 ("[The claimant's] right to a [timely] forfeiture proceeding . . . satisfies any due process right with respect to the [forfeited property]"); *Windsor* v. *McVeigh*, 93 U. S. 274, 279 (1876).

The distinction the Court tries to draw between our precedents and this case—the only distinction it *can* draw—is that real property is somehow different than personal property for due process purposes. But that distinction has never been considered constitutionally relevant in our forfeiture cases. Indeed, this Court rejected precisely the same distinction in a case in which we were presented with a due process

challenge to the forfeiture of real property for back taxes:

> "The power to distrain personal property for the payment of taxes is almost as old as the common law. . . . Why is it not competent for Congress to apply to realty as well as personalty the power to distrain and sell when necessary to enforce the payment of a tax? It is only the further legitimate exercise of the same power for the same purpose." *Springer*, *supra*, at 593–594.

There is likewise no basis for distinguishing between real and personal property in the context of forfeiture of property used for criminal purposes. The required nexus between the property and the crime—that it be used to commit, or facilitate the commission of, a drug offense—is the same for forfeiture of real and personal property. Compare 21 U. S. C. §881(a)(4) with §881(a)(7); see *Austin* v. *United States*, 509 U. S. ___, ___ (1993) (construing the two provisions equivalently). Forfeiture of real property under similar circumstances has long been recognized. *Dobbins's Distillery* v. *United States*, 96 U. S. 395, 399 (1878) (upholding forfeiture of "the real estate used to facilitate the [illegal] operation of distilling"); see also *United States* v. *Stowell*, 133 U. S. 1 (1890) (upholding forfeiture of land and buildings used in connection with illegal brewery).

The Court attempts to distinguish our precedents by characterizing them as being based on "executive urgency." *Ante*, at 16. But this case, like all forfeiture cases, also involves executive urgency. Indeed, the Court in *Calero-Toledo* relied on the same cases the Court disparages:

> "[D]ue process is not denied when postponement of notice and hearing is necessary to protect the public from contaminated food, *North American [Cold] Storage Co.* v. *Chicago*, 211 U. S. 306 (1908); . . . or to aid the collection of taxes, *Phillips* v. *Commissioner*, 283 U. S. 589 (1931); or the war effort, *United States* v. *Pfitsch*, 256 U. S. 547 (1921)." 416 U. S., at 679.

The Court says that there is no "plausible claim of urgency today to justify the summary seizure of real property under §881(a)(7)." *Ante*, at 17–18. But we said precisely the opposite in *Calero-Toledo*: "The considerations that justified postponement of notice and hearing in those cases are present here." 416 U. S., at 679. The *only* distinction between this case and *Calero-Toledo* is that the property forfeited here was realty, whereas the yacht in *Calero-Toledo* was personalty.

It is entirely spurious to say, as the Court does, that executive urgency depends on the nature of the property sought to be forfeited. The Court reaches its anomalous result by mischaracterizing *Calero-Toledo*, stating that the movability of the yacht there at issue was "[c]entral to our analysis." *Ante*, at 8. What we actually said in *Calero-Toledo*, however, was that "preseizure notice and hearing might frustrate the interests served by [forfeiture] statutes, since the property seized—as here, a yacht—will *often be of a sort* that could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given." 416 U. S., at 679 (emphasis added). The fact that the yacht could be sunk or sailed away was relevant to, but hardly dispositive of, the due process analysis. In any event, land and buildings *are* subject to damage or destruction. See *ante*, at 8 (REHNQUIST, C. J., concurring in part and dissenting in part). Moreover, that was just one of the three justifications on which we relied in upholding the forfeiture in *Calero-Toledo*. The other two—the importance of the governmental purpose and the fact that the seizure was made by government officials rather than private parties—are without a doubt equally present in this case, as THE CHIEF JUSTICE's opinion demonstrates. *Ante*, at 7–8.

My second disagreement is with the Court's holding

that the Government acted unconstitutionally in seizing *this* real property for forfeiture without giving Good prior notice and an opportunity to be heard. I agree that the due process inquiry outlined in *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976)—which requires a consideration of the private interest affected, the risk of erroneous deprivation and the value of additional safeguards, and the Government's interest—provides an appropriate analytical framework for evaluating whether a governmental practice violates the Due Process Clause notwithstanding its historical pedigree. Cf. *Medina* v. *California*, 505 U. S. ___, ___ (1992) (O'CONNOR, J., concurring in judgment). But this case is an *as applied* challenge to the seizure of Good's property; on these facts, I cannot conclude that there was a constitutional violation.

The private interest at issue here—the owner's right to control his property—is significant. Cf. *Connecticut* v. *Doehr*, 500 U. S. ___, ___ (1991) ("[T]he property interests that attachment affects are significant"). Yet the preforfeiture intrusion in this case was minimal. Good was not living on the property at the time, and there is no indication that his possessory interests were in any way infringed. Moreover, Good's tenants were allowed to remain on the property. The property interest of which Good was deprived was the value of the rent during the period between seizure and the entry of the judgment of forfeiture—a monetary interest identical to that of the property owner in *$8,850*, *supra*, in which we stated that preseizure notice and hearing was not required.

The Court emphasizes that people have a strong interest in their homes. *Ante*, at 9, 18. But that observation confuses the Fourth and the Fifth Amendments. The "sanctity of the home" recognized by this Court's cases, *e. g.*, *Payton* v. *New York*, 445 U. S. 573, 601 (1980), is founded on a concern with governmental *intrusion* into the owner's possessory

or privacy interests—the domain of the Fourth Amendment. Where, as here, the Government obtains a warrant supported by probable cause, that concern is allayed. The Fifth Amendment, on the other hand, is concerned with *deprivations* of property interests; for due process analysis, it should not matter whether the property to be seized is real or personal, home or not. The relevant inquiry is into the governmental interference with the owner's interest in whatever property is at issue, an intrusion that is minimal here.

Moreover, it is difficult to see what advantage a preseizure adversary hearing would have had in this case. There was already an *ex parte* hearing before a magistrate to determine whether there was probable cause to believe that Good's property had been used in connection with a drug trafficking offense. That hearing ensured that the probable validity of the claim had been established. Cf. *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337, 343 (1969) (Harlan, J., concurring). The Court's concern with innocent owners (see *ante*, at 10–11) is completely misplaced here, where the warrant affidavit indicated that the property owner had already been convicted of a drug offense involving the property. See App. 29–31.

At any hearing—adversary or not—the Government need only show probable cause that the property has been used to facilitate a drug offense in order to seize it; it will be unlikely that giving the property owner an opportunity to respond will affect the probable-cause determination. Cf. *Gerstein* v. *Pugh*, 420 U. S. 103, 121–122 (1975). And we have already held that property owners have a due process right to a prompt *post*seizure hearing, which is sufficient to protect the owner's interests. See *$8,850*, 461 U. S., at 564–565; *Von Neumann*, 474 U. S., at 249.

The Government's interest in the property is substantial. Good's use of the property to commit a drug offense conveyed all right and title to the United

States, although a judicial decree of forfeiture was necessary to perfect the Government's interest. See *United States* v. *A Parcel of Rumson, N. J., Land*, 507 U. S. ___, ___ (1993) (plurality opinion); compare *Doehr*, *supra*, at ___ (noting that the plaintiff "had no existing interest in Doehr's real estate when he sought the attachment"). Seizure allowed the Government to protect its inchoate interest in the property itself. Cf. *Mitchell* v. *W. T. Grant Co.*, 416 U. S. 600, 608–609 (1974).

Seizure also permitted the Government "to assert *in rem* jurisdiction over the property in order to conduct forfeiture proceedings, thereby fostering the public interest in preventing continued illicit use of the property and in enforcing criminal sanctions." *Calero-Toledo*, 416 U. S., at 679 (footnote omitted); see also *Fuentes*, 407 U. S., at 91, n. 23, citing *Ownbey* v. *Morgan*, 256 U. S. 94 (1921). In another case in which the forfeited property was land and buildings, this Court stated:

> "Judicial proceedings *in rem*, to enforce a forfeiture, cannot in general be properly instituted until the property inculpated is previously seized by the executive authority, as it is the preliminary seizure of the property that brings the same within the reach of such legal process." *Dobbins's Distillery*, 96 U. S., at 396, citing *The Brig Ann*, 9 Cranch 289 (1815).

The Government in *Dobbins's Distillery* proceeded almost exactly as it did here: The United States Attorney swore out an affidavit alleging that the premises were being used as an illegal distillery, and thus were subject to forfeiture; a federal judge issued a seizure warrant; a deputy United States Marshal seized the property by posting notices thereon admonishing anyone with an interest in it to appear before the court on a stated date; and the court, after a hearing at which Dobbins claimed his interest, ordered the property forfeited to the United States.

See Record in *Dobbins's Distillery* v. *United States*, No. 145, O. T. 1877, pp. 2–8, 37–39, 46–48. The Court noted that "[d]ue executive seizure was made in this case of the distillery and of the real and personal property used in connection with the same." 96 U. S., at 396.

The Court objects that the rule has its origins in admiralty cases, and has no applicability when the object of the forfeiture is real property. But Congress has specifically made the customs laws applicable to drug forfeitures, regardless of whether the Government seeks to forfeit real or personal property. 21 U. S. C. §881(d); cf. *Tyler* v. *Defrees*, 11 Wall. 331, 346 (1871) ("Unquestionably, it was within the power of Congress to provide a full code of procedure for these cases [involving the forfeiture of real property belonging to rebels], but it chose to [adopt], as a general rule, a well-established system of administering the law of capture"). Indeed, just last Term, we recognized in a case involving the seizure and forfeiture of real property that "it long has been understood that a valid seizure of the res is a prerequisite to the *initiation* of an *in rem* civil forfeiture proceeding." *Republic Nat. Bank of Miami* v. *United States*, 506 U. S. ___, ___ (1992).

Finally, the burden on the Government of the Court's decision will be substantial. The practical effect of requiring an adversary hearing before seizure will be that the Government will conduct the full forfeiture hearing on the merits before it can claim its interest in the property. In the meantime, the Government can protect the important *federal* interests at stake only through the vagaries of state laws. And while under the current system only a few property owners contest the forfeiture, the Court's opinion creates an incentive and an opportunity to do so, thus increasing the workload of federal prosecutors and courts.

For all these reasons, I would reverse the judgment

of the Court of Appeals. I therefore respectfully dissent from Part II of the opinion of the Court.