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 THOMAS, concurring in part and dissenting in part.

Two fundamental considerations seem to motivate the Court's due process ruling: first, a desire to protect the rights incident to the ownership of real property, especially residences, and second, a more implicitly expressed distrust of the Government's aggressive use of broad civil forfeiture statutes. Although I concur with both of these sentiments, I cannot agree that Good was deprived of due process of law under the facts of this case. Therefore, while I join Parts I and III of the Court's opinion, I dissent from Part II.

Like the majority, I believe that "[i]ndividual freedom finds tangible expression in property rights." *Ante*, at 18. In my view, as the Court has increasingly emphasized the creation and delineation of entitlements in recent years, it has not always placed sufficient stress upon the protection of individuals' traditional rights in real property. Although I disagree with the outcome reached by the Court, I am sympathetic to its focus on the protection of property rights—rights that are central to our heritage. Cf. *Payton* v. *New York*, 445 U. S. 573, 601 (1980) ("[R]espect for the sanctity of the home . . . has been embedded in our traditions since the origins of the Republic"); *Entick* v. *Carrington*, 19 How. St. Tr. 1029, 1066 (C. P. 1765) ("The great end, for which men entered into society, was to secure their property").

And like the majority, I am disturbed by the breadth of new civil forfeiture statutes such as 21 U. S. C. §881(a)(7), which subjects to forfeiture *all* real property that is used, or intended to be used, in the commission, or even the *facilitation*, of a federal drug offense.[1] As JUSTICE O'CONNOR points out, *ante*, at 2–4, since the Civil War we have upheld statutes allowing for the civil forfeiture of real property. A strong argument can be made, however, that §881(a)(7) is so broad that it differs not only in degree, but in kind, from its historical antecedents. See, *e.g.*, Brief for Respondents 19–21. Indeed, it is unclear whether the central theory behind *in rem* forfeiture, the fiction "that the thing is primarily considered the offender," *J. W. Goldsmith, Jr.-Grant Co.* v. *United States*, 254 U. S. 505, 511 (1921), can fully justify the immense scope of §881(a)(7). Under this provision, "large tracts of land [and any improvements thereon] which have no connection with crime other than being the location where a drug transaction occurred," Brief for Respondents 20, are subject to forfeiture. It is difficult to see how such real property is necessarily in any sense "guilty" of an offense, as could

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[1]Other courts have suggested that Government agents, and the statutes under which they operate, have gone too far in the civil forfeiture context. See, *e.g.*, *United States* v. *All Assets of Statewide Auto Parts, Inc.*, 971 F. 2d 896, 905 (CA2 1992) ("We continue to be enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes"); *United States* v. *One Parcel of Property*, 964 F. 2d 814, 818 (CA8 1992) ("[W]e are troubled by the government's view that *any* property, whether it be a hobo's hovel or the Empire State Building, can be seized by the government because the owner, regardless of his or her past criminal record, engages in a single drug transaction"), rev'd *sub nom. Austin* v. *United States*, 509 U. S. ___ (1993).

reasonably be argued of, for example, the distillery in *Dobbins's Distillery* v. *United States*, 96 U. S. 395 (1878), or the pirate vessel in *Harmony* v. *United States*, 2 How. 210 (1844). Given that current practice under §881(a)(7) appears to be far removed from the legal fiction upon which the civil forfeiture doctrine is based, it may be necessary—in an appropriate case—to reevaluate our generally deferential approach to legislative judgments in this area of civil forfeiture.[2]

In my view, however, Good's due process claim does not present that "appropriate" case. In its haste to serve laudable goals, the majority disregards our case law and ignores the critical facts of the case before it. As the opinions of THE CHIEF JUSTICE, *ante*, at 5–8, and JUSTICE O'CONNOR, *ante*, at 2–5, persuasively demonstrate, the Court's opinion is predicated in large part upon misreadings of important civil forfeiture precedents, especially *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U. S. 663 (1974).[3] I will not repeat the critiques found in the other dissents, but will add that it is twice-puzzling for the majority to explain cases such as *Springer* v. *United States*, 102 U. S. 586 (1881), and *Dobbins's Distillery*,

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[2]Such a case may arise in the excessive fines context. See *Austin* v. *United States*, 509 U. S. ___, ___ (1993) (slip op., at 6) (SCALIA, J., concurring in part and concurring in judgment) (suggesting that "[t]he relevant inquiry for an excessive forfeiture under [21 U. S. C.] §881 is the relationship of the property to the offense: Was it close enough to render the property, under traditional standards, `guilty' and hence forfeitable?").

[3]With scant support, the Court also dispenses with the ancient jurisdictional rule 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) (slip op., at 4), at least in the case of real property. See *ante*, at 13–14.

supra, as depending on the Federal Government's urgent need for revenue in the 19th century. First, it is somewhat odd that the Court suggests that the Government's financial concerns might justifiably control the due process analysis, see *ante*, at 16, and second, it is difficult to believe that the prompt collection of funds was more essential to the Government a century ago than it is today.

I agree with the other dissenters that a fair application of the relevant precedents to this case would indicate that no due process violation occurred. But my concerns regarding the legitimacy of the current scope of the Government's real property forfeiture operations lead me to consider these cases as only helpful to the analysis, not dispositive. What convinces me that Good's due process rights were not violated are the facts of this case—facts that are disregarded by the Court in its well-intentioned effort to protect "innocent owners" from mistaken Government seizures. *Ante*, at 10. The Court forgets that "this case is an *as applied* challenge to the seizure of Good's property." *Ante*, at 5 (O'CONNOR, J., concurring in part and dissenting in part). In holding that the Government generally may not seize real property prior to a final judgment of forfeiture, see *ante*, at 15, 18, the Court effectively declares that many of the customs laws are facially unconstitutional as they apply under 21 U. S. C. §881(d) to forfeiture actions brought pursuant to §881(a)(7). See, *e.g.*, 19 U. S. C. §§1602, 1605 (authorizing seizure prior to adversary proceedings). We should avoid reaching beyond the question presented in order to fashion a broad constitutional rule when doing so is unnecessary for resolution of the case before us. Cf. *Ashwander* v. *TVA*, 297 U. S. 288, 347 (1936) (Brandeis, J., concurring). The Court's overreaching is particularly unfortunate in this case because the Court's solicitude is so clearly misplaced: Good is not an "innocent owner"; he is a convicted

drug offender.

Like JUSTICE O'CONNOR, I cannot agree with the Court 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." *Ante*, at 2 (O'CONNOR, J., concurring in part and dissenting in part). Wherever the due process line properly should be drawn, in circumstances such as these, a preseizure hearing is not required as a matter of constitutional law. Moreover, such a hearing would be unhelpful to the property owner. As a practical matter, it is difficult to see what purpose it would serve. Notice, of course, is provided by the conviction itself. In my view, seizure of the property without more formalized notice and an opportunity to be heard is simply one of the many unpleasant collateral consequences that follows from conviction of a serious drug offense. Cf. *Price* v. *Johnston*, 334 U. S. 266, 285 (1948) ("Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights").

It might be argued that this fact-specific inquiry is too narrow. Narrow, too, however, was the first question presented to us for review.[4] Moreover, when, as here, ambitious modern statutes and prosecutorial practices have all but detached themselves from the ancient notion of civil forfeiture,

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[4]"Whether the seizure of the respondent real property for forfeiture, pursuant to a warrant issued by a magistrate judge based on a finding of probable cause, violated the Due Process Clause of the Fifth Amendment because the owner (who did not reside on the premises) was not given notice and an opportunity for a hearing prior to the seizure." Pet. for Cert. I.

I prefer to go slowly. While I sympathize with the impulses motivating the Court's decision, I disagree with the Court's due process analysis. Accordingly, I respectfully dissent.