

# SUPREME COURT OF THE UNITED STATES

No. 92-6073

RICHARD LYLE AUSTIN, PETITIONER v.  
UNITED STATES

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

[June 28, 1993]

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, concurring in part and concurring in the judgment.

I am in substantial agreement with Part I of JUSTICE SCALIA's opinion concurring in part and concurring in the judgment. I share JUSTICE SCALIA's belief that Part III of the Court's opinion is quite unnecessary for the decision of the case, fails to support the Court's argument, and seems rather doubtful as well.

In recounting the law's history, we risk anachronism if we attribute to an earlier time an intent to employ legal concepts that had not yet evolved. I see something of that in the Court's opinion here, for in its eagerness to discover a unified theory of forfeitures, it recites a consistent rationale of personal punishment that neither the cases nor other narratives of the common law suggest. For many of the reasons explained by JUSTICE SCALIA, I am not convinced that all *in rem* forfeitures were on account of the owner's blameworthy conduct. Some impositions of *in rem* forfeiture may have been designed either to remove property that was itself causing injury, see, e.g., *United States v. Brig Malek Adhel*, 2 How. 210, 233 (1844), or to give the court jurisdiction over an asset that it could control in order to make injured parties whole, see *Republic National Bank of Miami v. United States*, 506 U. S. \_\_\_, \_\_\_ (1992) (slip op., at 7).

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At some point, we may have to confront the constitutional question whether forfeiture is permitted when the owner has committed no wrong of any sort, intentional or negligent. That for me would raise a serious question. Though the history of forfeiture laws might not be determinative of that issue, it would have an important bearing on the outcome. I would reserve for that or some other necessary occasion the inquiry the Court undertakes here. Unlike JUSTICE SCALIA, see *ante*, at 3, I would also reserve the question whether *in rem* forfeitures always amount to an intended punishment of the owner of forfeited property.

With these observations, I concur in part and concur in the judgment.