United States v. Ursery: The Long Arm of the Law Gets Reattached

In *United States v. Ursery*,[1] the United States Supreme Court evaluated the constitutionality of in rem civil forfeitures when they are used with criminal proceedings in relation to a single act. *Ursery* was a consolidation of two cases, *United States v. Ursery*[2] and *United States v. $405,089.23 United States Currency*,[3] from the Sixth and Ninth Circuit Courts of Appeals, respectively.

I. FACTS

In *Ursery*, the Michigan State Police found an illegal narcotics-growing operation adjacent to the home of the respondent, Guy Ursery.[4] The United States instituted a civil forfeiture proceeding under 21 U.S.C. § 881(a)(7)[5] against Ursery's home in federal district court.[6] The government contended that the home had been used for several years to traffic narcotics.[7] Ursery agreed to pay the United States $13,250 to settle the forfeiture claim.[8] Before the claim was paid, however, Ursery was indicted and convicted on narcotics manufacturing violations.[9] Ursery appealed to the Sixth Circuit Court of Appeals on the grounds that his conviction violated his constitutional right under the Double Jeopardy Clause of the Fifth Amendment.[10] The Double Jeopardy Clause protects against three abuses: "a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense."[11] Ursery

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1. 116 S. Ct. 2135 (1996).
2. 59 F.3d 568 (6th Cir. 1995).
3. 33 F.3d 1210 (9th Cir. 1994).
4. *Ursery*, 116 S. Ct. at 2138.
5. 21 U.S.C. § 881(a)(7) (1994) (allowing asset forfeiture for narcotics violations).
6. 116 S. Ct. at 2139.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. United States v. Halper, 490 U.S. 435, 440 (1989).

contended that the conviction constituted a second punishment for purposes of double jeopardy.[12] The court of appeals, in a divided vote, agreed and reversed Ursery's criminal conviction.[13]

In *$405,089.23 United States Currency*, the government filed an in rem proceeding in district court against currency the government believed had been gained through the laundering of drug profits.[14] Wesley Arlt and James Wren possessed the currency when it was seized by the government.[15] Arlt and Wren were convicted on drug distribution and money laundering charges after the in rem suit was filed, but before it was litigated.[16] The district court cited 18 U.S.C. § 981(a)(1)(A)[17] and granted summary judgment for the government in the in rem proceeding after the criminal conviction.[18] The Ninth Circuit reversed the decision on the grounds that it violated the Double Jeopardy Clause of the Fifth Amendment.[19]

The Sixth Circuit and the Ninth Circuit used similar reasoning in reaching their decisions in *Ursery* and *$405,089.23 United States Currency*.[20] The circuits relied on the holdings of *United States v. Halper*[21] and *Austin v. United States*,[22] two recent Supreme Court decisions dealing with the issue of double jeopardy and civil forfeitures. The appellate courts in *Ursery* and *405,089.23 United States Currency* interpreted *Halper* and *Austin* as categorically making civil forfeitures punishment and thus, unconstitutional when used in conjunction with criminal prosecutions.[23] The Supreme Court granted the government's petition for certiorari in *Ursery* and *$405,089.23 United States Currency* and reversed the appellate courts.[24] The Supreme Court stated, "[t]hese civil forfeitures (and civil forfeitures generally), we hold, do not constitute 'punishment' for purposes of the Double Jeopardy Clause."[25]

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12. *Ursery*, 116 S. Ct. at 2139.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. 18 U.S.C. § 981(a)(1)(A) (1994) (allowing asset forfeiture for violations of money laundering laws).
18. 116 S. Ct. at 2139.
19. *Id.*
20. *Id.*
21. 490 U.S. 435 (1989).
22. 509 U.S. 602 (1993).
23. *Ursery*, 116 S. Ct. at 2139.
24. *Id.*
25. *Id.* at 2138.

II. LEGAL BACKGROUND

Civil forfeiture in the United States historically has been one of the most potent weapons available to prosecutors.[26] Civil forfeiture, however, originally began in English common law.[27] English common law recognized three types of civil forfeiture.[28] The first type of forfeiture was called deodand forfeiture.[29] Deodand forfeiture required any object that caused the death of a king's subject to be forfeited to the crown.[30] Deodand forfeitures were often justified as a penalty for carelessness.[31] The second type of civil forfeiture in English common law was property seizure of individuals convicted of a felony or of treason.[32] The justification for this forfeiture was that a criminal act equaled a breach of the king's peace and the perpetrator should be denied property ownership.[33] The third type of forfeiture employed in English common law was created by statutes and generally used to seize objects that were in violation of customs and revenue laws.[34] These statutory forfeitures used the in rem fiction to seize the property.[35]

Deodand forfeitures did not become part of common law in the United States.[36] For the most part, forfeiture for felony convictions did not either.[37] However, in the United States, if convicted, treason still carries the penalty of property forfeiture for life.[38] Statutory forfeitures have been extensively adopted in the United States.[39] The earliest

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26. United States v. Daccarett, 6 F.3d 37, 46 (2d Cir. 1993). Civil forfeitures are distinctly different from criminal forfeitures that take place in the same trial as the actual criminal prosecution. These criminal forfeitures are not subject to the Double Jeopardy Clause, but are generally disfavored by prosecutors because they add complex issues in property law to an already complicated criminal trial. Interview with James Fleissner, Mercer Law School Professor and former United States Attorney, in Macon, Ga. (Oct. 9, 1996).

27. Jimmy Gurule, *Introduction: The Ancient Roots of Modern Forfeiture Law*, 21 J. LEGIS. 155, 156 (1995).

28. *Id.* *See also* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680-83 (1974).

29. *Id.* at 680-81.

30. *Id.*

31. *Id.* (citing 1 M. HALE, PLEAS OF THE CROWN 419, 423-24 (1st Am. ed. 1847)).

32. *Id.*

33. *Id.* (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *299).

34. *Id.*

35. *Id.*

36. *Id.* at 682.

37. *Id.* at 682-83.

38. *See* U.S. CONST. art. III, § 3, cl. 2.

39. 416 U.S. at 683 (quoting C.J. Hendry Co. v. Moore, 318 U.S. 133, 139 (1943)).

forfeiture laws in the United States came shortly after the ratification of the Constitution in 1789.[40] These acts dealt primarily with forfeiture of ships and cargo that were in violation of customs laws.[41] The federal government, in time, did not limit these forfeiture statutes to customs violations. Today, "forfeiture statutes reach virtually any type of property that might be used in the conduct of criminal enterprise."[42]

Many Supreme Court cases have reinforced the legality of civil forfeitures. In one of the earliest cases, an 1827 decision, *The Palmyra*,[43] the Supreme Court held in rem forfeitures constitutional even if the defendant was prosecuted on criminal charges for the same act.[44] In the opinion, Justice Story stated, "the practice has been, and so this Court understand[s] the law to be, that the proceeding in rem stands independent of, and wholly unaffected by any criminal proceeding in personam."[45] Justice Story reinforced the theory that in rem proceedings are directed against a thing, and therefore no punishment is directed toward an individual.[46] In 1877, the Supreme Court again had an opportunity to rule on civil forfeitures in *Dobbins's Distillery v. United States*.[47] In *Dobbins's Distillery*, the Court found constitutional the forfeiture of a building used to illegally produce alcohol, even though the owner had no knowledge of the activity.[48] Early in this century, the Supreme Court revisited the issue of in rem civil forfeitures in *Various Items of Personal Property v. United States*.[49] The Court upheld a revenue statute that provided for civil forfeiture and stated that during in rem proceedings, "[t]he provision of the Fifth Amendment to the Constitution in respect of double jeopardy does not apply."[50] Many other Supreme Court decisions reaffirmed this general principle.[51]

In 1970, Congress began to expand the use of forfeitures with the Comprehensive Drug Abuse Prevention and Control Act.[52] This statute provides for the forfeiture of the illegal narcotic, production and

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40. *Id.*
41. *Id.*
42. *Id.*
43. The Palmyra, 25 U.S. 1 (1827).
44. *Id.* at 18.
45. *Id.* at 15.
46. *Id.* at 14-15.
47. 96 U.S. 395 (1877).
48. *Id.* at 395-401.
49. 282 U.S. 577 (1931).
50. *Id.* at 581.
51. *See* Helvering v. Mitchell, 303 U.S. 391 (1938); *see also* Origet v. United States, 125 U.S. 240 (1888).
52. 21 U.S.C.A. § 881 (West Supp. 1996); Gurule, *supra* note 27, at 157-58.

distribution equipment, and any records involved.[53] Congress again expanded the forfeiture laws in 1984 by enacting the Comprehensive Forfeiture Act ("CFA").[54] The CFA provided the first congressional authorization for the forfeiture of real property used in narcotics violations.[55] Most drug related forfeitures are pursued under 21 U.S.C. §§ 881(a)(4),(6), and (7).[56] Finally, Congress passed the Money Laundering Control Act of 1986 which authorized civil forfeiture of any property involved in money laundering schemes.[57]

The Supreme Court did not stand by idly as Congress expanded the forfeiture laws.[58] In 1972 and 1984, the Court reaffirmed that civil forfeitures did not violate the Double Jeopardy Clause in *One Lot Emerald Cut Stones v. United States*[59] and *United States v. One Assortment of 89 Firearms*.[60] In *One Lot Emerald Cut Stones*, the Court stated, "the forfeiture is not barred by the Double Jeopardy Clause of the Fifth Amendment because it involves neither two criminal trials nor two criminal punishments."[61] The Court went on to say, however, that in some instances a forfeiture could be criminal if it was not remedial in nature.[62] Similarly, in *One Assortment of 89 Firearms*, the Court ruled that a forfeiture proceeding was not a violation of the Double Jeopardy Clause even if accompanied by a criminal trial, but added, "[t]he question, then, is whether a . . . forfeiture proceeding is intended to be, or by its nature necessarily is, criminal and punitive, or civil and remedial."[63] The Court laid out a two-step process to determine if a forfeiture was civil or criminal.[64] The first step determines whether Congress intended the law to be criminal or civil.[65] The second step looks at the forfeiture itself to see, regardless of congressional intent, whether the statute was so punitive as to reach the level of

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53. 21 U.S.C.A. § 881(a); Gurule, *supra* note 27, at 158 n.2.

54. Pub. L. No. 98-473, 98 Stat. 2050 (1984) (codified at 21 U.S.C. §§ 881(a)(4)-(7) (1994)); Gurule, *supra* note 27, at 158-59.

55. Gurule, *supra* note 27, at 158-59.

56. *Id.* at 159.

57. Pub. L. No. 99-570, 100 Stat. 3207-35 (codified at 18 U.S.C. § 981 (1994)); Gurule, *supra* note 27, at 159.

58. Gurule, *supra* note 27, at 161.

59. 409 U.S. 232 (1972).

60. 465 U.S. 354 (1984).

61. 409 U.S. at 235.

62. *Id.* at 237.

63. 465 U.S. at 362-63.

64. *Id.* (quoting United States v. Ward, 448 U.S. 242, 248 (1980)).

65. *Id.*

punishment.[66] If the forfeiture passes these two levels of analysis, it is civil in nature and the Double Jeopardy Clause does not apply.[67]

In 1989, the Court did rule a civil forfeiture proceeding as punishment under the Double Jeopardy Clause in *United States v. Halper*.[68] The Court found the statutory forfeiture scheme to be not remedial or compensatory, but punitive.[69] Although the forfeiture was labeled nonpunitive, it functioned as punishment for purposes of double jeopardy.[70] It was punishment because the civil liability was measured at $130,000, even though actual government expense was no more than $16,000.[71] Moreover, because the civil liabilities were calculated at a set fine of $2000 per offense, this was a fine structure that was more punitive than remedial in nature.[72] Three years later in *Austin,* the Court ruled that the Excessive Fines Clause of the Eighth Amendment[73] applied to civil forfeitures under 21 U.S.C. §§ 881(a)(4) and (7).[74] Although not dealing directly with the Fifth Amendment, the *Austin* decision raised the question of whether all civil forfeitures should be considered punishment under the same analysis.[75] As a result of *Halper, Austin*, and *Department of Revenue v. Kurth Ranch*,[76] many different views emerged from the various courts of appeals,[77] and it was not until *United States v. Ursery*[78] on June 24, 1996 that the diversity was resolved.

III. RATIONALE OF THE COURT

In *Ursery*, Chief Justice Rehnquist, joined by four other justices,[79] wrote the opinion of the Court holding that civil forfeitures are not a violation of the Double Jeopardy Clause if they are nonpunitive and remedial in nature.[80] Justice Kennedy filed a concurring opinion,[81]

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66. *Id.*
67. *Id.*
68. 490 U.S. 435 (1989).
69. *Id.* at 452.
70. *Id.*
71. *Id.*
72. *Id.* at 438.
73. U.S. CONST. amend. VIII.
74. *Austin*, 509 U.S. at 604.
75. Gurule, *supra* note 27, at 163.
76. Department of Revenue v. Kurth Ranch, 511 U.S. 767 (1994) (holding that a tax on marijuana possession that was imposed after a criminal conviction was double jeopardy).
77. Gurule, *supra* note 27, at 163.
78. 116 S. Ct. 2135 (1996).
79. The Justices that joined the majority were O'Connor, J., Kennedy, J., Souter, J., Ginsburg, J., and Breyer, J.
80. 116 S. Ct. at 2149.

and Justices Scalia and Thomas filed an opinion concurring in judgment.[82] Justice Stevens concurred in part and dissented in part.[83] The Court reversed the rulings of the Sixth and Ninth Circuit Courts of Appeals because of a long line of precedent in favor of civil forfeitures.[84] The Court began with an extensive analysis of the history of in rem civil forfeitures in the United States.[85] After examining a host of previous cases, the Court concluded that statutory forfeiture has long been deemed constitutional and not double jeopardy.[86] The argument for civil forfeiture was even stronger, the Court stated, when an in rem proceeding was involved.[87] This is because the legal fiction of in rem allows one to proceed against the property, rather than the person.[88] Thus, no punishment exists against any individual.[89]

After completing the examination of precedent in favor of civil forfeitures, the Court attempted to distinguish its recent decisions in *Austin* and *Halper* on which the Ninth and Sixth Circuits had relied in deciding *Ursery*.[90] *Halper* was distinguishable because the statutory scheme involved was not remedial, but punitive.[91] The fines in *Halper* were predetermined fines of $2000 per violation.[92] This, along with the fine of $130,000, a sum that was 220 times greater than the expenses the government had incurred, made this particular fine a punishment from a double jeopardy analysis.[93] In *Ursery*, however, there was no similar fine structure. Moreover, "[t]he narrow focus of *Halper* followed from the distinction that we have drawn historically between civil forfeitures and civil penalties."[94]

The Court then distinguished *Austin* from *Ursery*.[95] The Sixth and Ninth Circuits had used *Austin* in ruling the forfeitures in *Ursery* unconstitutional.[96] To distinguish *Ursery* from *Austin*, the Court

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81. *Id.* at 2149 (Kennedy, J., concurring).
82. *Id.* at 2152 (Scalia and Thomas, JJ., concurring in judgment).
83. *Id.* at 2152 (Stevens, J., concurring in part and dissenting in part).
84. *Id.* at 2149.
85. *Id.* at 2140-42.
86. *Id.*
87. *Id.* at 2140.
88. *Id.* (citing the decision in Various Items of Personal Property v. United States, 282 U.S. 577 (1931)).
89. *Id.*
90. *Id.* at 2143.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* at 2144.
95. *Id.* at 2146-47.
96. *Id.* at 2142-43.

simply stated, "*Austin* was decided solely under the Excessive Fines Clause of the Eighth Amendment, a constitutional provision which we never have understood as parallel to, or even related to, the Double Jeopardy Clause of the Fifth Amendment."[97] The Court went on to say that the Sixth and Ninth Circuit Courts of Appeals misread the *Halper* and *Austin* decisions.[98]

After explaining how the appeals courts erroneously interpreted the *Halper* and *Austin* decisions, the Court applied the two-step analysis used in *One Assortment of 89 Firearms* to determine when forfeitures become punishment.[99] The first step of the test is for a court to decide whether or not Congress intended the forfeiture statute to be a punishment.[100] The forfeiture provisions used in the *Ursery* cases were 18 U.S.C. § 981(a)(1)(A) and 21 U.S.C. § 881(a)(7).[101] The Court found that Congress intended these statutes as remedial civil actions for several reasons.[102] First, Congress attempted to make them impersonal by using the in rem fiction to target the property and not the individual.[103] Next, Congress did not require actual notice of impending forfeitures, making the property the important party, not the owner.[104] Finally, by making the level of proof only probable cause, Congress intended this action as a distinctly separate civil remedy.[105] The Court then moved to the second stage of the analysis to find if the forfeitures were in fact punitive in nature, regardless of congressional intent.[106] Again, the Court found the statutes to be constitutional because they serve important nonpunitive goals.[107] These nonpunitive goals include encouraging owners to take care in managing their property, ensuring that criminals do not profit from their crimes, preventing further illegal use of the property, and preventing the circulation of illegally obtained property.[108] The Court also noted that to find statutes punitive which Congress had intended to be remedial requires the clearest proof of such punishment, as stated in *One Assortment of 89 Firearms*.[109] The Court concluded its opinion by

97. *Id.* at 2146.
98. *Id.* at 2144.
99. *Id.* at 2147-49.
100. *Id.*
101. *Id.* at 2139.
102. *Id.* at 2147-49.
103. *Id.*
104. *Id.*
105. *Id.* at 2147-48.
106. *Id.* at 2148.
107. *Id.* at 2148-49.
108. *Id.*
109. *Id.* at 2148.

holding that although the statutes at hand can serve as some deterrence, in these cases they "are neither 'punishment' nor criminal for the purposes of the Double Jeopardy Clause."[110]

Justice Kennedy concurred with the majority, but elaborated on the theory of in rem proceedings being against the property and therefore, not punishment against any individual.[111] Justice Kennedy further added that although this decision did not clarify the two-step analysis used previously in *One Assortment of 89 Firearms*, given the weight of precedent, concurrence was justified.[112] Justice Scalia wrote a short concurrence which was joined by Justice Thomas, stating: "In my view, the Double Jeopardy Clause prohibits successive prosecution, not successive punishment."[113]

Justice Stevens concurred with the decision against the *$405,089.23 United States Currency* from the Ninth Circuit Court of Appeals, but dissented in regard to the forfeiture action against Ursery's home from the Sixth Circuit.[114] Justice Stevens first argued that even if the majority's reasoning concerning civil forfeiture statutes was correct, as applied to these facts, the forfeiture was punitive.[115] Justice Stevens explained in *Ursery* that the respondent's home was confiscated even though "[t]here is no evidence that the house had been purchased with the proceeds of unlawful activity and the house itself was surely not contraband."[116] Given these circumstances, Justice Stevens felt the *Ursery* forfeiture was not supported by any reasons laid out by the majority and should therefore be considered punishment.[117] Justice Stevens then began a lengthy attack on the theoretical underpinnings of the in rem legal fiction by calling it a "fanciful premise."[118] The fiction was fanciful to Justice Stevens because even during in rem proceedings the owner of the property is ultimately being punished.[119] Justice Stevens further argued that *One Assortment of 89 Firearms* and *One Lot Emerald Cut Stones* should be read in support of his dissent because they pointed out that in rem proceedings, as a categorical matter, were never exempted from double jeopardy constraints.[120]

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110. *Id.* at 2149.
111. *Id.* at 2150-51 (Kennedy, J., concurring).
112. *Id.* at 2151-52.
113. *Id.* at 2152 (Scalia and Thomas, J.J., concurring in judgment)..
114. *Id.* at 2152-53 (Stevens, J., concurring in part and dissenting in part).
115. *Id.*
116. *Id.* at 2152.
117. *Id.* at 2152-53.
118. *Id.* at 2153-54.
119. *Id.* at 2158-60.
120. *Id.* at 2155-56.

Justice Stevens concluded by stating that regardless of whether the action was in rem, there was "simply no rational basis for characterizing the seizure of this respondent's home as anything other than punishment for his crime."[121]

IV. IMPLICATIONS

The Supreme Court's decision in *Ursery* was critical in clarifying an issue that had been interpreted differently in the various judicial circuits.[122] Prior to the *Ursery* decision, a respondent may or may not have had their property seized simply by the fortuity of which judicial circuit had jurisdiction. For instance, in the Second and Eleventh Circuits, the Double Jeopardy Clause would likely have not been a defense.[123] These circuits viewed in rem proceedings as two parts to a single prosecution; therefore, no double jeopardy issues arose.[124] Conversely, in the Ninth Circuit, a defendant did not have to be concerned about having property forfeited after a criminal prosecution because the court considered civil forfeitures, as a categorical matter, violative of the Double Jeopardy Clause.[125] Lastly, in the Fifth Circuit, defendants ran the risk of having their property forfeited, but only if it could be characterized as "drug proceeds."[126] These divergent views resulted in an application of the Double Jeopardy Clause that was not uniform.

The Supreme Court in *Ursery* attempted to remedy this problem with the reaffirmation of the two-step analysis.[127] This analysis should be applied to all forfeiture statutes whether they are labelled remedial, punitive, or civil.[128] The first stage of the test is to determine if Congress intended the statute to be remedial or punitive.[129] If Congress intended the statute to be punitive, then double jeopardy applies. If Congress has not intended the statute to be punitive, then the second step of the test is applied.[130] In the second step, the court must determine if the statute is punitive regardless of congressional intent.[131] If the statute is found to be punitive, then double jeopardy

121. *Id.* at 2161.
122. Gurule, *supra* note 27, at 162-64.
123. *Id.* at 163-64.
124. *Id.*
125. *Id.* at 165-67.
126. *Id.* at 164-65. *See* United States v. Tilley, 18 F.3d 295 (5th Cir. 1994).
127. *Ursery*, 116 S. Ct. at 2142.
128. *Id.* at 2143.
129. *Id.* at 2142.
130. *Id.*
131. *Id.*

applies.[132] However, if Congress did not intend the statute to be punitive, there must be the clearest proof that the forfeiture has risen to the level of punishment.[133] The test reaffirmed in *Ursery* will now take the place of the differing standards the courts of appeals have been applying in similar situations. The *Ursery* decision also reinforces the precedent that civil forfeitures, if correctly applied, do not violate the Double Jeopardy Clause.[134]

After the decisions in *Austin, Halper*, and *Kurth Ranch*, many commentators predicted an end to all civil actions that took place in conjunction with criminal prosecutions on double jeopardy grounds.[135] Given the reasoning in those decisions this conclusion was logical. Thus, the decision in *Ursery* was an unexpected shift back to supporting civil forfeitures.

Another important result of the decision in *Ursery* is the return to prosecutors of one of their most potent weapons in the war on drugs.[136] The level of proof for asset seizure is only probable cause. Therefore, federal prosecutors often use forfeitures when criminal prosecutions fail or when evidence to charge is lacking.[137] These civil forfeitures were often used as the long arm of the law when criminal prosecution attempts failed to reach or were ineffective in reaching the assets. The decision in *Ursery* will also avoid the scenario where a criminal goes unprosecuted because he has already settled a civil forfeiture claim in the same matter. By giving prosecutors and Congress guidelines to follow in establishing and using civil forfeitures, the Court in *Ursery* has reestablished forfeitures as a viable option to combat crime in all circuits.

BRIAN C. MAX

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132. *Id.*

133. *Id.*

134. *Id.* at 2149.

135. *See* Andrew L. Subin, *The Double Jeopardy Implications of In Rem Forfeiture of Crime-Related Property: The Gradual Realization of a Constitutional Violation*, 19 SEATTLE U. L. REV. 253 (1996); Gurule, *supra* note 27, at 173; Jeffrey M. Geller, *The Impact of Recent Double Jeopardy Decisions on Federal Agencies*, 10 ADMIN. L.J. AM. U. 327 (1996).

136. *See* Gurule, *supra* note 27, at 156.

137. Gary M. Maveal, *Criminalizing Civil Forfeitures*, 74 MICH. B.J. 658 (1995).