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Ruling in $100 million government seizure case endangers due process rights

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In *Omidi v. United States*, decided March 13, the 9th U.S. Circuit Court of Appeals held that the government is not required to provide notice of its seizure of property in "judicial" forfeiture matters, even if no case has actually been filed in court.[1] In that case, the government froze more than $100 million but failed to provide notice to potential claimants, and also did not initiate civil or criminal forfeiture proceedings.

Nearly three years after seizing the funds, at the time of the court of appeals' decision, the government had still not filed a forfeiture action.

THE FORFEITURE PROCESS

In general, the federal government may attempt to forfeit property in one of three ways: by seizing it and seeking to forfeit it through a nonjudicial, administrative process; by filing a civil forfeiture action in rem against the property itself; or by filing a criminal indictment and alleging that the property is forfeitable.

Administrative forfeiture is extremely limited compared to the other two options available to the government.

First, there are serious restrictions on what kinds of property can be administratively forfeited: real estate cannot be administratively forfeited, nor can personal property in excess of $500,000.[2]

Second, administrative forfeiture is purely a vehicle for obtaining property by default. If someone comes forward to challenge an administrative forfeiture, the government must initiate judicial forfeiture proceedings (civil or criminal) in order to provide a forum for that claim to be litigated.[3]

In practice, this means that the administrative process is used by the government to forfeit abandoned property.[4] For example, in narcotics investigations, it is common for law enforcement to seize currency involved in drug deals. People rarely assert claims to that money — because doing so would implicate them in the drug deal — and so it is administratively forfeited to the government.

By allowing uncontested forfeitures to be handled administratively, Congress provided a mechanism for the efficient forfeiture of certain assets without needlessly bogging down the courts. Indeed, between 80 and 85 percent of all forfeitures are done administratively.[5] Still, whenever a forfeiture is contested, it must be resolved in court.

Because the universe of potential claimants to property may be unknown to the government — particularly innocent claimants — notice is especially important in forfeiture cases.

For example, property "involved in" the commission of certain crimes can be forfeited, such as a car used to transport contraband. But the potential claimants to that property may not be part of the government's investigation.

The government may know who was driving the car, for example, but not who owns it or pays for it, let alone whether the car is financed and whether there's a bank somewhere that has a claim to the car.

> In *Omidi* the government froze more than $100 million but failed to provide notice to potential claimants and did not initiate civil or criminal forfeiture proceedings.

Likewise, the government may know the identity of a bank account holder, but not every person with a potential claim to the account's funds.

Under federal forfeiture laws, the government must typically make notice two ways.

First, it must promptly give specific notice to parties it is aware of that might have a claim to the property. In the case of administrative forfeitures, for example, the government must make a targeted notice within 60 days after its property seizure.[6]

In civil forfeiture cases, of course, potential claimants must be served with the government's complaint under the Federal Rules of Civil Procedure, including its supplemental rules for forfeiture cases.

In addition, the government must publish notice, usually by publicizing the potential forfeiture on a government website continuously for at least a month.

THE *OMIDI* DECISION

In *Omidi* the 9th Circuit addressed a significant gap in the forfeiture laws' notice provision.

Omidi involves an ongoing criminal investigation being conducted by the U.S. attorney's office for the Central District of California. Because no civil or criminal case has actually been filed yet, the nature of the investigation remains largely unknown.

But what is known is that, starting in early June 2014, the government obtained seizure warrants for the contents of bank and brokerage accounts owned by Cindy Omidi and others containing approximately $110 million.

Although the funds were seized almost three years ago, the government never notified potential claimants of the seizure, nor did it initiate a civil or criminal forfeiture case. Instead, for the past almost three years, those funds have simply been frozen.

> The government contended that it would only have to provide notice if and when it chose to file a court case.

Of course, notwithstanding the lack of legal notice, the accountholders noticed that they no longer had access to their money and attempted to challenge the forfeiture.

Approximately six months after the initial seizure, when the government had not taken any steps to file a judicial forfeiture action, several parties claiming an interest in the frozen funds filed a motion in the U.S. District Court for the Central District of California.

The parties, relying on the notice provision for administrative forfeitures, argued that the government's failure to provide notice or to initiate a judicial forfeiture action meant that the seizure needed to be dissolved and the property returned to them.

Specifically, 18 U.S.C.A. § 983 provides:

> In any nonjudicial civil forfeiture proceeding under a civil forfeiture statute, with respect to which the government is required to send written notice to interested parties, such notice shall be sent in a manner to achieve proper notice as soon as practicable, and in no case more than 60 days after the date of the seizure.[7]

Because the government had not filed a judicial forfeiture action, and had not provided notice within the 60 day window, the accountholders argued that their property had to be returned — the sanction specified in the statute for failure to provide timely notice.[8]

The government argued that this notice provision did not apply. Remember that administrative forfeiture is not available for personal property in excess of $500,000 — the government can only forfeit it through a civil or criminal court case.

The government therefore claimed that its seizure of Omidi's $110 million could not possibly be part of a "nonjudicial civil forfeiture proceeding," that is, an administrative forfeiture, as a matter of law. Because the money was not seized administratively, the government argued, the notice provision for nonjudicial forfeitures does not apply.

Instead, the government contended that it would only have to provide notice if and when it chose to file a court case. Months and now years after the seizure, however, the government still had not filed a court case, so it claimed that it was not subject to any notice requirement.

In a one-sentence order, the District Court agreed with the government, and the 9th Circuit subsequently affirmed.

In a succinct opinion authored by Judge Paul J. Watford and joined by Judge Alex Kozinski and U.S. District Judge Mark W. Bennett of the Northern District of Iowa, the court agreed that the statute's reference to "nonjudicial" forfeiture resolved the appeal because it limits the applicability of the 60-day notice period to administrative forfeitures.

Because the government's seizure of $100 million could not possibly be an administrative forfeiture, the statute simply did not apply, even though the government had filed no judicial proceeding, the court said.

The court addressed the "apparent anomaly" of its holding. Under the court's reasoning, a person from whom $100 was seized is entitled to immediate notice, whereas a person from whom $100 million was taken is not.

The government's ability to seize large amounts of cash without giving notice to potential claimants and, more importantly, without a forum to challenge the seizure, is therefore limited only by the U.S. Constitution's due process clause. And the Supreme Court has held that seizures as long as 18 months without any judicial forfeiture being filed do not offend due process.[9]

Thus, the government can seize enormous amounts of money and other personal property — money that businesses may need in order to operate, or that people may need to pay their rent — and hold on to it for years without providing notice to potential claimants and without filing a court case. Still, the court held, the statutory text is clear, and it was not free to rewrite it.

The court also noted that potential claimants are not totally without recourse. While they may not seek to dissolve the seizure based on the government's failure to provide notice, they can always file a motion for return of property under Federal Rule of Criminal Procedure 41(g), which provides that "[a] person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return."

Even where no criminal case is pending, Rule 41(g) has been interpreted to allow potential claimants to make a

free-standing claim for the return of property wrongfully taken by the government.

Thus, the court held in *Omidi*, "Virtually all challenges to the government's basis for seeking forfeiture that could be raised in judicial forfeiture proceedings may be raised in proceedings under Rule 41(g)."

CONSTITUTIONAL CONCERNS

As the court also recognized, a claim under Rule 41(g) is not equivalent to a judicial forfeiture action, even if the same arguments can be made.

Most significantly, the burden of proof under Rule 41(g) is on the claimant, whereas in a civil or criminal forfeiture case, the burden is on the government.[10]

In addition, judicial forfeiture provides more procedural protections for claimants, such as the absolute right to engage in discovery under the federal rules and to a hearing or trial on the merits, whereas Rule 41(g) motions are equitable and are often handled without discovery or live evidence.

There is a reason that judicial forfeiture actions entail these safeguards. When the government deprives a person of his or her property — a person who has generally not been accused of any crime, else the government would pursue criminal forfeiture — the government should have the burden of proof, and the claimant should be entitled to take discovery and test the government's evidence in court.

By putting the burden on the claimant instead, the court in *Omidi* glossed over significant due process concerns.

Property seizures are almost always done in the course of a criminal investigation. By requiring a potential claimant to affirmatively prove that his or her property was taken unlawfully, the *Omidi* decision puts people in the midst of a criminal investigation in an untenable position: either make an affirmative case that the seizure was unlawful and almost certainly waive their Fifth Amendment right to remain silent, or exercise that Fifth Amendment right and also suffer the indefinite deprivation of property.

That is not an acceptable trade-off, and is one that in similar contexts, courts have found to raise due process concerns.[11]

Indeed, at least one Supreme Court justice has recently asked more generally "whether modern civil-forfeiture statutes can be squared with the due process clause and our nation's history."[12]

The *Omidi* court held that it was powerless to address this problem because the statute provides that notice is only required in "nonjudicial" forfeitures — which it interpreted to mean administrative forfeitures — and the seizure of more than $100 million cannot possibly be an administrative forfeiture. But is the statute really so clear?

"Nonjudicial" could mean administrative, but it more logically means exactly what it says: a forfeiture that is not the subject of a pending judicial action.

Read that way, the statute requires that whenever the government seizes property that is not the subject of an existing lawsuit, it must provide notice to potential claimants. And upon receiving notice, a potential claimant can force the government to file a judicial forfeiture action — and satisfy its burden of proof.

This reading of the statute is buttressed by an adjacent provision, which says that "no notice is required if, before the 60-day period expires, the government files a civil judicial forfeiture action against the property and provides notice of that action as required by law."[13]

Taken together, when the government seizes property that is not the subject of a judicial forfeiture action, it must — within 60 days — either file a civil forfeiture action or provide notice to potential claimants so that they can file a claim and therefore require the government to file a judicial action.

At the very least, the statute is not crystal clear that "nonjudicial" means administrative.

> The *Omidi* court held that it was powerless to address this problem.

Various interpretative rules insist that the term be construed to require notice to potential claimants. For example, the "constitutional avoidance" canon of construction requires courts to interpret ambiguous terms to avoid raising serious constitutional questions, such as due process concerns. And the forfeiture version of the rule of lenity requires courts to interpret ambiguous terms in the forfeiture laws against the government.

Of course, whether or not the statute is ambiguous, Congress could easily require notice to potential claimants of all seizures, particularly because the legislative history and purpose of the statute seems to cut against the reading given by the *Omidi* court.

Either way, in cases where the government has not accused anyone of wrongdoing, individuals should not be required to come forward and prove that the government wrongfully seized their property; the burden should always be on the government.

NOTES

[1] *Omidi v. United States,* 851 F.3d 859 (9th Cir. 2017).

[2] 18 U.S.C.A. § 985(a) (real property only subject to judicial forfeiture); 19 U.S.C.A. § 1607(a) (same for personal property worth more than $500,000).

[3] 18 U.S.C.A. § 983(a)(2)(A) (after receiving notice, potential claimants may assert their interest in the property in a claim filed with the administrative agency that made the seizure); 18 U.S.C.A. § 983(a)(3) (requiring the government to file a civil or criminal forfeiture action in court within 90 days after receiving such a claim).

[4] 18 U.S.C.A. § 983(a)(2)(B); 19 U.S.C.A. § 1609; *see also* 18 U.S.C.A. § 981(d) (incorporating provisions of the Tariff Act of 1930, 19 U.S.C.A. §§ 1607 and 1609, into the forfeiture laws).

[5] Stefan D. Cassella, Asset Forfeiture Law in the United States, § 1-4, n.22 (2d ed. 2012).

[6] 18 U.S.C.A. § 983(a)(1)(A); see also 19 U.S.C.A. § 1607(a).

[7] 18 U.S.C.A. § 983(a)(1)(A).

[8] 18 U.S.C.A. § 983(a)(1)(F) (as a sanction for violating subsection (A), "the government shall return the property to [the person from whom it was seized] without prejudice to the right of the Government to commence a forfeiture proceeding at a later time").

[9] *United States v. $8,850 in U.S. Currency,* 461 U.S. 555, 564, 569–70 (1983).

[10] Compare 18 U.S.C.A. § 983(c)(1) (burden on the government in judicial forfeiture cases) with, *e.g., United States v. Gladding,* 775 F.3d 1149, 1152 (9th Cir. 2014) (burden on claimant in Rule 41(g) proceedings).

[11] *See, e.g., Luis Vuitton Malletier SA v. LY USA Inc.,* 676 F.3d 83, 97 (2d Cir. 2012) ("A stay can protect a civil defendant from facing the difficult choice between being prejudiced in the civil litigation, if the defendant asserts his or her Fifth Amendment privilege, or from being prejudiced in the criminal litigation if he or she waives that privilege in the civil litigation." (citation omitted)).

[12] *Leonard v. Texas,* 137 S. Ct. 847 (2017) (Thomas, J., respecting the denial of certiorari); *see also Bennis v. Michigan,* 516 U.S. 442, 454 (1996) (Thomas, J., concurring) ("One unaware of the history of forfeiture laws and 200 years of this court's precedent regarding such laws might well assume that such a scheme is lawless — a violation of due process.").

[13] 18 U.S.C.A. § 983(a)(1)(A)(ii).

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