Dumping Drug Dealers Off the Dole: An Examination of the Procedural Due Process Implications of Pre-Hearing Seizures of Public Housing Leaseholds from Tenants Involved in Drug Trafficking

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"[I]n America these days, there is nothing so sensible, necessary, or appropriate that a judge can't be found to block it." — Boston Herald[1]

Introduction

In Chicago, a woman hands over a dollar to gun-wielding punks so she can enter the lobby of her building, get her mail, and ride the elevator up to her own apartment. Still more money is extorted by the drug dealers who call her hallway their "turf." Drug dealers congregate outside a Philadelphia Head Start center full of children. Parents do not let their children play outside in the daytime, and at night the family sleeps on mattresses laid on the floor because they are afraid of stray bullets from gun fights.[2] These scenarios occur every day across the country for many of the 1.3 million residents of public housing.[3] The high concentration of poverty has made public housing developments especially vulnerable to drugs and drug trafficking and has turned low-income housing into what the Office of National Drug Control Strategy has identified as a "staging area for the distribution of drugs and the violence related to drug trafficking and consumption."[4]

In enacting the Anti-Drug Abuse Act of 1988 (The Act),[5] Congress recognized that public housing, which should be safe, decent, and free of illegal drugs, is instead plagued with rampant drug-related crime. Problems with inefficient eviction procedures led Congress to create a

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1. *Get Off Our Property*, Boston Herald, June 26, 1990, at 6.

2. *See, e.g.*, Jack Kemp, Address to the President's Drug Advisory Council (Nov. 9, 1990); *see generally Balancing Rights: Is There Any Room for Leniency in Evicting Drug Dealers from Public Housing?*, Phila. Inquirer, June 16, 1990, at 8A.

3. Telephone interview with Anthony Mitchell, Deputy Assistant Secretary for Public Affairs, Department of Housing and Urban Development (Jan. 3, 1992).

4. Office of National Drug Control Strategy, National Drug Control Strategy 64 (Feb. 1991).

5. Pub. L. No. 100-690, § 5105, 102 Stat. 4181 (1988).

new mechanism to efficiently and effectively remove tenants who use their housing units to deal drugs (or allow their guests to do so) and return the developments to law-abiding tenants.[6] The Act, subtitled "Preventing Drug Abuse in Public Housing," amended the civil forfeiture statute[7] to provide for the forfeiture of a leasehold interest which is

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6. *See How the LSC Helps Drug Dealers*, WASH. TIMES, June 16, 1990, at D2 (removal of convicted drug dealer in Lowell, Massachusetts delayed 13 months; drug dealer in Macon, Georgia whose eviction was delayed for one year, but when jury finally heard case it decided to evict in only four minutes); James P. Moran, Jr., *High Noon in Alexandria: How We Ran the Crack Dealers Out of Public Housing*, HERITAGE FOUND. REP., March 20, 1990, at 73 (describes administrative grievance procedure for evictions of known drug dealers as taking up to two years, but it is easier to evict a tenant for non-payment of rent).

The HUD regulations implementing this provision are found at 24 C.F.R. §§ 882.118, 882.210 and 882.413 (1991). HUD has also required public housing agencies to revise the standard lease to provide that drug-related activity is a sufficient basis for eviction. 24 C.F.R. § 966 (1991).

7. 21 U.S.C. §881 (1991) provides in pertinent part:

(a) Property subject

The following shall be subject to forfeiture to the United States and no property right shall exist in them:

* * * *

(7) All real property including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(b) Seizure pursuant to Supplemental Rules for Certain Admiralty and Maritime Claims; issuance of warrant authorizing seizure.

Any property subject to civil forfeiture to the United States under this subchapter may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property, except the seizure without such process may be made when:

(1) the seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;

(2) the property subject to seizure has been the subject of a prior judgement in favor of the United States in a criminal injunction or forfeiture proceeding under this subchapter;

(3) the Attorney General has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(4) the Attorney General has probable cause to believe that the property is subject to civil forfeiture under this subchapter.

In the event of seizure pursuant to paragraph (3) or (4) of this subsection, proceedings under subsection (d) of this section shall be instituted promptly. The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture

used, or intended to be used in any manner, to commit or facilitate a felony drug violation. Senator Joseph Biden, Judiciary Committee Chairman and one of the Act's sponsors, stated:

> Chapter 1 of this subtitle codifies current HUD guidelines granting public housing agencies authority to evict tenants if they, their families or their guests engage in drug-related activity. It also allows the federal government to seize housing units from tenants who violate drug laws by clarifying that public housing leases are considered property with respect to civil forfeiture laws.[8]

Although civil forfeitures are *in rem* actions against "guilty" property, or property which has been used to facilitate drug trafficking, the Supreme Court considers forfeitures "quasi-criminal" in nature because they serve many of the same goals as the criminal justice system.[9] Consequently, the Constitutional rights and safeguards in the Fourth and Fifth Amendments also apply to civil forfeiture.[10] In fact, the civil forfeiture statute allows seizure in the same manner under which search warrants are obtained — evidence that Congress also views civil forfeitures as "quasi-criminal."[11]

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under this section in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure.

Federal Rule of Criminal Procedure 41 requires an *ex parte* finding of probable cause by a judicial officer to support issuance of the warrant.

8. 134 CONG. REC. S 17360 (daily ed. Nov. 10, 1988). In § 5101 of the Act, Congress also amended the public housing statute (United States Housing Act of 1937) to require that all public housing leases prohibit drug-related criminal activity and that such activity is grounds for eviction.

9. United States v. $8,850 in U.S. Currency, 461 U.S. 555, 564 (1983) (applying the balancing test involving a criminal's right to a speedy trial to the issue of whether or not a delay in civil forfeiture proceedings is unreasonable); *see generally* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).

Thus, just as an arrest warrant is issued for the seizure of an allegedly guilty person or a search warrant for the seizure of evidence, a seizure warrant is issued to seize allegedly guilty property. *See* United States v. Valdes, 876 F.2d 1554 (11th Cir. 1989); Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325 (1991) (although there are some factual inaccuracies in footnote 64 regarding *Richmond Tenants Org., Inc. v. Kemp*).

10. Boyd v. United States, 116 U.S. 616, 634-35 (1886); *see also Calero-Toledo*, 416 U.S. at 680-90 (detailing the history and upholding the validity of forfeitures); Cheh, *supra* note 9 (history, background and theory behind civil forfeiture).

Additionally, because of the evidence gathered prior to seizure, most forfeiture actions are accompanied by criminal prosecutions, although this is not required under the statute.

11. *See supra* note 7.

Additionally, the procedure followed in a civil forfeiture is very similar to that of a criminal case. Law enforcement authorities identify a problem area, conduct an investigation, and present the evidence to the U.S. Attorney, who then must decide whether to file a forfeiture complaint. Although the forfeiture statute authorizes adoption of a procedure that does not require a warrant based upon a showing of probable cause, Department of Justice policy requires a U.S. Attorney to obtain *ex parte* judicial approval prior to any seizure of real property.[12] If a complaint is filed and the court determines there is probable cause to believe the property is used for drug trafficking, then a seizure warrant will be issued. When the property is a residence, the U.S. Attorney has the discretion to enter into an occupancy agreement with the residents, allowing them to stay on the property until the conclusion of the forfeiture proceeding.[13] After discovery and motions, a trial is held to determine whether the forfeiture should be ordered and the title to the property

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12. Cary H. Copeland, *Departmental Policy Regarding Seizure of Occupied Real Property* (Oct. 9, 1990) (Memorandum from the Director, Executive Office of Asset Forfeiture, to United States Attorneys) (on file with the author and each U.S. Attorney's office) (restatement of policy stated in Jan. 11, 1990 memorandum). The same procedure is specified in the Federal Rules of Criminal Procedure for search warrants. FED. R. CRIM. P. 41.

13. Department of Justice policy favors permitting residents to remain on the property:

> 1. *Permitting Continued Occupancy*
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> As a general rule, occupants of real property seized for forfeiture should be permitted to remain in the property pursuant to an occupancy agreement pending forfeiture provided that:
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> a. The occupants agree to maintain the property [and continue to make rent payments]; . . .
> b. The occupants agree not to engage in continued illegal activity;
> c. The continued occupancy does not pose a danger to the health or safety of the public or a danger to law enforcement;
> d. The continued occupancy does not adversely affect the ability of the U.S. Marshal or his designee to manage the property; and,
> e. The occupants agree to allow the U.S. Marshal or his designee to make reasonable periodic inspections of the property with adequate and reasonable notice to the occupants.
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> 2. *Removal of Occupants Upon Seizure*
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> Immediate removal of all occupants at the time of seizure should be sought if there is reason to believe that failure to remove the occupants will result in one or more of the following:
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> a. Danger to law enforcement officials or the public health or safety;
> b. The continuation of illegal activity on the premises; or
> c. Interference with the Government's ability to manage and conserve the property.

Copeland, *supra* note 12.

turned over to the government.[14] If a judge or jury is convinced that the United States has proven its case and that the residents have failed to disprove the government's case or successfully assert an innocent owner defense,[15] the court will enter an order of forfeiture.[16]

In response to the severe drug problem in public housing and the new mechanism created by Congress, the Department of Housing and Urban Development (HUD) and the Department of Justice (DOJ) developed the Public Housing Asset Forfeiture Demonstration Project (Forfeiture Project) to encourage U.S. Attorneys and local public housing authority officials to collaborate in an effort to remove drug dealers from federally subsidized housing. HUD and DOJ chose more than twenty cities of varying sizes and diverse geographic locations to participate.[17] The selections were based on the severity of the public housing authority's drug problem, the inefficiency of the eviction process, and the amount of cooperation and goodwill public housing officials enjoyed with their tenants.[18] HUD and DOJ then drafted a Notice to Residents which explained that under the civil forfeiture law a public housing unit may be seized if the tenants use, or allow others to use, the unit for drug trafficking.[19] This Notice was distributed to all public housing tenants in the targeted cities early in June of 1990.

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14. This process can be expedited upon request. *See infra* notes 108-12 and accompanying text.

15. The innocent owner defense is included in 21 U.S.C. § 881. However, the United States Supreme Court has previously rejected the innocent owner defense stating "the innocence of the owner of the property subject to forfeiture has almost uniformly been rejected as a defense." Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 683-84 (1974).

16. *See generally* 21 U.S.C. § 881 et. seq. (1991); *Calero-Toledo*, 416 U.S. at 680-90 (history of forfeitures); DAVID B. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES (Matthew Bender 1991) (forfeiture procedure information); OLIVER W. HOLMES, JR., THE COMMON LAW (1881) (history of forfeitures); Cheh, *supra* note 9 (procedure information and history of forfeitures); Christopher M. Neronha, *In re Metmor Financial, Inc.: The Better Approach to Post Seizure Interest Under the Comprehensive Drug Abuse Prevention and Control Act*, 65 NOTRE DAME L. REV. 853 (1990) (explaining that the Fourth Circuit was the first appellate court to consider and grant the award of post-seizure interest to an "innocent owner").

17. The cities chosen to participate in the Project included: New York City, Los Angeles, Washington D.C., Chicago, St. Louis, Atlanta, Dallas, Baltimore, Indianapolis, Hartford, Newark, Frederick, Richmond, Flint, Charleston, Macon, El Paso, Kansas City, Omaha, Chandler, Tacoma, and Portland.

18. The Project was first announced by HUD Secretary Jack Kemp in May of 1990.

19. The Notice to Residents read, in part:

> Under federal law, a unit can be taken by the United States Government if any member of the household is using the unit for selling drugs. This may result in the *immediate* eviction of the entire household unless the resident can

Based on successful public housing forfeiture programs in New York City, Chicago, and Bridgeport, Connecticut, HUD and DOJ developed suggested case criteria which go beyond statutory requirements for use by U.S. Attorneys and public housing officials in selecting cases for the project.[20] The Forfeiture Project targeted cases where compelling evidence was obtained pursuant to a search warrant or undercover investigation to indicate that the unit involved was a notorious site of drug trafficking and the leaseholder had participated in, or knowingly allowed, at least two felony drug offenses. This strict requirement ensured that the targeted tenant would also likely face criminal charges. Additionally, U.S. Attorneys were directed to give careful consideration to innocent family members, including pre-arranging temporary housing and other social services for any children or elderly residents who might be adversely affected by a forfeiture.[21] However, actual case selection was ultimately left to the discretion of the U.S. Attorney and public housing authority

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prove that he or she did not know about the criminal conduct.

Each resident *must make sure* that his or her unit is not being used for drug-related activities by members of the household or by guests. To protect yourself, make sure that you are aware of what is happening in your unit. If you find that drug dealing is taking place, you should see to it that the person(s) involved leave your household. If you need help doing this, you may call the police, housing authority, or development manager to assist you. Otherwise, you may face the seizure of your unit by the United States Government and immediate eviction.

In an Order dated June 18, 1990, the district court enjoined enforcement of the first paragraph.

20. The complete HUD/DOJ criteria for case selection are:

1. The violator should be the leaseholder of the property. (The term "violator" refers to the person whose actions give rise to the forfeiture.)
2. Compelling evidence should be developed that the violator participated in at least two felony drug offenses. (Drug purchases by undercover law enforcement officials from individual notorious drug dealers or evidence obtained pursuant to a search warrant would satisfy this criteria.)
3. Where appropriate, the violator should also be prosecuted by local, state or federal authorities for drug activities.
4. The property should be an open and notorious site of drug distribution.
5. Careful consideration should be given to factors involving family members of the violator and other registered occupants of the property. Those involved in this effort will seek to minimize the impact of the Government's actions on minors and/or the elderly, should they be effected by the action. Appropriate human resource services support (i.e. child welfare, emergency shelter, etc.) should be prearranged where minors or the elderly are affected.

United States v. Leasehold Interest in 121 Nostrand Ave., 760 F. Supp. 1015, 1026 (E.D.N.Y. 1991). The weight given to each criteria is determined by the U.S. Attorney on a case by case basis.

21. News release from Department of Housing and Urban Development, *HUD and Justice Strike Against Drug Dealers in Public Housing*, June 25, 1990, at 1-2.

in each participating city. "There was only one binding requirement: the United States Attorneys were directed that in all cases (regardless of whether immediate dispossession is sought), 'Department of Justice officials shall obtain *ex parte* judicial approval prior to seizure of realty.' "[22] No guidance, other than the previously stated DOJ policy, was given concerning the circumstances in which a U.S. Attorney could remove tenants prior to notice and hearing in accordance with the forfeiture statute.[23]

Before the Forfeiture Project could be implemented, the Richmond Tenants Organization and others brought suit against the Secretary of Housing and Urban Development, the U.S. Attorney General, the Department of Justice and the Richmond Redevelopment and Housing Authority in *Richmond Tenants Organization, Inc. v. Kemp*.[24] The amended complaint sought a declaration that no-notice seizures in general and, more specifically the planned Forfeiture Project, are unlawful and requested an injunction barring any such seizures and any steps to implement the Forfeiture Project.

Three days later, on June 18, 1990, the District Court for the Eastern District of Virginia preliminarily enjoined the government from evicting household members of public housing units whose leaseholds had been seized without prior notice and an opportunity to be heard. However, the government was permitted to continue executing warrants of arrest *in rem*, seizure warrants and writs of entry.[25] The court specified that its order did not affect DOJ's authority to seek the immediate eviction of household members in exigent circumstances.[26] Eventually, the court (Williams, J.) granted the plaintiffs' motion for summary judgement, holding that no-notice removal of tenants from public housing without a pre-seizure hearing violates due process, except in extraordinary situations.[27]

DOJ appealed the district court decision and the Court of Appeals for the Fourth Circuit affirmed the trial court.[28] Seizures, both with and

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22. Appellant's Brief at 5, *Richmond Tenant's Org. v. Kemp*, 753 F. Supp. 607 (E.D. Va. 1990) (on appeal to 4th Cir.) (No. 91-1520) [hereinafter Appellant's Brief].

23. The Oct. 9, 1990, DOJ policy memoranda (*see supra* notes 11-12) was the first time DOJ issued a written statement of the DOJ policy. The memoranda was issued because of this litigation, but the policy was not changed as a result of it.

24. 753 F. Supp. 607, 608 (E.D. Va. 1991), *aff'd*, 956 F.2d 1300 (4th Cir. 1992).

25. The court provisionally denied the plaintiffs' motion for class certification but on June 22, 1990 extended its June 18, 1990 order to the prospective class of nationwide public housing residents.

26. *Richmond Tenants Org.*, 753 F. Supp. at 608. However, the district court did not define an exigent circumstance.

27. *Id.* at 609. The court also denied plaintiff's renewed motion for class certification.

28. Richmond Tenants Org. v. Kemp, 956 F.2d 1300 (4th Cir. 1992).

without removal of tenants, were conducted in most of the participating cities during the week of June 25, 1990, but the Forfeiture Project was later halted until the outcome of this litigation.[29] *Richmond Tenants Organization* is one of the few district court decisions involving forfeiture in public housing[30] and the only court of appeals decision on the issue to date.

This Note examines the procedural due process issues attending the forfeiture of public housing units, focusing on *Richmond Tenants Organization*.[31] The Note argues that a facial challenge to the civil forfeiture statute and the Forfeiture Project ultimately fails, as does the inherent dispute with the legitimacy of prosecutorial discretion. Further, this Note argues that although procedural due process generally requires notice and an opportunity for a hearing prior to permanent deprivation of property, forfeitures of public housing meet the requirements for extraordinary situations enumerated by the Supreme Court in *Fuentes v. Shevin*[32] and *Calero-Toledo v. Pearson Yacht Leasing Co.*,[33] thus justifying postponement of notice and a hearing. This Note also maintains that the civil forfeiture statute and the Forfeiture Project meet the procedural due process standards established by the Supreme Court in *Mathews v. Eldridge*.[34] Finally, this Note concludes that the district court and court of appeals in *Richmond Tenants Organization* misapplied these

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29. *See, e.g.*, Andrew Fegelman, *U.S. Law Helps CHA Fight Drugs*, CHI. TRIB., June 27, 1990, at 13C; Adam Geib, *Police Seize Tenants' Leases in Techwood Raid*, ATLANTA J.-CONST., June 30, 1990, at 1B; Randolph Goode and Peter Hardin, *Drug Eviction Notices are Filed in Richmond*, RICHMOND NEWS LEADER, June 26, 1990, at 1; Dan Maley, *Public Housing Drug Raids Result in Three Arrests*, MACON TELEGRAPH AND NEWS, June 26, 1990, at 1B.

30. *See also* United States v. The Leasehold Interest in 121 Nostrand Ave., Apt. 1-C, Brooklyn, N.Y., 760 F. Supp. 1015 (E.D.N.Y. 1991) (requiring pre-seizure notice and hearing); United States v. Leasehold Interest in Property Located at 850 S. Maple, Ann Arbor, Mich., 743 F. Supp. 505 (E.D. Mich. 1990) (requiring notice and hearing prior to seizure and eviction); United States v. Leasehold Interest in Property, 740 F. Supp. 540 (N.D. Ill. 1990) (criticizing such efforts as a waste of prosecutorial resources).

31. Although other minor issues are also included in *Richmond Tenants Org.*, this Note will be limited to due process concerns. For example, it is arguable that the plaintiffs lacked standing because they did not allege that their apartments were being used for drug dealing, that the circumstances were such that forfeiture proceedings were likely to be initiated against them and that immediate removal without prior notice or hearing would have been sought. The Supreme Court requires that plaintiffs must show a likelihood that they will violate the law and otherwise be in a situation making enforcement of the alleged illegal law enforcement practices or policies imminent, before obtaining an injunction. O'Shea v. Littleton, 414 U.S. 488 (1974); Los Angeles v. Lyons, 461 U.S. 95 (1983).

32. 407 U.S. 67 (1972).

33. 416 U.S. 663 (1974).

34. 424 U.S. 319 (1975).

precedents by ignoring Congressional intent, minimizing the important governmental interests to provide safe and drug-free public housing, and challenging the adequacy of a judicial probable cause finding.

I. Procedural Due Process and Public Housing Leasehold Forfeitures

A. The Facial Challenges to the Civil Forfeiture Statute and the DOJ Forfeiture Project Fail

Unlike the few other cases decided on this issue, the plaintiffs in *Richmond Tenants Organization* did not challenge the manner in which a particular forfeiture was conducted.[35] Rather, the plaintiffs filed suit before any actual seizures had occurred and argued that the Forfeiture Project was constitutionally invalid because it did not provide adequate due process protection.[36] However, because the Forfeiture Project merely gave a U.S. Attorney the discretion to follow the optional procedure set out by Congress in the forfeiture statute,[37] the plaintiffs made what amounted to a facial challenge against both the forfeiture statute and the Forfeiture Project. For such a challenge to be successful, the plaintiffs must establish that there is no set of circumstances under which the statute may validly be applied to immediately remove a tenant from a public housing unit without giving the tenant prior notice and a hearing.[38]

The district court recognized that no-notice removals are valid if there are "exigent circumstances" to justify the lack of notice and failure to hold a hearing prior to seizure.[39] In allowing this exception, the district court followed the decision of the Second Circuit Court of Appeals in *United States v. Premises and Real Property Located at 4492 Livonia Rd.*,[40] a case involving the forfeiture of private real property which held that due process bars pre-hearing seizures, even without eviction, absent "extraordinary" circumstances.[41] In keeping with this approach, no circuit

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35. *See supra* cases cited in note 30.

36. *See generally* Appellee's Brief, *supra* note 22.

37. *See supra* note 7.

38. United States v. Salerno, 481 U.S. 739, 745 (1987).

39. The district court enjoined pre-hearing removals "except in exigent circumstances." 753 F. Supp. at 609.

40. 889 F.2d 1258 (2d Cir. 1989), *reh'g granted* 897 F.2d 659 (2d Cir. 1990).

41. *Id.* at 1265, 897 F.2d at 661; *see also In re* Application of Kingsley, 802 F.2d 571, 580, 583 (1st Cir. 1986) (in a concurring and a dissenting opinion, two circuit judges held that seizure of a home based on a judicial finding of probable cause violated the owner's due process rights because the seizure occurred prior to filing a civil forfeiture

has held that pre-hearing seizures are invalid in all cases. The Eleventh Circuit has adopted a more deferential view by holding that a hearing is not required prior to seizure of private residential property.[42] However, the Fourth Circuit chose not to follow the Eleventh Circuit in deciding *Richmond Tenants Organization*.[43] The result places the government in the untenable position of not being able to seize property by a procedure that is constitutionally adequate for other types of seizures, including an arrest.[44] As the Supreme Court has observed,

> [I]t would be odd to conclude that the Government may not restrain property, such as the home and apartment in respondent's possession, based on a finding of probable cause, when we have held that under appropriate circumstances, the Government may restrain *persons* where there is a finding of probable cause to believe that the accused has committed a serious offense.[45]

This facial challenge necessarily includes the contention that the forfeiture statute is invalid because it allows the government the option to request a seizure warrant in the same manner as provided for a search warrant. This pinpoints the fallacy of the court's reasoning because the execution of a search warrant does not require prior notice. In the case of residential property, the government's decision includes a determination regarding the removal of the occupants. Both decisions are part of the prosecutorial discretion given to each U.S. Attorney concerning the

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complaint).

The district court in *Richmond Tenants Org.* incorrectly cited *Livonia*, *Kingsley* and another case, United States v. Parcel I Beginning at Stake, 731 F. Supp. 1348 (S.D. Ill. 1990), as being part of the case law on forfeiture of public housing leaseholds. 753 F.2d at 609. All of these cases involve private property, which this Note contends makes a considerable difference when assessing the governmental and public interests at issue and the need for prompt action.

42. United States v. A Single Family Residence, 803 F.2d 625, 631-32 (11th Cir. 1986).

43. Instead, the court of appeals discounted the Eleventh Circuit's holding, by stating that it was unclear in that case whether the residents lived on the property at the time of the seizure and whether the seizure included an eviction. 956 F.2d 1300 (4th Cir. 1992).

44. United States v. Valdes, 876 F.2d 1554, 1559 (11th Cir. 1989) (seizure of property under civil forfeiture statute "is essentially the same as the arrest of a person.").

45. United States v. Monsanto, 491 U.S. 600, 615-16 (1989) (emphasis in original). In *Monsanto*, an adversary hearing had been held concerning an order to freeze assets. Nevertheless, it reveals a basic flaw in the ruling of the district court and court of appeals: property suspected of involvement in a crime has a right to notice and hearing while a person does not. This paradox is particularly bewildering because property in a forfeiture proceeding is viewed as analogous to an individual defendant charged with wrongdoing. *See* United States v. United States Coin and Currency, 401 U.S. 715, 719-20 (1971).

manner in which the case is conducted.[46] Beyond this, the validity of a facial challenge to the forfeiture statute has already been established by the Supreme Court's development of special procedural due process rules for cases involving "exigent circumstances."

B. Exigent Circumstances: Fuentes v. Shevin and Calero-Toledo v. Pearson Yacht Leasing Co.

Drug trafficking in public housing contaminates the living environment of law-abiding tenants. Dealing promptly and effectively with this problem serves an important public interest. The Supreme Court has held that government seizures of misbranded vitamins, diseased poultry, and taxes justify no-notice seizures.[47] The common theme among these

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46. Though the question is ultimately left to each U.S. Attorney, DOJ has issued a memorandum regarding departmental policy on the seizure of any occupied property and immediate removal of occupants:

A. Reason to believe that leaving occupants in possession will result in danger to the health and safety of the public or to law enforcement may be based upon the following:
   1. The nature of the illegal activity;
   2. Presence of weapons, "booby traps," or barriers on the property;
   3. Information that occupants will intimidate or retaliate against cooperating individuals, neighbors, or law enforcement personnel;
   4. Presence of serious safety code violations; or
   5. Contamination by[,] or presence of[,] dangerous chemicals.

B. Reason to believe that leaving occupants in possession will result in continued use of the property for illegal activities may be based upon:
   1. The nature of the illegal activity (e.g., repetitive drug sales);
   2. The history of the property's and/or occupant's involvement in illegal activities;
   3. Evidence that all occupants have been involved in the illegal activity;
   4. The inability of non-participating occupants to prevent continued illegal activity; or
   5. The failure of other sanctions to stop illegal activity.

C. Reason to believe that leaving occupants in possession might undermine the U.S. Marshal's or his designee's ability to manage the property may be based upon all the factors set out above or information that the occupants intend to waste or destroy the property.

D. The above list of circumstances is not intended to be exclusive. Attorneys for the Government may find other circumstances justifying immediate removal of the occupants based upon demonstrable and articulable information provided by credible sources.

Copeland, *supra* note 12 (emphasis in original) (on file with the author and each U.S. Attorney's office).

47. FDIC v. Mallen, 486 U.S. 230 (1988) (no-notice removal of indicted bank officer); Bob Jones Univ. v. Simon, 416 U.S. 725, 746-48 (1974) (no-notice revocation of tax-exempt status); Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 599-600 (1950) (misbranded but harmless vitamins); Fahey v. Mallonee, 332 U.S. 245, 253-54 (1947)

cases is a strong governmental interest in acting quickly and in the public interest.[48]

In *Fuentes v. Shevin*, the Supreme Court recognized the validity of summary seizures in cases involving "exigent circumstances."[49] *Fuentes* involved constitutional challenges to prejudgment replevin statutes in Florida and Pennsylvania which permitted the seizure of property based solely on the plaintiff's complaint and without any prior notice to the defendant or opportunity for a hearing.[50] The Supreme Court held that the statutes were constitutionally invalid because they failed to provide due process before dispossession of the property.[51] The Court thereby reaffirmed that procedural due process generally requires notice and a hearing prior to the deprivation of a property interest.[52] Significantly, however, the Court also recognized that "there are 'extraordinary situations' that justify postponing notice and opportunity for a hearing."[53]

The Court in *Fuentes* reviewed its prior precedent and discovered three characteristics of such "extraordinary situations:"

> First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.[54]

From these characteristics, the Court developed a three-part test for extraordinary circumstances.[55] The Court then determined that the replevin statutes at issue did not meet any of these criteria, noting in

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(summary seizure of unsound bank); Phillips v. Commissioner, 283 U.S. 589 (1931) (summary tax collection procedures); North Am. Cold Storage Co. v. Chicago, 211 U.S. 306 (1908) (diseased poultry in cold storage).

48. 407 U.S. 67 (1972).

49. *Id.* at 91-92.

50. The Florida statute required a hearing on the merits following the seizure, whereas the Pennsylvania law did not.

51. 407 U.S. at 80-93.

52. 407 U.S. at 80, 82 (citing Baldwin v. Hale, 1 Wall. 223, 233 (1864)).

53. 407 U.S. at 90 (citing Boddie v. Connecticut, 401 U.S. 371, 379 (1970)).

54. 407 U.S. at 91.

55. The Court in *Fuentes* and later in *Calero-Toledo* used the term "extraordinary circumstances." However, later circuit court and district court cases used the term "exigent circumstances" to mean the same thing and this Note adopts the latter term. *See, e.g.*, United States v. Property at 850 S. Maple, Ann Arbor, Mich., 743 F. Supp. 505, 510 (E.D. Mich. 1990).

particular that no governmental interest was served by the summary replevin seizures because only private gain was at stake: "state intervention in a private dispute hardly compares to state action furthering a war effort or protecting the public health."[56]

Additionally, neither replevin statute limited the application of the summary seizure device to special situations demanding prompt action and there were no unusual situations in the cases presented. The statutes simply abdicated "effective state control over state power,"[57] for they allowed private parties to unilaterally invoke state power to replevy goods from another without the participation or review of state officials.[58] Regarding this issue, the Court noted:

> The seizure of possessions under a writ of replevin is entirely different from the seizure of possessions under a search warrant. First, a search warrant is generally issued to serve a highly important governmental need—e.g., the apprehension and conviction of criminals—rather than the mere private advantage of a private party in an economic transaction. Second, a search warrant is generally issued in situations demanding prompt action. The danger is all too obvious that a criminal will destroy or hide evidence or fruits of his crime if given any prior notice. Third, the Fourth Amendment guarantees that the State will not issue a search warrant merely upon the conclusory application of a private party. It guarantees that the State will not abdicate control over the issuance of warrants and that no warrant will be issued without a prior showing of probable cause. Thus, our decision today in no way implies that there must be opportunity for an adversary hearing before a search warrant is issued.[59]

Because both the Congress and the Supreme Court[60] have equated search warrants with warrants for seizure, the distinction drawn in *Fuentes* provides useful analogies in the civil forfeiture context. As discussed in greater detail below, both the civil forfeiture statute and the Forfeiture Project meet all three parts of the *Fuentes* "extraordinary circumstance" test.

In *Calero-Toledo v. Pearson Yacht Leasing Co.*, the Supreme Court applied *Fuentes* to a case involving the seizure of a yacht allegedly used to transport illegal drugs. The Court rejected the contention that due

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56. Fuentes v. Shevin, 407 U.S. 67, 93 (1972).
57. *Id.*
58. *Id.*
59. *Id.* at 93-94 n.30.
60. United States v. Monsanto, 491 U.S. 600, 615-16 (1989); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 679-80 (1973).

process required notice and a hearing prior to the seizure, even though the government had not obtained a judicial finding of probable cause and a warrant before the seizure.[61] Employing the *Fuentes* test, the Court found that: (1) the seizure served significant governmental interests, because it allowed the government to assert in rem jurisdiction over the property, "thereby fostering the public interest in preventing continued illicit use of the property and in enforcing criminal sanctions"; (2) pre-seizure notice and hearing might frustrate the interests served by the statute, since the property seized will often be of a sort that could be removed to another jurisdiction, destroyed, or concealed if advance warning of confiscation were given; and (3) unlike the situation in *Fuentes*, the seizure was by government officials responsible for determining if the seizure was appropriate under the statute, rather than self-interested parties.[62]

In *Richmond Tenants Organization*, the district court and court of appeals cited *Fuentes* and made a passing reference to *Calero-Toledo*, but failed to properly apply either's rationale concerning "extraordinary circumstances" to the forfeiture of public housing leases.[63] First, both courts only recognized a narrow governmental interest in obtaining pre-notice seizure. Second, both courts misapplied an erroneous view of the need for prompt actions discussed in *Calero-Toledo*.[64] Finally, neither court even mentioned that a government official, not a private litigant, is responsible for determining that seizure is necessary and justified in a particular instance. The significance of these errors becomes apparent when the *Fuentes* characteristics and the language in *Calero-Toledo* is applied to the type of no-notice seizures contemplated by the civil forfeiture statute and the Forfeiture Project.

1. The Seizure of Public Housing Units from Tenants Involved in Drug Trafficking is Directly Necessary to Further an Important Governmental and Public Interests.—The government has a general obligation to apprehend criminals, enforce laws, and safeguard the public.[65] To fulfill these obligations, the government has a legitimate interest in maintaining an effective law enforcement system, minimizing related

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61. 416 U.S. 663 (1974).

62. *Id.* at 679. The Court also noted the distinction between a search warrant and seizure under a writ of replevin made by the *Fuentes* Court. *Id.* n.14 (quoting 407 U.S. at 93-94, n. 30). *See supra* note 22.

63. 753 F. Supp. 607, 609 (E.D. Va. 1990); 956 F.2d 1300, 1307 (4th Cir. 1992) (affirming district court).

64. The district court did discuss an interpretation of *Calero-Toledo* by the U.S. District Court for the Southern District of Illinois in United States v. Parcel I Beginning at Stake, 731 F. Supp. 1348 (1990). 753 F. Supp. at 609. The court of appeals discussed *Calero-Toledo* itself. 956 F.2d at 1307-08.

65. U.S. CONST. preamble.

public expenditures and protecting law enforcement personnel as they carry out their duties.[66] Promoting the government's interest not only eases the burden of its duties, but also directly benefits the general public.[67]

In *Calero-Toledo*, the Supreme Court recognized that the prompt seizure of a yacht used for drug trafficking served a public interest by preventing the further use of the property for drug trafficking while the forfeiture action was pending.[68] Neighborhood residents, whether they live in public or private housing, have a similar important interest in living in an environment free from the dangers of drug trafficking.[69] But tenants of private rental housing have an advantage over public housing tenants in maintaining a drug free environment because private landlords can evict tenants far more easily.[70] One of the editorials in favor of the Forfeiture Project observed: "No one could reasonably subordinate a landlord's right to tell [a drug dealer to] 'Get off my property'. . . . If it's true of privately owned property, *a fortiori* it's true of drug dealers, who occupy their apartments through the generosity of the taxpayer."[71]

Through local public housing authorities, HUD is a landlord to approximately 1.3 million public housing tenants.[72] The United States Housing Act of 1937[73] mandates that HUD assist state and local governments in remedying the chronic shortage of "decent, safe, and sanitary dwellings for families of lower income" and vests the "maximum amount of responsibility" for administration of public housing with local officials.[74] To this end, HUD spent over 5.8 billion dollars on public

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66. *See Calero-Toledo*, 416 U.S. at 679; United States v. 141st St. Corp., 911 F.2d 870, 875 (2nd Cir. 1990) (finding exigent circumstances under *Fuentes*, the court recognized that "prior notice of the seizure might have hampered efforts to enforce the narcotics laws and increased the risk to police and the community from the seizure.").

67. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970) (government's interest in conserving fiscal resources and administrative burden does not outweigh a welfare recipient's right to an informal proceeding prior to termination of benefits due to ineligibility).

68. *See* 416 U.S. at 679 and 679 n.14 (describes the apprehension and conviction of criminals as a "highly important governmental need.").

69. *141st Street*, 911 F.2d at 875 (recognizing the interests of neighbors).

70. Jack Kemp, *Letterline: The Poor Have Rights Too*, USA TODAY, June 6, 1990, at 9A.

71. BOSTON HERALD, *supra* note 1; *see also* PHILA. INQUIRER, June 16, 1990, at 8A; John Lofton, *Don't Cry for Criminals' 'Rights' in War on Drugs*, USA TODAY, May 23, 1990, at 10A; *How the LSC Helps Drug Dealers*, WASH. TIMES, July 16, 1990, at D2.

72. *See supra* note 3.

73. 42 U.S.C. § 1437 (1991).

74. 42 U.S.C. § 1437 (1991).

housing in 1991.[75] Moreover, Congress has found that the federal government has a duty to provide public housing that is decent, safe, and free from illegal drugs and has established a grant program for this purpose.[76] During 1991 alone, HUD distributed 140 million dollars in grants specifically directed toward drug enforcement, drug use prevention and education.[77] Local governments also provide a substantial amount of money each year for public housing.[78] Finally, most public housing leases create a contractual duty requiring the housing authority to provide the tenants with a safe environment.[79] Ironically, the plaintiffs in *Richmond Tenants Organization* sued the Richmond Redevelopment and Housing Authority in an effort to get better security from drug-related violence at the same time that the *Richmond Tenants Organization* case was being considered by the district court.[80] The congressional mandate, considerable financial investment, and possible contractual obligations all show that the government has a significant interest in providing safe and drug-free housing for the poor, rather than taxpayer-subsidized housing for drug dealers.

The government's interest was not sufficiently recognized by the district court in *Richmond Tenants Organization*. Nevertheless, when ruling on the Richmond Tenants Organization's challenge to the housing authority's proposed lease changes, the same district judge recognized that the Richmond Redevelopment and Housing Authority has an interest in improving the safety and quality of life in public housing. In *Richmond Tenants Organization v. Richmond Redevelopment and Housing Authority*,[81] decided only 13 days before *Richmond Tenants Organization*

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75. *See supra* note 3.

76. Congress has also found that:

> (2) public and other federally assisted low-income housing in many areas suffers from rampant drug-related crime;
>
> (3) drug dealers are increasingly imposing a reign of terror on public and other federally assisted low-income housing tenants;
>
> (4) the increase in drug-related crime not only leads to murders, muggings, and other forms of violence against tenants, but also to a deterioration of the physical environment that requires substantial government expenditures; and
>
> (5) local law enforcement authorities often lack the resources to deal with the drug problem in public and other federally assisted low-income housing, particularly in light of recent federal aid to cities.

Public Housing Drug Elimination Pilot Program, 42 U.S.C. § 11901 (1991).

77. The Department of Justice's Office of Juvenile Justice Development Programs also administers a grant program for anti-drug efforts aimed at public housing.

78. *See generally* 42 U.S.C. § 1437 (1991); *see also supra* note 3.

79. *See, e.g.*, Richmond Tenants Org., Inc. v. Richmond Redevelopment and Hous. Auth., 751 F. Supp. 1204 (E.D. Va. 1990).

80. Alan Cooper, *Tenants Sue for Better Security*, RICHMOND NEWS LEADER, June 26, 1990, at 7.

81. 751 F. Supp. 1204 (E.D. Va. 1990).

v. Kemp, the court acknowledged that the 14,000 tenants of Richmond public housing "are the victims of an extraordinarily high incidence of crime, much of which is connected to illegal drug traffic."[82] In fact, the district court upheld various lease provisions, including a ban on possessing firearms in public housing and an emergency eviction clause which could require tenants to vacate their units within twenty-four hours of a reported threat to the life, health, or safety of other tenants or housing authority employees.[83] The district court deferred to the housing authority's judgement in drafting lease provisions based on the fact that the provisions were rationally related to a legitimate housing purpose.[84] Consequently, the district court's subsequent decision regarding lease seizures paradoxically ignores the same dire situation in Richmond public housing and the same important governmental interest in addressing this problem.

Similarly, the court of appeals failed to mention the severe drug problem in public housing or its consequences for innocent tenants, and it did not acknowledge that an important governmental interest existed. These omissions clearly demonstrate a lack of comprehension of the terrible circumstances which public housing tenants endure daily.

2. There is a Special Need for Very Prompt Action When a Drug Trafficking Problem Appears in Public Housing.—The strong governmental interest in upholding the law, protecting citizens and law enforcement officers, fulfilling congressional mandates, and guarding the substantial investment in public housing translates into a "special need for very prompt action" as identified by the Supreme Court in *Fuentes* and as applied to civil forfeiture in *Calero-Toledo*.[85] The *Calero-Toledo* opinion focused on whether pre-seizure notice might frustrate the interests served by the statute. For example, the property involved can often be removed, destroyed, or concealed.[86] Such could easily be the case with a public housing unit. Although a housing unit is immobile, the structure may be damaged and destroyed or its contents removed, including evidence needed for a criminal conviction, if a drug trafficking tenant is

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82. *Id.* at 1207. The court also said that "[t]he murder rate in RRHA housing is very high" and that "[t]enants are routinely intimidated by gunfire and the presence of youths with guns." *Id.*

83. The court also upheld a section which holds tenants responsible for the actions of "other persons on the premises" who disturbed neighbor's peaceful enjoyment of the premises. *Id.* at 1210. Provisions which would have prohibited any type of weapon on public housing grounds and made the use or sale of drugs off of public housing cause for eviction were the only two which the court found to be unreasonable. *Id.* at 1204-05, 1209-14.

84. *Id.* at 1205-06.

85. *See supra* notes 62-64 and accompanying text.

86. 416 U.S. 663 (1974).

given notice prior to the seizure. In this way, prior notice can hamper law enforcement efforts and substantially increase the risk of harm to the police and the community.[87]

The district court in *Richmond Tenants Organization v. Kemp* did not apply *Calero-Toledo* itself, but instead looked to another district court's interpretation of that case in *United States v. Parcel I Beginning at Stake*,[88] which held that to show a need for very prompt action, the government must show *either* that the "pre-hearing seizure is required to prevent further unlawful activity" or "to prevent dissipation or concealment of the property."[89] This interpretation of *Calero-Toledo* unduly focuses on mobility factors and gives insufficient weight to broader governmental interests like the protection of the substantial investment in public housing. Yet even under this interpretation, the situation in public housing easily meets both criteria. Incredibly, while using language almost identical to *Calero-Toledo*, the district court found that the government's interest in preventing continued drug-related activity did not meet either criteria.[90] Instead, the district court, and later the court of appeals, concentrated on the fact that the *Calero-Toledo* case involved the seizure of a highly mobile yacht, whereas a housing unit obviously cannot be moved.[91] However, *Calero-Toledo* did not turn on the mobility of the yacht; rather, the Supreme Court merely stated that concealment, destruction or removal "will often be" present, not that the property in question must be capable of removal.[92] Thus, the *Richmond Tenants Organization v. Kemp* courts' attention to the mobility issue was misplaced. Moreover, in later formulations of *Calero-Toledo*, the Supreme Court has omitted the mobility factor, stressing instead the "governmental purposes" served by immediate seizure and the "unworkability" of a requirement for a pre-seizure hearing in all cases.[93]

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87. United States v. 141st St. Corp., 911 F.2d 870, 875 (2nd Cir. 1990) (upholding no-notice seizure of an apartment building and recognizing that in the situation under consideration prior notice could have meant greater risk of harm to police and neighbors).

88. 731 F. Supp. 1348 (S.D. Ill. 1990).

89. 753 F. Supp. 607, 609 (E.D. Va. 1990).

90. *Id.* at 609.

91. *Id.* (citing United States v. 850 S. Maple, Ann Arbor, Mich., 743 F. Supp. 505, 510 (E.D. Mich. 1990)); 956 F.2d 1300, 1307 (4th Cir. 1992).

92. 416 U.S. 663, 679 (1974).

93. *See* United States v. $8,850 in U.S. Currency, 461 U.S. 555, 562 n.12 (1983) ("The government interests found decisive in *Pearson Yacht* are equally present in this situation: the seizure serves important governmental purposes; a pre-seizure notice might frustrate the statutory purposes; and the seizure was made by government officials rather than self-motivated parties.").

In a subsequent decision, the Court characterized *$8,850 in U.S. Currency* in the following way: "We reasoned that [a pre-seizure hearing] requirement would make customs

Both of the *Richmond Tenants Organization v. Kemp* courts also put great stock in the fact that a residence was being seized. Following the Second Circuit and another district court decision, the district court said that in addition to being immobile, homes deserve special protection because the Constitution affords individuals an expectation of "privacy and freedom from governmental intrusion."[94] The court of appeals also emphasized a special expectation for privacy in homes.[95] What the *Richmond Tenants Organization v. Kemp* courts overlooked is that the homes of innocent victims living in public housing also deserve protection. The court of appeals expressly stated that drug activity in public housing does not always constitute an "extraordinary situation which requires prompt governmental action to protect other innocent tenants from dangerous drug activities in their buildings."[96] In contrast, the Fourth Circuit has stated previously: "while we recognize that the home has a protected place in our jurisprudence, . . . we cannot sanction a rule that gives favored protection to drug dealers who choose to deal directly from their homes."[97] Significantly, the statutory civil forfeiture procedure does not distinguish between real and personal property.[98]

Furthermore, the Supreme Court has emphasized that "private residences are places in which the individual normally expects privacy free of governmental intrusion *not authorized by a warrant* . . . ."[99] The Forfeiture Project is consistent with the traditional Fourth Amendment protection given to homes because it requires that a warrant supported by probable cause be obtained prior to seizure. Indeed, the owner of seized property has essentially the same remedies available as an arrestee: the owner can challenge the legality of the seizure before a judicial officer, or sue to hold accountable the law enforcement officials who made an illegal seizure.[100] Recognizing this, the Eleventh Circuit has ruled that the forfeiture statute procedures complied with the Fourth Amendment and provided "the owner of the property [with] all of the process that [is] due."[101]

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processing entirely unworkable and also found that because 'the seizure serves important governmental purposes[,] a preseizure notice might frustrate the statutory purpose . . . .'" United States v. Von Neumann, 474 U.S. 242, 249, n.7 (1986).

94. 753 F. Supp. at 609 (citing Livonia, 889 F.2d at 1264 (citing United States v. Karo, 468 U.S. 705, 714 (1984))); *850 S. Maple*, 743 F. Supp. at 510.

95. *Richmond Tenants Org.*, 956 F.2d 1300, 1307-08 (4th Cir. 1992).

96. *Id.* at 1308.

97. United States v. Santoro, 866 F.2d 1538, 1542-43 (Cir. 1989) (citations omitted).

98. 42 U.S.C. § 881; United States v. Property Located at 4880 S.E. Dixie Highway, 838 F.2d 1558, 1561 (11th Cir. 1988).

99. *Karo*, 468 U.S. at 714 (emphasis added).

100. United States v. Valdez, 876 F.2d at 1554, 1559 (11th Cir. 1989); *see generally* 42 U.S.C. § 881.

101. 876 F.2d at 1560, n.12.

3. The Person Initiating the Seizure is a Government Official Responsible for Determining, Under the Standards of a Narrowly Drawn Statute, that the Seizure is Necessary and Justified.—The civil forfeiture statute allows the U.S. Attorney to seize a leasehold by obtaining a warrant from a magistrate based upon a finding of probable cause.[102] The Supreme Court has noted that obtaining a warrant would satisfy the third part of the *Fuentes* test, as such a procedure "guarantees that the State will not abdicate control over the issuance of warrants and . . . no warrant will be issued without a prior showing of probable cause."[103] Neither the district court nor the court of appeals in *Richmond Tenants Organization v. Kemp* discussed the significance of the warrant requirement in this context.

Two government officials are relevant to this issue: the U.S. Attorney and the magistrate. In the initial stages of a case, the U.S. Attorney will consult the forfeiture statute and review DOJ forfeiture policy to determine if a case should be pursued. In making this judgment, the role of the government attorney is not simply that of an adversary. Rather, as the Supreme Court has observed, the government attorney "is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . is not that it shall win a case, but that justice shall be done."[104] As such, a U.S. Attorney is a "servant of the law" with a "twofold aim . . . that guilt shall not escape or innocence suffer."[105] The *Calero-Toledo* Court upheld the no-notice seizure of a yacht under a Puerto Rican statute substantially the same as the federal civil forfeiture law in part because, unlike the situation in *Fuentes*, the seizure was not initiated by self-interested parties, but rather by government officials responsible for determining if the seizure was appropriate under the statute.[106]

However, the U.S. Attorney is not free to seize property and remove residents at will. Whatever discretion the U.S. Attorney has in deciding whether or not to pursue a case, the warrant requirement ensures that no lease will be seized, nor any tenant removed, without a finding of probable cause to believe that the leasehold is subject to forfeiture. Thus, to obtain a warrant, the U.S. Attorney must request that a magistrate apply well-established standards to determine if there is probable cause to believe that the premises are being used to facilitate drug

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102. *See* 21 U.S.C. § 881 (1990).

103. 407 U.S. at 94, n.30.

104. Berger v. United States, 295 U.S. 78, 88 (1935).

105. Singer v. United States, 380 U.S. 24, 37 (1965) (citing *Berger*, 295 U.S. at 88).

106. 416 U.S. 633, 679 (1974).

trafficking.[107] This preliminary procedure plainly satisfies the third *Fuentes* requirement.

C. The Civil Forfeiture Statute and the Forfeiture Project Satisfy the Balancing Test for Procedural Due Process Established in Mathews v. Eldridge[108]

As defined in *Fuentes*, any seizure conducted in public housing under the civil forfeiture statute or the Forfeiture Project qualifies as an exigent circumstance. The exigent circumstances concept was used by both the district court and court of appeals in *Richmond Tenants Organization v. Kemp* and the Second Circuit in *Livonia* to define when seizures could take place with a warrant. However, the concept was first developed in Fourth Amendment jurisprudence to define the circumstances in which seizures could take place *without* a warrant.[109] These Fourth Amendment cases hold that, absent exigent circumstances, the government must obtain a warrant prior to seizure, and that when the government has a warrant, exigent circumstances are irrelevant. Because the Forfeiture Project and the civil forfeiture statute both utilize a warrant to seize property, the Fourth Amendment guarantee is satisfied.[110]

Moreover, even if the government could not meet the *Fuentes* test for exigent circumstances, due process still would not mandate a prior adversary hearing. The entire civil forfeiture procedure, including the warrant before temporary removal and the full civil action afterwards, satisfies the constitutional balancing test in *Mathews v. Eldridge*. In *Mathews*, the Supreme Court used a balancing test to uphold an administrative procedure for termination of disability benefits that did not require a prior hearing.[111] Under the *Mathews* balancing test, three factors must be considered: (1) the significance of the property interest at stake; (2) the risk of erroneous deprivation and whether the procedure adequately protects the property interest; and, (3) the government's interest, including the burden extra procedures would entail.[112]

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107. United States v. 141st St. Corp., 911 F.2d 870, 875 (2nd Cir. 1990) (upholding the no-notice seizure of a private apartment building based on a finding of exigent circumstances).

108. 424 U.S. 319 (1976).

109. Payton v. New York, 445 U.S. 573, 590, 599 (1980); G.M. Leasing Corp. v. United States, 429 U.S. 338, 358 (1977).

110. United States v. Karo, 468 U.S. 705 (1984) (requiring a warrant prior to official entry into homes).

111. 424 U.S. at 349.

112. 424 U.S. at 335; *see also* Goss v. Lopez, 419 U.S. 565, 579 (1975) ("the timing and content of notice and nature of hearing will depend on appropriate accommodation of the competing interests involved.").

1. The Tenant has Only a Limited Interest in Uninterrupted Occupancy.—The tenant's property interest involved in a public housing leasehold seizure can be significant. However, as in *Mathews*, because a tenant whose unit is seized will be restored to the unit if the tenant ultimately prevails in a challenge to the seizure, the tenant's sole interest is in the uninterrupted occupation of the unit.[113] When the government enters into an occupancy agreement with the tenant, as is often the case, this interest disappears. Also, if the tenant is arrested at the time of the seizure, the issue of his interest in occupying the unit is likely to be moot. Moreover, the Forfeiture Project provided for the welfare of innocent family members and belongings. On this issue, the district court in *Richmond Tenants Organization v. Kemp* simply stated that the eviction of a tenant prior to a forfeiture trial "constitutes a harm of major proportions," and did not analyze the actual property interest involved.[114] Shockingly, not only did the court of appeals fail to confront the property interest issue, it never even mentioned the landmark *Mathews* decision. An examination of a tenant's property interest in uninterrupted occupancy of the unit reveals that just as a showing of probable cause is sufficient to accommodate private interests when the government executes a search or arrest warrant, it also does so in the case of seizure.

As explained in *Mathews*, the possible length of wrongful deprivation is also an important factor in assessing the impact of official action on private interests.[115] In the case of civil forfeiture, a tenant can trigger the rapid filing of a forfeiture action. A tenant may file an equitable action seeking a court order to compel the filing of the forfeiture action or return of the seized unit.[116] Alternatively, a tenant may contend that the seizure was improper and file a motion under Federal Rules of Criminal Procedure 41(e) for a return of the seized property.[117] Finally, a tenant may petition the U.S. Attorney for expedited release of the unit if the tenant can establish what essentially amounts to an "innocent owner" defense.[118]

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113. 424 U.S. at 340.
114. 753 F. Supp. 607, 610 (E.D. Va. 1990).
115. 424 U.S. at 341 (quoting Fusari v. Steinberg, 419 U.S. 379, 389 (1975)).
116. United States v. $8,850 in U.S. Currency, 461 U.S. 555, 569 (1983).
117. *Id.*
118. The petitioner must establish:
(1) The owner has a valid, good faith interest in the seized conveyance as owner or otherwise;
(2) The owner has statutory rights or defenses that would show to a substantial probability that the owner would prevail on the issue of forfeiture;
(3) The owner reasonably attempted to ascertain the use of the conveyance in a normal and customary manner; and,
(4) The owner did not know or consent to the illegal use of the conveyance;

Federal civil forfeitures are governed by the Fifth Amendment due process requirement that tenants be afforded a post-seizure hearing on the forfeiture of the subject property "at a meaningful time."[119] In *United States v. $8,850 in U.S. Currency*, the Supreme Court established a balancing test for determining whether a delay in forfeiture proceedings after the property has been seized is unreasonable and thus unconstitutional.[120] The length of the delay, the reason for the delay, the claimant's assertion of the right to a hearing, and the prejudice to the claimant because of the delay are the proper factors to be considered by a court deciding this question.[121] The Court's ruling in *$8,850 in U.S. Currency* and its balancing test imply that delays can occur which are either reasonable or unreasonable, but the mere fact that a delay can occur does not render the statute or the Forfeiture Project invalid.

2. The Warrant Requirement Provides an Adequate Procedure to Limit the Risk of an Erroneous Deprivation.—The second *Mathews* factor requires an assessment of the risk of error in a judicial finding of probable cause and the value of providing additional procedures.[122] The plaintiffs in *Richmond Tenants Organization v. Kemp* contended that there was still a high risk of erroneous seizures based on insufficient evidence, mistakes or lies. The district court agreed, stating: "[w]ithout an adversarial hearing at which the accused can confront and cross-examine his accusers, the accused has no means of ferreting out mistaken or deliberately false testimony."[123] Once again the court of appeals did not discuss the subject. Both courts overlooked the fact that a probable cause finding is deemed reliable enough to issue an arrest or search warrant.[124] Further, the very reason for requiring a warrant is to allow an impartial magistrate to assess the credibility or sufficiency of the evidence and limit the possibility of error. A questioning of the sufficiency of a magistrate's finding of probable cause is contrary to well established precedent.[125] Following the district court's logic would require an absurd restructuring of the criminal justice system in order to allow a "mini-

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or in the event that the owner knew or should have known of the illegal use, the owner did what reasonably could be expected to prevent the violation.

21 C.F.R. § 1316.95 (1991).

119. Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

120. 461 U.S. 555, 564 (an eighteen-month delay was not unreasonable given the circumstances involved).

121. *Id.* at 564 (this test was taken from Barker v. Wingo, 407 U.S. 514, 530 (1972), which involved a criminal defendant's right to a speedy trial).

122. 424 U.S. 319, 335 (1976).

123. 753 F. Supp. at 610.

124. 753 F.Supp. 607, 610 (E.D. Va. 1990).

125. *See, e.g.*, Illinois v. Gates, 462 U.S. 213, 236 (1983) ("A magistrate's finding of probable cause should be paid great deference by reviewing courts.") (quoting Spinelli v. United States, 393 U.S. 410, 419 (1969)).

trial" on the issue of whether or not an accused should be arrested. Moreover, due process requirements must be determined by "the risk of error inherent in the truthfinding process as applied to the generality of cases" rather than the "rare exceptions."[126]

A pre-seizure hearing would have little value compared to the great burden it would place on the government and the court system. The cost and time involved in providing what essentially amounts to two trials for each seizure and forfeiture would be prohibitive for U.S. Attorneys, magistrates, and district courts. A seizure may only temporarily remove tenants from their unit because the ultimate disposition of the case is determined at the forfeiture trial. As in a criminal case, a probable cause finding supports the warrant and more extensive due process safeguards are provided at trial, prior to final judgement. According to the *Mathews* Court, where elaborate post-deprivation procedures are available, the "ordinary principle" is that "something less than an evidentiary hearing is sufficient prior to adverse administrative action."[127] In those circumstances, the Court has generally required that pre-deprivation procedures be designed to provide a reasonably reliable basis for ascertaining that the facts justify governmental action.[128] Thus, the combination of a judicial probable cause finding and a prompt, complete trial after seizure is constitutional because it provides a sufficiently reliable safeguard to permit a temporary deprivation of property.

3. The Government and the Public have Important Interests which Justify Pre-hearing Seizures.—The third factor in the *Mathews* balancing test is substantially the same as the first part of the *Fuentes* test: assessing the government's interest in pre-notice seizure. As discussed above, the government has what the Supreme Court has identified as "highly important" interests in upholding the law, preventing the continuation of drug-related activity, and protecting law-abiding citizens.[129] Moreover, HUD and local public housing authorities also have important governmental interests due to the Congressional mandate to provide safe, decent and drug-free housing for the poor, similar obligations which attach to the federal and local governments' role as landlord, and substantial investments of federal and local tax dollars in public housing.[130]

In order to fulfill these obligations, the government has an additional interest in utilizing the method of seizure which most efficiently and effectively accomplishes the goal of eliminating drug trafficking from

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126. *Mathews*, 424 U.S. at 344.

127. 424 U.S. at 343.

128. Mackey v. Montrym, 443 U.S. 1, 13 (1979) (citations omitted).

129. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 679 n.14 (1973) (quoting *Fuentes*, 407 U.S. 67, 93-94 n.30 (1972)).

130. *See supra* notes 65-84 and accompanying text.

public housing. A no-notice seizure executed upon a finding of probable cause will not only remove drug dealers quickly, but will likely act as a deterrent to future drug sales. As Ms. Mary Baldwin, a public housing tenant and the President of the Rockwell Gardens Tenants Council in Chicago, stated: "When you move in, they tell you [sic] are responsible for what happens, so it isn't any secret."[131]

The *Mathews* test specifically considers administrative burdens and other societal costs as legitimate governmental concerns.[132] The rights of public housing tenants to live in a safe environment are a substantial government concern.[133] Not only would requiring an adversarial hearing prior to seizure put a great burden on overworked government attorneys and courts, but the resulting delay would also mean that "those likely to be found undeserving in the end" would be occupying public housing instead of someone who does deserve it.[134] Ultimately, the government should be able to act to advance important public interests even though it deprives someone of property or liberty without a prior hearing, so long as adequate post-deprivation process provides an adequate safeguard against arbitrary seizures.[135]

The district court in *Richmond Tenants Organization v. Kemp* only acknowledged a narrow governmental interest in obtaining pre-notice seizure of a unit, believing that broader interests could be served by other means, such as a pre-seizure adversarial hearing.[136] The court of appeals failed to discuss any governmental interest. Instead, it focused on a "least restrictive alternative" analysis, citing *Livonia* and *Kingsley* and stating that the "governmental objective in evicting drug dealers from public housing may be accomplished by different procedures."[137] Nevertheless, the civil forfeiture statute plainly authorizes seizures, which may or may not include removal of the tenant, without prior notice. The policy decision that such procedures are more effective in curbing

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131. Andrew Fegelman, *U.S. Law Helps CHA Fight Drugs*, CHI. TRI., June 27, 1990, at 13C.

132. Matthews v. Eldridge, 424 U.S. 319, 319 (1976).

133. A tenant in Macon, Georgia, who has lived in public housing for thirty-eight years, put it well when she voiced her support for the Project: "During the night around these two buildings, there's traffic all the time," Hardeman said. "This used to be one of the nicest neighborhoods in the city . . . and I think we can make it good again, sure do." Dan Maley, *Public Housing Raids Result in Three Arrests*, MACON TELEGRAPH AND NEWS, June 26, 1990, at 1B.

134. 424 U.S. at 348.

135. United States v. 141st St. Corp., 911 F.2d 870, 876 (2nd Cir. 1990) (quoting J. Nowak et al., CONSTITUTIONAL LAW 560 (2d ed. 1983) (footnote omitted)).

136. 753 F. Supp. 607, 610 (E.D. Va. 1990) (quoting United States v. Premises and Real Property Located at 4492 Livonia Rd., 889 F.2d 1258, 1264 (2d Cir. 1989)).

137. *Richmond Tenants Org.*, 956 F.2d 1300, 1308 (4th Cir. 1992).

drug trafficking than other means should be made by Congress, not a court. The purpose of the third *Mathews* factor is not to second-guess congressional policy decisions, but merely to assess the extent to which additional due process procedures would burden the government. Given the important governmental and public interests at stake, and the enormous burden which would be placed on the government and courts, requiring a hearing prior to seizure would severely compromise the government's efforts to remove drug dealers from public housing.

III. Conclusion

HUD Secretary Jack Kemp once asked a tenant of Philadelphia public housing if she felt HUD's efforts to get drug dealers out of public housing violated her constitutional rights. She replied: "Before you came along, I didn't *have* any rights."[138] Indeed, the rights of law-abiding citizens, who are victims of the disruptions and violence caused by neighborhood drug dealers, are too often subsumed to the rights of the wrong-doer.[139] The wholly inadequate *Richmond Tenants Organization v. Kemp* decisions are prime examples. The district court and the court of appeals both disregarded highly important governmental and public interests in preventing further drug-related activity, enforcing the law, conducting law enforcement operations safely and efficiently, fulfilling the Congressional mandate to provide safe public housing, and protecting the substantial financial investment of tax dollars. Sadly, the effect of the rulings is to frustrate government efforts to efficiently rid public housing of drug dealers, leaving them free to oppress and terrorize tenants in Richmond and across America.

The district court and court of appeals also ignored the special function of a U.S. Attorney. Under the American ideal of separation of powers, the initial task of deciding whether or not to proceed with a case, and how to proceed based on an assessment of the circumstances,

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138. Kemp, *supra* note 2 (emphasis in original).

139. Jack Kemp, *Kemp: Keep Drugs Out of Housing Projects*, St. Louis Post-Dispatch, June 3, 1990, at 10 ("I think it's time we recognize that the rights of innocent people to live in a safe, drug-free community are just as important as the rights of the drug thugs who terrorize public housing."); Kemp, *supra,* note 70 at 9A ("Why should the rights of drug-dealing criminals be greater than those of the decent residents of public housing?").

The general public seems to agree:

> Barring a successful appeal by HUD, Williams' order effectively prevents the raids from taking place. To put it differently, Williams' order effectively gives drug criminals the right to continue behaving as they like in housing paid for by the taxpayers. Just one more case of a federal judge more concerned with the 'rights' of dangerous felons than with the rights of the public.

Boston Herald, *supra* note 1, at 6.

rightfully belongs to each individual U.S. Attorney.[140] The traditional role of the government attorney, which was reaffirmed by Congress in the civil forfeiture statute when it provided options under which a government attorney may choose to proceed based on the circumstances, should not be preemptively stripped away by a court. The duty of the court is "not that of policing or advising legislatures or executives," but simply "to decide the litigated case and to decide it in accordance with the law."[141]

Finally, both court decisions challenged the sufficiency of the historically recognized probable cause standard. Under the civil forfeiture statute and the Forfeiture Project, a seizure is conducted only after a warrant supported by a judicial finding of probable cause is issued. Such a finding is adequate to temporarily deprive arrestees of their liberty and to search homes. When the limited interest of the tenant in uninterrupted occupation of their housing unit is balanced against the multitude of important governmental and public interests served by the Forfeiture Project, a warrant is certainly sufficient to safeguard a tenant's due process rights. The district court's and court of appeals' rulings that extra due process procedures are required before the government can remove a drug dealer from public housing is bewildering and without support in Supreme Court precedent. As Jack Kemp has cogently observed: "The only 'public housing' drug dealers deserve is jail."[142]

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140. *See, e.g.*, Heckler v. Chaney, 470 U.S. 821 (1985) (prosecutorial discretion is unreviewable by a court).

141. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 4-10 (1961).

142. *HUD and Justice Announce Strike Against Drug Dealers in Public Housing*, News Release, Department of Housing and Urban Development, June 25, 1990, at 1.