ADEQUACY OF NOTICE UNDER CAFRA: RESOLVING CONSTITUTIONAL DUE PROCESS CHALLENGES TO ADMINISTRATIVE FORFEITURES

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INTRODUCTION

In April 2000, Congress enacted the Civil Asset Forfeiture Reform Act (CAFRA),[1] which significantly modified the rules governing both judicial and nonjudicial forfeitures to ensure that property owners benefit from the guarantees of due process of law.[2] State and federal asset forfeiture laws are designed to allow law enforcement agencies to seize and retain property suspected of involvement in criminal conduct.[3] The reforms responded to sustained criticism by both policymakers and the public that the overuse of asset forfeiture in federal law enforcement curtailed civil liberties and property rights.[4] Prior to the push for reform in the late 1990s, hundreds of millions of dollars worth of forfeited property and funds were collected annually and accumulated in the Department of Justice's Assets Forfeiture Fund.[5] Though law enforcement officials asserted that civil forfeiture deterred crime[6] and, at times, was the only avenue available to seize illegal assets, there was a growing consensus that "there must be adequate restrictions

1 Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202 (codified at 18 U.S.C. § 983 (2012)).

2 Stefan D. Cassella, *Overview of Asset Forfeiture Law in the United States*, 55 U.S. ATT'YS' BULL., Nov. 2007, at 8, 13 [hereinafter DOJ BULLETIN]. Forfeiture actions initiated after August 23, 2000 are subject to CAFRA rules.

3 25 AM. JUR. 2D *Drugs and Controlled Substances* § 232 (2014).

4 Representative Henry Hyde, Chairman, House Judiciary Comm., *Forfeiture Reform: Now, or Never?* (May 3, 1999) [hereinafter Statement of Rep. Henry Hyde], *available at* https://www.aclu.org/technology-and-liberty/statement-rep-henry-hyde-forfeiture-reform-now-or-never. Before CAFRA, the frequency of civil asset forfeiture was heightened by the low burden of proof carried by the government following a seizure. If the government demonstrated probable cause to believe that the property was connected to a crime, then one could only retrieve the property by "proving a negative, that [the] property was not involved in a crime, or establishing some allowed affirmative defense." *Id.*

5 H.R. REP. NO. 106-192, at 4 (1999), *available at* http://www.gpo.gov/fdsys/pkg/CRPT-106hrpt192/pdf/CRPT-106hrpt192.pdf.

6 Civil forfeiture laws were enacted to target the profits generated by illegal activity, thereby deterring the conduct. *See* Michael M. O'Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 815 (2004) ("Congress enacted these laws in order to strike at the 'economic roots' of the drug business by depriving producers and traffickers of money, equipment, and other necessary forms of capital.").

to prevent abuse of . . . power" by the government.[7] CAFRA made important headway in reforming the civil asset forfeiture system in an effort to protect due process rights,[8] but there are lingering constitutional inadequacies embedded in the framework, especially concerning procedural notice requirements.

Most civil forfeitures are completed administratively—without the involvement of the judiciary—so the risk of compromised rights is great. There is limited judicial review for completed administrative forfeitures; essentially, courts may only review whether seizing agencies[9] followed *procedures* in a way that comports with the due process rights of the property owner.[10] Since claimants may only challenge completed administrative forfeitures (also known as nonjudicial forfeitures) on procedural grounds, as opposed to on the merits,[11] it is especially crucial that the governing statutes impose requirements on the government that meet the constitutional standard for adequate notice. Enhanced procedural protections for notice are crucial because property owners only contest about twenty percent of seizures instituted under administrative asset forfeiture, meaning that the vast majority of administrative forfeitures are default declarations in favor of the government.[12] The low number of challenged administrative forfeitures indicates that the vast majority of forfeitures are never heard on the merits and are consequently never scrutinized under CAFRA's

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7 *Oversight of Federal Asset Forfeiture: Its Role in Fighting Crime: Hearing Before the S. Subcomm. on Criminal Justice Oversight of the Comm. on the Judiciary*, 106th Cong. 2 (1999) [hereinafter *Hearings on Federal Asset Forfeiture*] (opening statement by Strom Thurmond, Senator from South Carolina).

8 See *infra* Part I.C for a definition of rights protected by CAFRA reforms.

9 Seizing agencies include investigative agencies participating in the Department of Justice Asset Forfeiture Program, including the Federal Bureau of Investigation (FBI), the Drug Enforcement Administration (DEA), the Bureau of Alcohol Tobacco, Firearms and Explosives (ATF), and others. U.S. DEP'T OF JUSTICE, ASSET FORFEITURE AND MONEY LAUNDERING SECTION, GUIDE TO EQUITABLE SHARING FOR STATE AND LOCAL LAW ENFORCEMENT AGENCIES 1–2 (2009), *available at* http://www.justice.gov/usao/ri/projects/esguidelines.pdf.

10 STEFAN D. CASSELLA, ASSET FORFEITURE LAW IN THE UNITED STATES 210 (2d ed. 2013).

11 Courts have affirmed that judicial review of administrative forfeiture is limited to whether timely and sufficient notice was provided and does not extend to substantive violations of constitutional rights, including protection from illegal seizures, double jeopardy, and excessive fines. *See, e.g.*, Mohammad v. United States, 169 F. App'x 475, 480–81 (7th Cir. 2006); Walker v. DEA, No. 01 CIV-3668(SHS), 2002 WL 1870131, at *2 (S.D.N.Y. Aug. 14, 2002). A claimant may only seek relief under 18 U.S.C § 983(e) by setting aside a completed administrative forfeiture when the government has failed to give adequate notice. Valderrama v. United States, 417 F.3d 1189, 1196 (11th Cir. 2005).

12 Casella, DOJ BULLETIN, *supra* note 2, at 12. "Prior to the enactment of the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), the Drug Enforcement Administration (DEA) estimated that 85 percent of forfeitures in drug cases were uncontested. Since CAFRA, which made it easier to contest a forfeiture action, the number of uncontested DEA cases has dropped to 80 percent. Other seizing agencies reported similar figures." *Id.*

preponderance of the evidence standard, leaving room for mistake and abuse.[13]

This Note will address the constitutionality of notice requirements for administrative forfeitures under CAFRA, with an emphasis on whether § 983(e)—the portion of the statute allowing claimants to challenge completed administrative forfeitures—offers sufficient due process protections to satisfy constitutional notice requirements. Part I offers an overview of the history of asset forfeiture law in the United States and a discussion of the reforms instituted by CAFRA. Part II discusses the constitutional standard of adequate notice governing administrative forfeitures, as well as the troublesome language of § 983(e). Part III analyzes inconsistencies among lower courts in determining the adequacy of notice. Part IV elaborates on the statute's constitutional shortcomings and the lack of adequate safeguards. Part V offers a solution for guaranteeing due process in administrative forfeiture actions.

In evaluating the sufficiency of CAFRA in protecting constitutional rights, an overarching concept is that individuals whose property interests are at stake due to government actions are entitled, under the Due Process Clause,[14] to notice of the proceedings and an opportunity to be heard.[15] Specifically, the notice must be reasonably calculated to "apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[16] Yet the statutory language of § 983(e), seemingly in tension with the constitutional standard, indicates that a person who had actual notice of the seizure[17] is barred from challenging the forfeiture under the theory that the government's attempts to send notice were inadequate.[18] As a result, the lower courts have applied inconsistent standards in their effort to determine the adequacy of notice within administrative asset forfeitures. Most clearly, district courts disagree over whether actual notice of the seizure itself is sufficient to satisfy constitutional notice requirements, or whether there needs to be notice of the procedure for contesting the forfeiture.[19] Constitutional challenges to the notice standard codified by CAFRA suggest that courts should interpret the statute to require protections

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13 *See* David Pimentel, *Forfeitures Revisited: Bringing Principle to Practice in Federal Court*, 13 NEV. L.J. 1, 7, 27–28 (2012).

14 U.S. CONST. amend. V.

15 *See Valderrama*, 417 F.3d at 1196.

16 Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

17 Actual notice of the seizure is satisfied when there is knowledge that property was taken.

18 *See* CASSELLA, *supra* note 10, at 219.

19 *Compare* Volpe v. United States, 543 F. Supp. 2d 113 (D. Mass. 2008) (requiring notice of the procedure for contesting forfeiture), *with In re* Sowell, No. 08–51163, 2009 WL 799570 (E.D. Mich. Mar. 19, 2009) (requiring notice of the seizure itself).

including notice (either actual or otherwise) of forfeiture proceedings, not merely notice of the seizure itself.

I. EMERGENCE AND GROWTH OF ASSET FORFEITURE

A. *Understanding the History and Use of Asset Forfeiture*

Forfeiture is broadly defined as "the taking of property derived from a crime, involved in a crime, or which makes a crime easier to commit or harder to detect."[20] Historically, federal civil forfeiture was used to surrender cargo and ships violating custom laws, and comprised a large portion of the federal revenue.[21] From there, civil forfeiture statutes were expanded in order to reach property used in the commission of counterfeiting, smuggling, and drug trafficking.[22] The law of civil forfeiture later evolved to become a major tool in the war on drugs, especially following the enactment of the Comprehensive Drug Abuse Prevention and Control Act of 1970.[23] As the nature of crime evolved, asset forfeiture was increasingly used as a tool against expansive criminal organizations to cut off their monetary supply and limit their profits.[24]

Today, government officials characterize the objectives of asset forfeiture as "indispensible means of seizing and preserving assets for victims."[25] Asset forfeiture is widely employed by enforcement agencies—in fact, forfeiture is available for over 200 different federal, state, and local crimes.[26] Investigators and prosecutors favor the asset forfeiture tool because it purportedly targets the profit generated from criminal activity by depriving the criminal enterprise of its economic resources and eliminating a principal incentive for the crime.[27] It is argued that forfeiting property takes the tools necessary for illegal conduct out of "circulation."[28] For example, by forfeiting a warehouse used to distribute drugs, the government can debilitate a trafficking ring. Proponents of forfeiture also emphasize that it seeks to return

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20 Alice W. Dery, *Overview of Asset Forfeiture*, BUS. L. TODAY 1 (June 2012), http://apps.americanbar.org/buslaw/blt/content/2012/06/article-02-dery.pdf.

21 Craig Gaumer, *A Prosecutor's Secret Weapon: Federal Civil Forfeiture Law*, *in* DOJ BULLETIN, *supra* note 2, at 59.

22 *Id.*

23 H.R. REP. NO. 106-192, at 3 (1999), *available at* http://www.gpo.gov/fdsys/pkg/CRPT-106hrpt192/pdf/CRPT-106hrpt192.pdf.

24 Dery, *supra* note 20, at 2.

25 *Id.*

26 *Id.*

27 Cassella, *supra* note 2, at 8–9.

28 *Id.* at 9.

property and compensate victims of crimes[29]—since the early 2000s, asset forfeiture was used to return nearly $3 billion in criminal fraud proceeds to victims through the Victim Asset Recovery Program (as of June 2012).[30]

B. *Categories of Current Asset Forfeiture Law*

Current asset forfeiture law falls into three basic categories—criminal, civil, and administrative forfeiture—based on distinct legal theories.[31] Criminal forfeiture is an action against the person and requires that the defendant either be convicted of or plead guilty to federal violations before the government may forfeit the property.[32] The required elements of the criminal offense must be proven beyond a reasonable doubt, but the fact that the forfeited property was involved in or represents proceeds from illegal activities requires only a preponderance of the evidence.[33] Criminal forfeiture is limited to the defendant's interest in the property because the proceeding is part of the defendant's sentence and is an element of the punishment for the crime.[34] Civil forfeiture, however, is an in rem action, meaning that the suit is filed against the property.[35] Since a civil forfeiture proceeding is brought against the property itself, the owner's culpability is *not* a factor in deciding whether the property may be forfeited.[36] Unlike criminal

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29 Victims are those who suffer a specific economic loss as a result of the offense underlying the forfeiture. Together with investigating agencies, the Department of Justice (DOJ) identifies potential victims and determines the value of the pecuniary loss. The two primary methods used by the government to return assets to victims are remission and restoration. Remission aims to provide monetary payments to victims, whereas restoration returns forfeited assets to victims to satisfy court restitution orders. *See* U.S. DEP'T OF JUSTICE ASSET FORFEITURE PROGRAM, RETURNING FORFEITED ASSETS TO CRIME VICTIMS: AN OVERVIEW OF REMISSION AND RESTORATION 2–4 (2014), *available at* http://www.justice.gov/criminal/afmls/forms/pdf/victms-faqs.pdf.

30 Dery, *supra* note 20, at 1.

31 Which proceeding is invoked depends on the facts of the case and the government's or enforcement agency's strategy. It should be noted that the government may file parallel criminal and civil proceedings. *See* Gaumer, DOJ BULLETIN, *supra* note 2, at 66–67.

32 *See* United States v. Vampire Nation, 451 F.3d 189, 202 (3d Cir. 2006) (discussing the nature of an in personam forfeiture judgment).

33 Gaumer, DOJ BULLETIN, *supra* note 2, at 63.

34 Dery, *supra* note 20.

35 It is worth noting that the distinction between an in rem and an in personam forfeiture is a legal fiction. Using the theory that the property is tainted by the crime, the in rem action is framed against the object itself, with the property owner receiving notice of the proceeding. 36 AM. JUR 2D *Forfeitures and Penalties* § 18. For this reason, the guilt of the property owners is irrelevant to the outcome of an in rem proceeding, because the property in question committed the wrong by facilitating illegal conduct. Many have argued that prosecutorial and procedural advantages arise from the legal fiction of guilty property. *See* Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 45–46 (1998).

36 United States v. Cherry, 330 F.3d 658, 666 n.16 (4th Cir. 2003).

forfeiture, "[c]ivil forfeiture is considered remedial rather than punitive" and the property eligible for forfeiture is limited to that traceable to the criminal conduct.[37]

Administrative forfeiture is unique and distinct from both criminal and civil forfeiture in that it involves a nonjudicial process. The proceedings are considered to be uncontested forfeitures because they are handled by the law enforcement agency that seized the assets, not by the courts.[38] The procedure permits a federal law enforcement agency to forfeit property without any judicial involvement if it sends proper notice to potential claimants and no one files a claim in response.[39] The purpose behind the default procedure is to allow for the efficient disposition of uncontested forfeiture proceedings.[40] If no one files a timely claim in response to the proceeding, the government obtains clear title to the property within weeks and without any contact with the judiciary.[41] This Note aims to raise attention and concern regarding the narrow judicial review of administrative forfeiture proceedings, which is limited to the review of procedural violations of the governing statutes.

C. *Concern over Abuse of Federal Asset Forfeiture and the Enactment of CAFRA*

In the Civil Asset Forfeiture Reform Act of 2000, Congress substantially revised the statutory rules governing administrative forfeiture.[42] The reforms represented the result of an extended congressional push to restructure forfeiture law to "strike a much needed balance between achieving legitimate law enforcement goals and

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37 Dery, *supra* note 20, at 3.

38 *Id.* at 2.

39 CASSELLA, *supra* note 10, at 150.

40 *Id.* at 151–52.

41 19 U.S.C. § 1609(b) (2012) (the declaration of an administrative forfeiture has "the same force and effect as a final decree and order of forfeiture in a judicial forfeiture proceeding in a district court of the United States"). Only some proceedings are subject to administrative forfeiture. *See* 18 U.S.C. § 985 (2012); 19 U.S.C § 1607. Forfeiture of real property must be handled through a judicial proceeding. *See* 18 U.S.C. § 985. The value of personal property forfeited through an administrative proceeding cannot exceed $500,000. *See* 19 U.S.C. § 1607. Currency or monetary instruments of any value may be forfeited administratively, but bank accounts are excluded and are subject to the $500,000 limitation. Chaim v. United States, 692 F. Supp. 2d 461, 466 (D.N.J. 2010).

42 *See generally* Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-85, 114 Stat. 202 (codified at 18 U.S.C. § 983 (2012)); *see also* Stefan D. Cassella, *The Civil Asset Forfeiture Reform Act of 2000: Expanded Government Forfeiture Authority and Strict Deadlines Imposed on All Parties*, 27 J. LEGIS. 97 (2001) (describing CAFRA as "the most comprehensive revision of the civil asset forfeiture laws to be passed by Congress since the first forfeiture statutes were enacted in 1789").

protecting the legal rights of innocent property owners."[43] The astoundingly high revenue generated by federal forfeiture sparked concern over the growth and extensive use of asset forfeiture.[44] Representative Henry Hyde of Illinois, a key architect of the Act, brought attention to possible abuse of forfeiture law and asserted that the amount deposited in the DOJ's Assets Forfeiture Fund increased from $27 million in 1985 to $338 million in 1996, with much of the force behind forfeiture revenues coming from federal anti-drug laws.[45] Some courts also expressed concern over the unbridled use of civil asset forfeiture by the government.[46] The Congressional representatives who introduced CAFRA hoped to resolve the major faults of the civil asset forfeiture system through eight core reforms.[47] These key reform efforts included: raising the burden of proof on the government during civil forfeiture proceedings;[48] establishing a uniform innocent owner defense that protects third-party property owners who make a good faith attempt to deny use of their property to those engaged in illegal conduct;[49] and eliminating the cost bond required to contest a forfeiture, which in practice often deprived indigent claimants of an opportunity to be heard.[50]

The area of reform most pertinent to this Note is the intended assurance of adequate time and notice to contest an administrative forfeiture proceeding. Prior to the enactment of CAFRA, a property owner had a mere twenty days from the first publication of notice of the seizure to file a claim challenging the administrative forfeiture by the seizing agency.[51] Many of the stringent requirements, including deadlines, were in place to prevent the filing of frivolous challenges and

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43 Louis S. Rulli, *The Long Term Impact of CAFRA: Expanding Access to Counsel and Encouraging Greater Use of Criminal Forfeiture*, 14 FED. SENT'G REP. 87 (2001).

44 *See* Statement of Rep. Henry Hyde, *supra* note 4.

45 *Id.*

46 United States v. All Assets of Statewide Auto Parts, Inc., 971 F.2d 896 (2d Cir. 1992). The Second Circuit court stated that, "[w]e continue to be enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes." *Id.* at 905.

47 146 CONG. REC. H2040, H2047 (daily ed. Apr. 11, 2000) (statement of Rep. Henry Hyde).

48 *Id.* Before CAFRA was enacted, the burden of proof for forfeiture was probable cause. Therefore, even if there was no related criminal conviction or charge, there was a high likelihood of a subsequent civil forfeiture action where only probable cause needed to be demonstrated. H.R. REP. NO. 106-192, at 8 (1999). The drafters originally hoped to raise the burden of proof to clear and convincing evidence. *See* 145 CONG. REC. H4854–55 (daily ed. June 24, 1999).

49 146 CONG. REC. H2040, H2047.

50 *Id.* Property owners contesting a seizure in a court proceeding were required to pay a bond of either $5000 or ten percent of the value of the seized property, if it was a lesser amount. The cost bond served as an onerous financial burden and had the effect of deterring property owners from contesting forfeitures. 19 U.S.C § 1608 (2012).

51 *See* H.R. REP. NO. 106-192.

were therefore strictly enforced.[52] CAFRA was partly enacted to address the perceived inequity between the strict deadlines and sanctions imposed on property owners, compared to the comparatively lax requirements imposed on the government.[53] Many concerns over administrative forfeiture—principally, the short deadlines for filing claims and the low rates of challenge[54]—suggested that reform was necessary to improve access to courts and protect the right to property. For example, prior to CAFRA, the Drug Enforcement Administration (an agency that commonly employs administrative forfeiture) estimated that eighty-five percent of forfeitures in drug cases went uncontested.[55] In order to encourage meritorious challenges to administrative forfeiture, CAFRA sought to create stricter guidelines for the government, along with consequences for failure to abide by the guidelines.[56]

D. *Administrative Forfeiture Under CAFRA*

CAFRA imposed substantial statutory guidelines for civil judicial forfeiture and administrative asset forfeiture.[57] Congress amended the procedures for administrative forfeiture of property in the now codified 18 U.S.C. § 983.[58] The procedure for contesting an administrative

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52 *See, e.g.*, Arango v. U.S. Dep't of the Treasury, 115 F.3d 922, 925 (11th Cir. 1997) (describing the requirement for a claimant to post a cost bond for the expense of the proceeding, which was aimed to deter the filing of frivolous claims). The legislative history of CAFRA indicates that the strict time limits were occasionally ignored in the interest of justice, but for the most part, a claimant's failure to file a timely claim resulted in a judgment in favor of the government. H.R. REP. NO. 106-192, at 19 (citing United States v. Beechcraft Queen Airplane Serial No. LD-24, 789 F.2d 627, 630 (8th Cir. 1986)).

53 *See* CASSELLA, *supra* note 10; *see also* Cassella, *supra* note 42, at 122–24 (commenting on the lack of statutory deadlines imposed on the government prior to CAFRA and stating "that the only protection a property owner had against government delay was the Due Process Clause of the Fifth Amendment," even while courts were resistant to find due process violations despite significant delays in commencing a forfeiture proceeding).

54 *See infra* Part I.E.

55 Casella, DOJ BULLETIN, *supra* note 2, at 12. Other seizing agencies reported similar figures. *Id.*

56 The government now has sixty days from the date of seizure to provide notice to all those with an interest in the seized property. If notice is not sent during that time period, the government must return the seized property. 18 U.S.C. § 983(a)(1)(A)(i) (2012).

57 The procedural issues related to criminal asset forfeiture were less of a concern for the drafters. *See* 145 CONG. REC. H4854 (daily ed. June 24, 1999) (statement of Rep. Henry Hyde) ("The difference is in criminal asset forfeiture you must be indicted and convicted. Once that happens, the government then may seizure your property if your property was used, however indirectly, in facilitating the crime for which you have been convicted. You are a criminal, you are convicted, and they seize your property. I have no problem with [criminal asset forfeiture].").

58 *See* Centeno v. United States, No. 05 Civ. 8794(RMB)(GWG), 2006 WL 2382529, at *2 (S.D.N.Y Aug. 17, 2006) ("CAFRA 'consolidated and dramatically overhauled the procedures for civil . . . forfeiture proceedings.'" (quoting United States v. $557,933.89, More or Less, in U.S. Funds, 287 F.3d 66, 76 n.5 (2d Cir. 2002))).

forfeiture is used in response to a seizure of eligible property based on probable cause by the seizing agency. The general rule applied is that once the property is seized, the government must send notice[59] of the administrative forfeiture action to interested persons within sixty days of the seizure.[60] The letter or publication directs anyone wishing to contest the forfeiture to file a claim with the agency that seized the property.[61] The property owner must file a claim challenging the forfeiture before the deadline stated in the notice letter or within thirty days of the final publication of notice if the letter is never received.[62]

Section 983(a)(3)(A) sets forth a ninety-day deadline for the government to decide how to proceed following the termination of an administrative forfeiture proceeding.[63] Congress enacted the ninety-day deadline in response to concern that a person who challenged an administrative forfeiture by filing a claim had no way to ensure that the government would commence a judicial forfeiture action in a timely manner.[64] Prior to CAFRA there was no statutory deadline for the commencement of a judicial forfeiture action and the only procedural protections were imposed by the Due Process Clause, which offered little guidance on the topic of delayed proceedings.[65] The modifications to forfeiture law are indicative of the drafters' intent to impose strict and straightforward limitations on the government in order to ensure heightened protections for claimants during the process.

If a property owner fails to file a claim by the expiration of the deadline stated in the notice letter, the property is summarily forfeited to the U.S. government. The only avenue available to individuals seeking to challenge the validity of a completed forfeiture is to claim that

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59 Unlike the issue of timing for the government's response to the challenge of a seizure, CAFRA is essentially silent on the topic of required content of the original notice and § 983 offers no guidance. The pre- and post-CAFRA case law also provides minimal guidelines, but does establish that notice must identify the property and the time and place it was seized. *See* Adames v. United States, 171 F.3d 728 & n.2 (2d Cir. 1999).

60 *See* United States v. Weimer, No. CRIM. A. 01-272-01, 2006 WL 562554, at *1 n.1 (E.D. Pa. Mar. 7, 2006). In a situation where the property is initially seized by a state or local enforcement official and subsequently transferred to a federal agency, the government is given ninety days to send notice. 18 U.S.C § 983(a)(1)(A)(iv).

61 Gaumer, DOJ BULLETIN, *supra* note 2, at 63.

62 18 U.S.C §983 (a)(2)(A). Publication occurs in a circulated newspaper, i.e., the *Wall Street Journal*, and must appear once a week for three weeks in a row. *See* Gaumer, DOJ BULLETIN, *supra* note 2, at 63.

63 A claimant terminates an administrative forfeiture by filing a challenge, which converts the proceeding into a civil judicial forfeiture. As soon as a claim is filed pursuant to 18 U.S.C. § 983(a)(2), the administrative proceeding is ended and the case is referred to the U.S. Attorney, who either declines the case or initiates a judicial forfeiture. *See* CASSELLA, *supra* note 10.

64 *Id.*

65 *See* United States v. $874,938.00 U.S. Currency, 999 F.2d 1323, 1325 (9th Cir. 1993) (denying relief to a claimant who invoked the Due Process Clause to argue that the government's eleven month delay in filing a judicial forfeiture proceeding violated his rights). *See generally* H.R. REP. NO. 106-192 (1999).

no notice was received.[66] The opportunity to set aside a forfeiture on grounds of inadequate notice is founded on the Due Process Clause of the Fifth Amendment, which provides individuals "whose property interests are at stake . . . [with a guarantee of] 'notice and opportunity to be heard.'"[67] If a claimant seeks the return of forfeited property, the sole available remedy is a claim based on lack of notice under § 983(e) of CAFRA.[68] Following the filing of a § 983(e) petition, district courts can review the procedures employed by a seizing agency in the administrative proceeding to ensure compliance with due process rights of owners. Courts, guided by CAFRA, require the claimant to demonstrate: 1) that the government did not take reasonable steps to provide notice, and 2) that the claimant did not know or have reason to know of the seizure with sufficient time to file a prompt claim.[69] The test is taken directly from the language of CAFRA, as drafted in 2001, which establishes the process for a motion to set aside forfeiture.[70]

It is worth examining the procedure for filing and assessing a § 983(e) petition, as the relative burdens imposed on the claimant and the government raises constitutional questions rooted in the Fifth

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66 *See* United States v. Weimer, No. CRIM. A. 01-272-01, 2006 WL 562554, at *4 (E.D. Pa. Mar. 7, 2006). Once an administrative forfeiture has been completed, a claimant may not challenge the forfeiture on the merits because the courts lack jurisdiction to hear such a challenge when the government complied with notice requirements. *See* Walker v. DEA, No. 01 CIV.3668(SHS), 2002 WL 1870131, at *2 (S.D.N.Y. Aug. 14, 2002) (stating that while a district court may review administrative forfeiture for procedural due process violation for lack of notice, it may not review other constitutional claims such as violations of the Fourth, Fifth, and Eighth Amendments).

67 *See* Dusenbery v. United States, 534 U.S. 161, 161 (2002) (quoting United States v. James Daniel Good Real Prop., 510 U.S. 43, 48 (1993)).

68 Bermudez v. N.Y.C. Police Dep't, No. 07 Civ. 9537(HB), 2008 WL 3397919, at *3 (S.D.N.Y. Aug. 11, 2008). Prior to the passage of CAFRA, there was no clear statutory provision to challenge a forfeiture. Following the enactment of 18 U.S.C. § 983(e), claimants have up to five years following the final publication of notice of a seizure to contest, but the statutory provision is the sole remedy used to set aside forfeitures. *See* I.R.S. Chief Couns. Adv. 200106001, 2008 WL 112417 (Feb. 9, 2001).

69 *Bermudez*, 2008 WL 3397919, at *4.

70 The statute states:

> (e) Motion to set aside forfeiture.—
>
> > (1) Any person entitled to written notice in any nonjudicial civil forfeiture proceeding under a civil forfeiture statute who does not receive such notice may file a motion to set aside a declaration of forfeiture with respect to that person's interest in the property, which motion shall be granted if—
> >
> > > (A) the Government knew, or reasonably should have known, of the moving party's interest and failed to take reasonable steps to provide such party with notice; and
> >
> > > (B) the moving party did not know or have reason to know of the seizure within sufficient time to file a timely claim.

18 U.S.C. § 983(e)(1)(A)–(B) (2012).

Amendment.[71] First, the claimant must demonstrate that he has a legal interest in the money or property seized.[72] There are significant limitations on standing—for example, some courts have held that a claimant who pleads guilty to a drug offense abandons any interest in money seized and therefore lacks standing to contest the administrative forfeiture of those funds.[73] Second, it must be determined whether the efforts made by the government to provide notice were adequate. The language of the statute asks if "the Government knew, or reasonably should have known, of the moving party's interest and failed to take reasonable steps to provide such party with notice."[74] Lastly, the court must ascertain if the claimant had actual or constructive notice. The language of the statute asks whether "the moving party did not know or have reason to know *of the seizure* within sufficient time to file a timely claim."[75] In other words, a claimant "must show both that the government did not take 'reasonable steps' to provide notice, *and* that [the claimant] did not have 'reason to know of the seizure with sufficient time to file a timely claim.'"[76]

E. *Failures of CAFRA and the Continuation of Uncontested Forfeitures*

The enactment of CAFRA was expected to increase access to courts and encourage meritorious challenges to administrative asset forfeiture. The Congressional Budget Office (CBO) anticipated that the enactment of CAFRA would result in fewer civil seizures by the DOJ and the Treasury Department.[77] The estimate predicted that the revenues

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71 U.S. CONST. amend. V. The exercise of asset forfeiture is limited by the property protection of the Due Process Clause:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Id.

72 *See* Yashar v. United States, No. 05 CV 29(JG), 2006 WL 1071585, at *3 (E.D.N.Y. Apr. 21, 2006) (holding that the lessee of a warehouse from which money was seized lacked a legal interest in the money seized and was not entitled to notice of the forfeiture proceedings).

73 See United States v. Stokes, 191 F. App'x 441, 444 (7th Cir. 2006). Courts have consistently held that no person has a property right in drug proceeds and therefore has no basis to bring a claim seeking recovery. *See* United States v. Rodriguez-Aguirre, 414 F.3d 1177, 1186 (10th Cir. 2005).

74 18 U.S.C. § 983 (e)(1)(A).

75 *Id.* § 983(e)(1)(B) (emphasis added).

76 *See* Centeno v. United States, No. 05 Civ. 8794(RMB)(GWG), 2006 WL 2382529, at *3 (S.D.N.Y. Aug. 17, 2006).

77 146 CONG. REC. H2047–48 (daily ed. Apr. 11, 2000). Stating that:

deposited into the Assets Forfeiture Fund and the Treasury Forfeiture Fund would decrease by approximately $115 million each year, beginning in fiscal year 2001.[78] The CBO also predicted that CAFRA's enactment would increase the percentage of seizures that would result in contested civil cases.[79] The combination of an increasingly informed defense bar, the elimination of the bond requirement, and greater opportunity for court-appointed counsel was expected to raise the percentage of contested civil cases to about thirty percent each year.[80]

Despite the predictions and the significant reform to asset forfeiture created by CAFRA, the rate of challenges to administrative forfeitures has remained relatively constant, even after the passage of the Act.[81] Property owners still only contest about twenty percent of seizures conducted through administrative forfeiture.[82] Some argue that the high rate of uncontested forfeitures is the result of property owners' reluctance to file a claim for fear of deserved prosecution.[83] Proponents of this viewpoint, including government and law enforcement officials, suggest that the harsh burdens imposed on claimants prior to CAFRA were not discouraging a significant number of meritorious claims from being filed, and that property owners truly lacked viable defenses to forfeitures.[84]

But the argument that the frequency of uncontested forfeitures is a reflection of a perfect system fails to recognize indications of abuse and procedural inadequacy. In a recent report issued by the Institute for

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> The various changes to civil forfeiture laws under this act would make proving cases more difficult and more time-consuming for the federal government. In many instances, law enforcement agencies, including state and local agencies that work on investigations jointly with the federal government and then receive a portion of the receipts generated from the forfeitures, many determine that certain cases, especially those with a value less than $25,000, may no longer be cost-effective to pursue.

Id. at H2048.

78 *Id.* ("CBO expects that the total number of seizures would decrease by nearly 40 percent. CBO estimates that such a reduction in seizures would reduce total forfeiture receipts by about $115 million in fiscal year 2001 and by $575 million over the 2001–2005 period.").

79 The DOJ expressed concern over the prediction that the number of claims to clearly forfeitable property would increase. *See Hearings on Federal Asset Forfeiture*, *supra* note 7, at 54 (Eric H. Holder, Jr., Deputy Attorney General, U.S. DOJ, testified that the number of frivolous claims would rise "dramatically" if some of the proposed features of CAFRA were codified).

80 146 CONG. REC. H2048.

81 CASSELLA, *supra* note 10, at 150 n.2.

82 According to federal statistics, there were more than 11,000 noncriminal forfeiture cases in 2010, but claimants challenged only about 1800 civil forfeiture cases in federal court. John R. Emshwiller & Gary Fields, *Federal Asset Seizures Rise, Netting Innocent with Guilty*, WALL ST. J. (Aug. 22, 2011), http://online.wsj.com/news/articles/SB10001424053111903480904576512253265073870#printMode.

83 CASSELLA, *supra* note 10, at 152–53 (arguing that many administrative forfeitures involve property that was derived from or used to commit a criminal offense, so owners choose not to file a claim in order to avoid criminal prosecution).

84 *Id.*

Justice,[85] policy analysts warned of perverse financial incentives for local law enforcement to forfeit property and exploit the forfeiture system.[86] Local and state seizing agencies are able to profit from federal forfeiture proceedings through equitable sharing—a system that allows local authorities to hand over seized assets to federal agencies and receive back as much as eighty percent of the assets' value.[87] In January 2015, the Attorney General issued an order limiting the scope of equitable sharing,[88] but the basic framework of the program allowing for shared profits from seized assets remains intact.[89] Another example of lingering abuse of the administrative forfeiture process is the increasingly popular use of waivers by law enforcement officials—where property owners are

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85 The Institute for Justice is a public interest law firm with a mission to litigate and advocate on behalf of individuals whose basic rights are denied by the government. *Our Mission*, INST. FOR JUST., http://www.ij.org/about (last visited Apr. 24, 2015).

86 MARIAN R. WILLIAMS ET AL., INST. FOR JUSTICE, POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 12–25 (2010), *available at* http://heartland.org/sites/default/files/asset forfeituretoemail.pdf (explaining that law enforcement may keep a portion of the proceeds from civil forfeiture and "[t]his incentive has led to concern that civil forfeiture encourages policing for profit, as agencies pursue forfeitures to boost their budgets at the expense of other policing priorities").

87 *Id.* at 23. Equitable sharing emerged from a provision in the Comprehensive Crime Control Act of 1984 and permits federal agencies to adopt seizures or pursue a joint investigation with a state agency in order to initiate a forfeiture action under applicable federal statutes. Pub. L. No. 98-473, 98 Stat. 1976 (codified at 21 U.S.C. § 881(e)(1)(A) (2012)). In 2012, the federal government paid more than $447 million to state and local agencies through the equitable sharing program. *See* U.S. DEP'T OF JUSTICE, FY 2012 ASSET FORFEITURE FUND REPORT (2012), *available at* http://www.justice.gov/jmd/afp/02fundreport/2012affr/report2b.htm.

88 Press Release, Dep't of Justice, Office of Pub. Affairs, Attorney General Prohibits Federal Agency Adoptions of Assets Seized by State and Local Law Enforcement Agencies Except Where Needed to Protect Public Safety (Jan. 16, 2015), *available at* http://www.justice.gov/opa/pr/attorney-general-prohibits-federal-agency-adoptions-assets-seized-state-and-local-law. Attorney General Eric Holder issued an order that curtailed the range of situations in which the federal government may adopt property seized by state or local law enforcement in order to forfeit the assets under federal law. Permissible federal adoptions are limited to circumstances where the assets themselves implicate public safety concerns, i.e., where the assets seized are firearms, explosives, child pornography, etc. *Id.*

89 The new policy announced by the DOJ does not apply to assets seized by a joint task force composed of both a federal agency and a state or local law enforcement authority. Neither does the policy apply to assets seized pursuant to a federal seizure warrant, even if the seizure originally occurred under state law and by a state law enforcement agency. Essentially, the policy change pertains strictly to adoption cases where the federal government played absolutely no role in the seizure. Radley Balko, *More Fallout from Eric Holder's Changes to Civil Asset Forfeiture Law*, WASH. POST (Jan. 19, 2015), http://www.washingtonpost.com/news/the-watch/wp/2015/01/19/more-fallout-from-eric-holders-changes-to-civil-asset-forfeiture-law (noting the "loopholes" in the new policy and recognizing that the policy may not affect "the hundreds of federally funded anti-drug task forces across the country"). Furthermore, federal adoption cases represent a mere sliver of the overall equitable sharing program. In the last six reporting years, the DOJ Asset Forfeiture Program collected only fourteen percent of its total equitable sharing revenue from federal adoption cases. As a result, the bulk of profits from equitable sharing between federal and state or local governments are generated through forfeiture proceedings that remain unaffected by the new policy announced by the Attorney General. Jacob Sullum, *How the Press Exaggerated Holder's Forfeiture Reform*, REASON.COM (Jan. 19, 2015, 10:34 PM), http://reason.com/blog/2015/01/19/how-the-press-exaggerated-holders-forfei.

able to evade criminal charges in exchange for relinquishing their possessions or cash.[90] Oftentimes, the use of waivers deprives the property owner of the opportunity to contest the forfeiture in a judicial proceeding.[91]

Though there is certainly room for abuse by local officials utilizing administrative forfeiture,[92] that explanation does not neatly address the concern of uncontested forfeitures. In an attempt to explain the hovering numbers of unchallenged forfeitures, scholars have proposed several theories pointing to procedural or judicial inadequacies.[93] For example, individuals with meritorious claims may calculate that the risk of exposure and prosecution outweigh the value of the property seized.[94] Alternatively, it is proposed that the lack of a right to appointment of counsel for indigents negatively affects the number of contested administrative forfeitures.[95] Although CAFRA improved access to justice by guaranteeing appointed counsel to indigent defendants whose primary residence was threatened by a civil judicial forfeiture proceeding,[96] some scholars suggest that the reforms were not broad

90 Eric Moores, *Reforming the Civil Asset Forfeiture Reform Act*, 51 ARIZ. L. REV. 777 (2009). It is difficult to precisely measure the extent of abuse in the administrative forfeiture system, partly due to the lack of accessibility of government-collected data. Hearst Newspapers requested four seizing agencies to produce data under the Freedom of Information Act, but the information has not yet been produced. Stewart Powell, *Administrative Forfeiture: No Charge, No Hearing, Little Recourse*, SAN ANTONIO EXPRESS-NEWS (June 1, 2013), http://www.expressnews.com/news/article/Administrative-forfeiture-No-charge-no-hearing-4568675.php ("Even in the identified cases [of administrative forfeiture], details such as the circumstances and justification for seizures are invisible to the public.").

91 Blumenson & Nilsen, *supra* note 35, at 50 n.61; *see also* Pimentel, *supra* note 13, at 29 (rightful property owners may have a fear of alienating law enforcement officials, so "[t]he gambit . . . allows the government to use the threat of criminal prosecution to intimidate property owners into waiving their rights to a hearing on the forfeitability of their property").

92 *See* Radley Balko, *Illinois Traffic Stop of Star Trek Fans Raises Concerns About Drug Searches, Police Dogs, Bad Cops*, HUFFINGTON POST (Aug. 7, 2013, 12:16 PM), http://www.huffingtonpost.com/2012/03/31/drug-search-trekies-stopped-searched-illinois_n_1364087.html.

93 *See, e.g.*, Pimentel, *supra* note 13, at 28 ("[T]he high rate of uncontested forfeitures may be indicative of widespread, or at least significant, compromises of due process.").

94 *Id.* at 30. Interestingly, this was also a theory presented in Senate hearings leading up to the passage of CAFRA. *See Hearings on Federal Asset Forfeiture*, *supra* note 7, at 90 (statement of Roger Pilon, Vice President for Legal Affairs, Cato Institute).

95 *See* Louis S. Rulli, *On the Road to Civil Gideon: Five Lessons from the Enactment of a Right to Counsel for Indigent Homeowners in Federal Civil Forfeiture Proceedings*, 19 J.L. & POL'Y 683, 729 (2011). The reality of mounting attorneys' fees often means that cases are too expensive to litigate in relation to the worth of the property. Rulli documented the story of a salesman who had cash seized by drug enforcement agents, but after paying significant attorneys' fees decided that it was not worth paying ten thousand dollars to get nine thousand back. *Id.* at 729 (citing LEONARD W. LEVY, A LICENSE TO STEAL: THE FORFEITURE OF PROPERTY (1996)).

96 See 18 U.S.C. § 983(b) (2012) (establishing that the right to counsel provision only applies under certain circumstances, including when an indigent property owner is accused of a crime related to the subject of the forfeiture proceeding and when the subject of the civil forfeiture proceeding is the property owner's primary residence).

enough to assure adequate safeguards.[97] The reforms also failed to address nonindigent claimants who are not appointed counsel and must cope with the possibility of bankruptcy. As a result, they may choose not to expend funds on legal representation and may be incapable of deciphering the requirements of contesting an administrative forfeiture independently.[98]

Yet, a more convincing explanation for the rate of over eighty percent[99] of uncontested administrative forfeitures is that many claimants simply are not aware of the procedure to contest, or lack notice of the forfeiture proceeding itself. The procedural protections guaranteed by the architects of CAFRA[100] lose strength if claimants are provided with inadequate written notice that a forfeiture proceeding has been initiated in the first place. Pursuant to CAFRA, the government is required to send written notice of nonjudicial forfeitures to interested parties in a manner intended to achieve proper notice,[101] and is also required to publish notice of the forfeiture in a newspaper of general circulation.[102] Despite these requirements, the statutory language of § 983(e),[103] combined with strict interpretation by the courts, has softened the impact of CAFRA's protections designed to shield property owners.[104] Interestingly, an earlier version of the legislation specified that notice must be sent "together with information on the applicable procedures," but this guidance was dropped in the final version.[105] The inadequacies of CAFRA's notice requirements for administrative forfeitures are disconcerting, since the Supreme Court has stated that the Fifth Amendment's due process requirement is meant "not only to ensure abstract fair play to the individual. . . . [but also] to protect his

97 *See* Rulli, *supra* note 43, at 89; Michael Van Den Berg, Comment, *Proposing a Transactional Approach to Civil Forfeiture Reform*, 163 U. Pa. L. Rev. 867, 887 (2015) (noting the limited circumstances in which an indigent defendant is appointed counsel under CAFRA).

98 Pimentel, *supra* note 13, at 30–31.

99 Leading up to the 2000 reforms of civil asset forfeiture law, the statistic that at least eighty percent of all civil forfeiture cases go unchallenged shocked many and was used as a rallying cry to generate support for reform. H.R. REP. NO. 105-358, pt. 1, at 28–29 (1997).

100 *See supra* Part I.C–D.

101 18 U.S.C. § 983(a)(1)(A)(i). The language "proper notice" is not defined, and its meaning is not elaborated upon elsewhere in the statute.

102 *See* 19 U.S.C. § 1607 (2012). On October 12, 2012 the DOJ announced that it would begin advertising administrative forfeitures online in an effort to reduce costs. *Asset Forfeiture Notifications: More Efficient and Cost-Effective than Ever*, U.S. DEP'T JUSTICE, http://blogs.justice.gov/main/archives/2523 (last visited Apr. 24, 2015). The DOJ forfeiture website can be accessed at www.forfeiture.gov.

103 *See infra* Part II.B.

104 Radley Balko, *Forfeiture Folly: Cover Your Assets*, REASON, no. 39, Apr. 2008, at 11 (discussing David B. Smith's treatise, PROSECUTION AND DEFENSE OF FORFEITURE CASES (Matthew Bender 2011)). Smith posits that courts have mitigated the Act's impact by "narrowly interpreting the protections it grants defendants and by being overly deferential to prosecutors when determining if they've met evidentiary standard[s]." *Id.*

105 H.R. REP. NO. 105-358, pt. 1, at 2, 84 (1997).

use and possession of property from arbitrary encroachment—to minimize substantively *unfair or mistaken deprivations of property*."[106] The result is that administrative forfeitures are rarely converted to judicial proceedings heard on the merits, and the government retains the property without the need to justify the forfeiture under CAFRA's evidentiary standard.[107]

II. THE ROLE OF DUE PROCESS IN ADMINISTRATIVE FORFEITURE

A. *Reasonableness of Notice Under the Constitution*

The Supreme Court has refined the scope of procedural due process requirements guaranteed by the Constitution over the course of its long history.[108] Legislative acts, including "[t]he statutory and regulatory guidelines for forfeitures are interpreted in light of constitutional due process concerns regarding notice of impending legal proceedings."[109] The Supreme Court set forth the standard for the form and adequacy of post-seizure notice in *Mullane v. Central Hanover Bank & Trust Co.*,[110] holding that the Fifth Amendment Due Process Clause requires notice to be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[111] The Court further clarified the emerging standard by declaring that the methods employed to provide notice must align with what a person truly desirous of conveying notice would do—in other words, the effort should involve more than a "mere gesture."[112]

In the context of asset forfeiture, circuit courts have applied the rule of *Mullane* consistently, and it is widely agreed that if the names and addresses of the owners of the property at issue are known, then written notice should be sent directly to those known property

106 United States v. James Daniel Good Real Prop., 510 U.S. 43, 53 (1993) (emphasis added) (citations omitted).

107 Pimentel, *supra* note 13, at 28. The evidentiary burden on the government at a judicial forfeiture proceeding under CAFRA is a preponderance of the evidence. 18 U.S.C. § 983(c) (2012).

108 Procedural due process encompasses the procedures the government must adhere to before depriving an individual of life, liberty, or property. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1143 (4th ed. 2013). For landmark cases discussing procedural issues, see *Greene v. Lindsey*, 456 U.S. 444 (1982), *Mathews v. Eldridge*, 424 U.S. 319 (1976), and *Goldberg v. Kelly*, 397 U.S. 254 (1970).

109 *See* United States v. Ritchie, 342 F.3d 903, 910 (9th Cir. 2003).

110 339 U.S. 306 (1950).

111 *Id.* at 314.

112 *Id.* at 314–15.

owners.[113] The justification for the standard articulated in *Mullane* was made clear by both the reasoning of that court[114] and subsequent clarification in later cases.[115] Given the fundamental right to property, an individual whose ownership rights are jeopardized must be provided with notice of the pending case and an opportunity to contest the serious loss.[116] The *Mullane* court offered other helpful reasoning in the development of the constitutional notice standard by promoting a balancing test to ascertain whether adequate notice has been provided in any given situation.[117] While the state has a valid interest in settling outstanding disputes with finality, the Court recognized that the state's interest must be weighed against the interest of the individual.[118] The right to be heard in any legal proceeding "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."[119] In the context of administrative forfeiture, where personal property is at stake, and forfeiture without the review of a judicial body is likely, the need to protect the interest of the individual is quite high.[120]

In *Dusenbery v. United States*,[121] the Court built upon the foundational case of *Mullane* and addressed due process requirements for sending notice of an administrative forfeiture proceeding to a

113 Merely posting notice in a newspaper is insufficient. *See* United States v. One Star Class Sloop Sailboat, 458 F.3d 16, 22–24 (1st Cir. 2006) (stating that although publication notice can satisfy constitutional requirements, it is generally insufficient when the government can easily obtain additional information regarding the location of the claimant); United States v. Latham, 54 F. App'x 441, 445 (6th Cir. 2002) (holding that attempts to send notice to a fugitive's last known address was sufficient to satisfy due process); Garcia v. Meza, 235 F.3d 287, 292 (7th Cir. 2000) (holding that publication in the *New York Times* will not, by itself, satisfy due process); United States v. 5145 N. Golden State Boulevard, 135 F.3d 1312, 1315–16 (9th Cir. 1998) (explaining that the type of notice required goes beyond publication and should be reasonably calculated to apprise interested parties of the pendency of the forfeiture action).

114 *Mullane*, 339 U.S. at 313.

115 *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319 (1976).

116 *Id.* at 348; *see also* Taylor v. United States, 483 F.3d 385, 388 (5th Cir. 2007) (interpreting *Mullane* reiterating that to withstand scrutiny under the Due Process Clause, a claimant facing forfeiture of property must be provided an opportunity to present their objections).

117 *Mullane*, 339 U.S. at 313–14.

118 *Id.* The right of the state is protected through leniency by the courts in circumstances where it would be an unreasonable or impractical expectation to provide more adequate warning than was actually provided. *Id.* at 317–18.

119 *Id.* at 314.

120 For example, the ability of federal enforcement agencies to seize property is far-reaching, and in the case of administrative forfeiture, potentially unchecked. The DEA can seize and forfeit any item of value that a person intends to exchange for a controlled substance, and "*all proceeds traceable*" to such an exchange. 21 U.S.C. § 881(a)(6) (2012) (emphasis added). If a forfeiture remains uncontested, the government never carries the burden of providing evidence to support the forfeiture, other than the minimal facts required to initially justify the seizure. FED. R. CIV. P. SUPP. A.M.C. Rule G(2)(f).

121 534 U.S. 161 (2002).

prisoner.[122] The Court held that a claimant in federal prison was not denied due process even though he did not receive notification that his car and close to twenty-two thousand dollars in cash were subject to an administrative forfeiture proceeding.[123] Dusenbery argued that notice must be *received* in order to comport with due process, but the Court rejected that argument as an inappropriate extension of the burden on the government.[124]

The reasoning in *Dusenbery* established that the government need not make "heroic efforts" to ensure that a property owner receives actual notice.[125] The factual inquiry revealed that the government sent notice by certified mail, which was signed by the mailroom staff of the prison, and though requiring the prisoner to sign for the letter himself would have made actual notice more likely,[126] the attempt was deemed constitutionally adequate.[127] By clarifying the standard for the provision of notice in the forfeiture framework, the Court affirmed the logic behind *Mullane* in that the government must still attempt to "send written notice of the seizure together with information on the applicable forfeiture procedures to each party who appear[s] to have an interest in the property."[128] Further, the government possessed the burden of demonstrating that the method of notification was "reasonably calculated" to inform interested parties of the forfeiture, as well as applicable proceedings.[129] *Dusenbery* confirmed that the requirements of the Due Process Clause are not diminished in the context of administrative forfeitures, but rather, attempts at notice must be faithful to the constitution and measured against the standard first announced in *Mullane*.[130]

The evolution of the constitutional standard for adequate notice continued with *Jones v. Flowers*,[131] a case that tackled a different factual

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122 *Id.* Though the case was decided following the passage of CAFRA, both the seizure and challenge to the administrative forfeiture occurred prior to August 23, 2000, so the provisions of the legislation do not apply.

123 *Id.*

124 *Id.* at 169–70. There is still no expectation for actual notice because once there is proof that notice was delivered, it is assumed that the internal delivery procedures are adequate. Chairez v. United States, 355 F.3d 1099, 1101 (7th Cir. 2004). *But see* United States v. Claridy, 373 F. App'x 417, 418 (4th Cir. 2010) (suggesting that there must be a determination that a jail's internal mail delivery system is adequate).

125 *Dusenbery*, 534 U.S. at 170.

126 Jones v. Flowers, 547 U.S. 220, 226 (2006) (discussing Court's reasoning in *Dusenbery* and the necessary steps for provision of notice).

127 *Dusenbery*, 534 U.S. at 172–73.

128 *Id.* at 164.

129 *Id.* at 170 (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)).

130 *See* Akeem v. United States, 854 F. Supp. 2d 289, 297 (E.D.N.Y. 2012) (reiterating the controlling principles of due process of law and stating that the notice requirements for administrative forfeitures are "coextensive with those of the constitution").

131 547 U.S. 220. Though not a forfeiture case, the Supreme Court's reasoning is relevant to the current formulation of adequate notice.

scenario than prior cases by introducing a situation where the government had reason to believe that its attempts to provide notice were unsuccessful.[132] The Court reasoned that the government's attempted notice failed the constitutional test under the Due Process Clause because a person making a good-faith effort to provide notice would take further steps after discovering that "a certified letter sent to the owner [was] returned unclaimed."[133] Courts hearing challenges to forfeitures have adopted the reasoning behind *Jones v. Flowers* and held that the government must take further affirmative steps to alert property owners of forfeiture proceedings when initial attempts are definitively known to have failed.[134] The government is not excused from "complying with its constitutional obligation of notice" when met with obstacles in fulfilling its responsibility of "provid[ing] adequate notice of [an] impending taking."[135]

B. *Statutory Complications Raised by CAFRA*

If an owner's property is forfeited and that owner claims to have never received notice, he may seek to have the forfeiture set aside pursuant to CAFRA.[136] However, the language of CAFRA establishes that the claimant must be able to demonstrate that he did not have knowledge of the seizure in order prevail.[137] The provision, though

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132 *Id.* at 229 (where notice of a tax sale sent to the property owner was returned undelivered, marked as "unclaimed," and the government did not take any extra measures to provide notification).

133 *Id.* For sufficiency of notice, courts continue to use the standard established in *Mullane*. *See* Johnson v. United States, No. 1:03-CV-00281-LJM VS, 2004 WL 2538649, at *2 (S.D. Ind. Oct. 22, 2004).

134 Dickerson v. United States, No. 12–mc–51642, 2013 WL 1898367, at *4–5 (E.D. Mich. May 7, 2013) (holding that the government met its burden of taking affirmative steps after a failed attempt at notice by sending a subsequent warning by regular mail, searching a law enforcement database, and making inquiries to discover the whereabouts of the owner); Thorp v. United States, No. 11–cv–00206–PAB–KLM, 2012 WL 5831184, at *4–5 (D. Colo. Nov. 16, 2012) (holding that adequate notice attempts were met after the DEA sent notice to individuals reasonably believed to be in communication with the property owner—after attempts to directly notify the owner had failed). Courts have suggested that additional reasonable steps may be as simple as resending a notice by regular mail or posting notice on a front door. *See* VanHorn v. DEA, 677 F. Supp. 2d 1299, 1310 (M.D. Fla. 2009).

135 *Flowers*, 547 U.S. at 232–34.

136 18 U.S.C. § 983 (2012); *see also id.* § 983(e).

137 *Id.* § 983(e)(B) (stating that a motion to set aside a forfeiture will only be granted if "the moving party did not know or have reason to know of the seizure within sufficient time to file a timely claim"). This essentially creates a two-prong test to successfully set aside an administrative forfeiture. A plaintiff must not only demonstrate that the government failed to take reasonable steps to provide notice under the constitutional standard, but also that the plaintiff did not know of the seizure within adequate time to file a claim. *See* Turner v. Att'y Gen., 579 F. Supp. 2d 1097, 1109 (N.D. Ind. 2008).

relied upon again and again by district courts to uphold forfeitures,[138] is unconstitutional under the due process standard set forth by *Mullane* and its progeny. While it is true that a due process violation does not necessarily occur absent actual notice,[139] the government is required to act reasonably in its attempts to inform affected persons and the notice must be of the forfeiture proceeding, not just of the seizure itself.[140] Before the overhaul of asset forfeiture law, courts resisted equating actual knowledge of a seizure with actual knowledge of a forfeiture proceeding, because if a claimant remains unaware of the proceeding itself, then a notice-based constitutional challenge should not be precluded.[141]

The argument that notice of a forfeiture proceeding should be considered distinct from notice of a seizure is bolstered by the language of a customs duties statute that governed notice requirements for forfeitures prior to the passage of CAFRA, which directed that "[w]ritten notice of seizure together with information on the applicable procedures [for contesting forfeiture] shall be sent to each party who appears to have an interest in the seized article."[142] The wording of the statute placed meaningful emphasis on "applicable procedures," which are independent of the seizure and should inform a claimant of the opportunity to challenge the forfeiture. Evidence that a claimant was not aware of the appropriate procedure to contest an administrative forfeiture due to lack of notice should be sufficient to set aside a forfeiture, but the statutory framework as it stands would preclude that claim.[143] The carve-out provision of the statute, articulated by § 983(e), relieves the government of its notice obligations and conflicts with the constitutional due process standard articulated in *Mullane*, *Dusenbery*,

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138 *See, e.g.*, Miller v. DEA, No. 10–1314, 2012 WL 4605225 (W.D. Tenn. Oct. 1, 2012); Lefler v. United States, No. 11cv220–LAB (POR), 2011 WL 2132827 (S.D. Cal. May 26, 2011); *In re* Sowell, No. 08–51163, 2009 WL 799570 (E.D. Mich. Mar. 19, 2009).

139 Due process does not require actual notice of the forfeiture, but rather notice that is "'reasonably calculated' to apprise a party of the pendency of the action." Dusenbery v. United States, 534 U.S. 161, 170 (2002).

140 Gonzalez-Gonzalez v. United States, 257 F.3d 31, 38 (1st Cir. 2001) (flatly rejecting the government's argument that actual knowledge of a seizure precludes a notice-based constitutional challenge to an ensuing forfeiture).

141 *Id.* The Second Circuit, which at one point held that actual knowledge of a seizure is sufficient to satisfy constitutional notice requirements under *Mullane*, later abandoned that view. *See* Ikelionwu v. United States, 150 F.3d 233, 238 (2d Cir. 1998).

142 19 U.S.C. § 1607(a) (2012). Note that this statute is no longer controlling. The Court in *Dusenbery* relied upon the statute as part of its explanation of the constitutionality of the provided notice prior to CAFRA. *Dusenbery*, 534 U.S. at 1645.

143 Even if the government fails to demonstrate that it took reasonable steps to provide notice, courts have invoked § 983(e)(1)(B) to deny a claimant's effort to set aside a forfeiture. United States v. Russell, No. 2:04cr150-MHT, 2006 WL 2786883, at *3 (M.D. Ala. Sept. 27, 2006).

and *Flowers* as applied to the steps necessary to provide a claimant with notice of a post-seizure forfeiture proceeding.[144]

III. CONFUSION IN THE LOWER COURTS: COPING WITH CONFLICTING STATUTORY AND CONSTITUTIONAL FRAMEWORKS

A. *Is Knowledge of a Seizure Insufficient to Satisfy Due Process?*

Though the procedure for administrative forfeitures is laid out plainly in CAFRA, district courts may exercise some judicial discretion by entertaining constitutional challenges after property is summarily forfeited to the government.[145] The scope of judicial review for the district courts is narrow, but forfeitures may be invalidated based on that limited authority to review.[146] Even when a challenge to an administrative forfeiture is plainly precluded under CAFRA due to § 983(e)(B), district courts have reviewed such forfeitures and concluded that notice of a seizure, without more, may be insufficient to satisfy constitutional due process.[147] Courts questioning the constitutionality of § 983(e) have returned to the pre-CAFRA reasoning in *Gonzalez-Gonzalez*, that "actual knowledge required to defeat a notice-based due process challenge is advance notice-in-fact of forfeiture proceedings, as opposed to notice-in-fact of seizure."[148]

The District Court of Massachusetts was a pioneer in the movement to scrutinize the validity of § 983(e) in response to constitutional challenges. In *Volpe v. United States*,[149] a claimant acknowledged that he was aware of the seizure of his money by the police, but he lacked knowledge of the commencement of federal forfeiture proceedings and, more importantly, was not informed of the

144 See *infra* Part III for a discussion of *Volpe v. United States*, 543 F. Supp. 2d 113 (D. Mass. 2008). Reliance on knowledge of a seizure to provide notice of a forfeiture proceeding is contrary to the spirit of *Mullane* and its progeny, which suggests that the government has not met its burden when the mode of communication chosen is substantially less likely to bring about adequate notice than an alternative mode that would not impose any "impractical obstacles" on the government. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314–15 (1950).

145 *See Gonzalez-Gonzalez*, 257 F.3d at 35.

146 *See* United States v. Mosquera, 845 F.2d 1122, 1126 (1st Cir. 1988) (noting that district courts have federal question jurisdiction over due process challenges to administrative forfeitures).

147 VanHorn v. DEA, 677 F. Supp. 2d 1299, 1309 (M.D. Fla. 2009) (recognized in dicta even though the court ultimately held that the claimant was not entitled to relief). The legal question framed "is whether notice of a seizure alone is sufficient to meet the requirements of the due process clause." *Volpe*, 543 F. Supp. 2d at 118.

148 *Gonzalez-Gonzalez*, 257 F.3d at 38.

149 543 F. Supp. 2d 113.

steps to challenge the forfeiture or make a claim.[150] In a bold decision, the court held that, even if a property owner has clear knowledge of the seizure, the government is not excused from the constitutional requirement of making reasonable attempts to convey adequate notice.[151] A claimant could have clear knowledge that his property has been seized by local law enforcement, but that cannot be considered the equivalent of knowledge of a federal seizure and investigation for the purposes of contesting a forfeiture.[152] Subsequent district court decisions have continued along the path forged by the *Volpe* court, indicating some level of agreement that the appropriate analysis is whether the government provided both notice of the seizure *and* the forfeiture proceedings.[153]

B. *Relying on Section 983(e)(B) to Reject Challenges to Forfeitures*

Despite the compelling argument fostered by the *Volpe* decision and its followers, district courts remain split on the question of what constitutes adequate notice, resulting in troublesome disharmony. Some district courts have proved amenable to denying motions to set aside a completed forfeiture where the movant had actual knowledge of the seizure, especially when the property was taken from the claimant's person at the time of arrest.[154] Courts cling to the language in § 983(e), despite the widespread acknowledgement that CAFRA's notice requirements should be construed in light of the requirements of due process.[155] The language of § 983(e) suggests that a claimant who knew

150 *Id.* at 118. The DEA adopted a forfeiture proceeding from local police who had seized currency from the plaintiff. The DEA sent written notice to the address provided at the time of seizure, but the letter was returned, prompting no further significant steps by the DEA to offer notice, other than publishing a fine-print announcement in the *Wall Street Journal*. *Id.* at 115–16.

151 *Id.* at 118–19 (stating that appropriate inquiry into the adequacy of notice under CAFRA should be "whether the government provided appropriate notice of the seizure and the forfeiture proceedings in sufficient time to meet the requirements of the Due Process Clause").

152 Bermudez v. N.Y.C. Police Dep't, No. 07 Civ. 9537(HB), 2008 WL 3397919, at *6 (S.D.N.Y. Aug. 11, 2008) (concluding that although the claimant knew his money had been seized by the NYPD, he did not have adequate knowledge of the DEA seizure to file a claim with the appropriate agency pursuant to 18 U.S.C. § 983(a)(2)(A) and § 983(a)(2)(B)).

153 *See* United States v. Huggins, 607 F. Supp. 2d 660, 666–67 (D. Del. 2009) (holding that the claimant's knowledge of the seizure on the day of his arrest was not sufficient to afford him adequate due process because he received no notice that administrative forfeiture proceedings would be commenced on his property); Hayes v. United States, No. 08 Civ. 6525(RMB)(HBP), 2009 WL 1856789, at *11 (S.D.N.Y. Feb. 18, 2009) (requiring a further investigation into the facts, because while it was undisputed that the claimant had knowledge of the seizure, the facts did not clearly establish that the claimant had notice of the forfeiture proceedings).

154 *See In re* Sowell, No. 08–51163, 2009 WL 799570 (E.D. Mich. Mar. 19, 2009).

155 VanHorn v. DEA, 677 F. Supp. 2d 1299, 1309–10 (M.D. Fla. 2009). The *VanHorn* court recognized in dicta that even when a claim is precluded under CAFRA, notice of a seizure, without more, may be insufficient to satisfy constitutional due process. *Id.* at 1309. Still, the court concluded that the claimant was not entitled to relief because he was aware of the DEA's seizure

that property was seized from him at the time of arrest is not entitled to relief, even if the government provided inadequate post-seizure notice, or worse yet, provided no notice at all. As a result, some courts view a lack of awareness of the procedure for contesting a forfeiture as an insufficient defense to an administrative forfeiture.[156] Such misguided analysis results in a situation where a claimant with constructive knowledge of a seizure, who received no written notice of a forfeiture proceeding, and whose inquiries regarding the status of the seizure were met with silence, was *still* denied a motion to set aside a completed administrative forfeiture.[157]

IV. THE CARVE OUT PROVISION OF SECTION 983(E) COMPROMISES ADEQUATE SAFEGUARDS FOR ADMINISTRATIVE FORFEITURE

A. *Notice of a Seizure Alone Is an "Indirect" Form of Notice*

The *Mullane* court concluded that "indirect" forms of notice do not satisfy the Due Process Clause when the interested person's name and address are known.[158] "Indirect" notice has often been interpreted as a situation where notice depends on the communications of an intermediary[159] or where a claimant would receive notice only due to happenstance or luck.[160] Such situations are suspect under the accepted constitutional standard because the government is shifting the burden of apprising interested property owners of the pending action onto

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of currency from his home *and* credible testimony from a law enforcement officer suggested that a forfeiture notice was left at the home. *Id.* at 1311. It should be noted that the claimant testified that the commencement of the forfeiture proceeding was not clear to him and he "thought [he] had to be convicted before [the currency] could be forfeited." *Id.* at 1303 (internal quotation marks omitted). Given the claimant's apparent ignorance of the initiation of the forfeiture proceedings, the court's reliance on the constructive knowledge of the seizure seems questionable in light of its proclaimed adherence to due process requirements.

156 *See* Lefler v. United States, No. 11cv220–LAB (POR), 2011 WL 2132827 (S.D. Cal. May 26, 2011); United States v. Russell, No. 2:04cr150-MHT, 2006 WL 2786883 (M.D. Ala. Sept. 27, 2006).

157 *Sowell*, 2009 WL 799570 (denying motion because the movant could not demonstrate the requirement of § 983(e)(B) that he did not have notice of the seizure within time to contest the administrative proceedings).

158 Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 317–18 (1950). Indirect notice is reserved for circumstances where the property at stake belongs to an unknown or missing person and attempts to provide meaningful notification would prove futile. *Id.* at 318.

159 *See, e.g.*, Nunley v. U.S. Dep't of Justice, 425 F.3d 1132, 1136 (8th Cir. 2005) (holding that notice of an administrative forfeiture fails due process where notice intended for a prisoner was sent to the residence formerly shared with his girlfriend).

160 *See, e.g.*, Small v. United States, 136 F.3d 1334, 1336 (D.C. Cir. 1998) (holding that notice published in a national newspaper does not ordinarily satisfy due process requirements because "newspaper notices have virtually no chance of alerting an unwary person that he must act now or forever lose his rights").

another party. If notice of the seizure alone is sufficient,[161] but a potential claimant remains unaware of the forfeiture proceeding, then the government is inappropriately relieved of its burden to notify interested parties of the relevant procedure. In essence, the claimant's knowledge of the forfeiture proceeding is dependent on factors other than communication from government; instead, it rests upon the assumption that an ordinary citizen will equate the occurrence of a seizure with an impending forfeiture action.[162] Yet, the constitutional standard places the burden on the government to make a good faith effort to convey notice of an administrative forfeiture to the claimant, meaning the government is required to directly provide information related to the proceeding itself.[163] In this sense, a seizure is an "indirect" form of notice of the forfeiture action and fails the constitutional test.

B. *CAFRA Compromises Adequate Content of Notice*

CAFRA's silence on the required content of notice contributes to the inadequate safeguards associated with administrative forfeiture.[164] Valid notice should, without exception, explain the reasons for both the seizure and the planned forfeiture, detail the appropriate procedure for contesting the forfeiture, and clearly designate the deadline for taking preventative action.[165] Additionally, in the context of judicial forfeitures,

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161 The language of 18 U.S.C. § 983(e) suggests that a motion to set aside a forfeiture would fail if the government neglected to take reasonable steps to provide notice, but the interested party had knowledge of the seizure prior to the forfeiture.

162 This assumption is rejected in dicta by the Court in *Jones v. Flowers*, 547 U.S. 220, 232 (2006), which stated that "the common knowledge that property may become subject to government taking when taxes are not paid does not excuse the government from complying with its constitutional obligation of notice before taking private property." In fact, the Supreme Court has a long history of refuting the argument that knowledge of a delinquency in payment of taxes is the logical equivalent of knowledge that a tax sale or some other punitive proceeding has been initiated. *See* Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 800 (1983) ("Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party . . . if its name and address are reasonably ascertainable.").

163 *See supra* Part II.A. Knowledge of a seizure cannot be considered as interchangeable with direct notice that the seizing agency has moved to initiate a forfeiture proceeding against the property.

164 Cassella, *supra* note 42, at 137 ("Section 983(a)(1)(A)(i) is silent as to the content of the notice. An earlier version of CAFRA would have specified that the notice contain 'notice of the seizure' and 'information on the applicable procedures' for filing a claim.").

165 *See* Gonzalez-Gonzalez v. United States, 257 F.3d 31, 34 (1st Cir. 2001) (explaining that adequate content of certified notice for administrative forfeitures should delineate the reasons for both the seizure and the forfeiture, the appropriate procedure for contesting the forfeiture, and the deadline for challenging the forfeiture). It is also worth noting that courts hearing pre-CAFRA challenges to administrative forfeitures integrated content-of-notice requirements into the analysis of the validity of the forfeiture. *See* Glasgow v. DEA, 12 F.3d 795, 798 (8th Cir. 1993) (holding that the claimant correctly argued that the DEA notice failed to satisfy the required standard because "it omitted the one piece of information most critical to affording . . . reasonable

courts have vehemently held that the importance of proper content of notice cannot be overlooked.[166] The government should not be excused from providing informative notice that can be realistically used by a claimant to contest a forfeiture simply because there was knowledge of the seizure itself within sufficient time to file a claim.[167] Some district courts have held notice to be inadequate when, among other reasons, a defendant did not receive any information outlining how or when to file a claim for the seized property, despite the fact that the defendant had knowledge of the seizure on the day of his arrest.[168] Though lower courts have indicated a dedication to the constitutional standard, § 983(e)(1)(B) minimizes the substantive requirements of notice by suggesting that an actual seizure adequately informs the claimant of both the impending forfeiture proceeding against the property and the applicable procedures to challenge the forfeiture and be heard.

The nonexistent guidance for content of notice provided by CAFRA is particularly troublesome in relation to the heavy burden placed on property owners in drafting a claim in opposition to a forfeiture. Section 983(a)(2)(C), the provision governing the required content of a valid claim challenging a forfeiture, demands that the claim state the claimant's interest in the property and be made "under oath, subject to penalty of perjury."[169] In order to raise an effective claim, the property owner must demonstrate an interest in the property by indicating control such as title or financial stake.[170] The imbalance in what the government must communicate to the claimant, versus the manner in which the claimant must respond in order to obtain a judicial

opportunity to be heard—the deadline for filing a claim and bond that would be timely under [the relevant statute].").

166 *See* Beck v. United States, No. WMN–10–2765, 2011 WL 862952, at *4–5 (D. Md. Mar. 10, 2011) (holding that the content of notice is extremely relevant to a motion to set aside a forfeiture because the burden should not fall on retained counsel to consult a statute in order to determine to whom a claim should be directed).

167 The approach taken by courts in the context of bankruptcy law offers persuasive support for the required content of notice sent to a claimant prior to a forfeiture proceeding. Appeals courts reviewing bankruptcy court decisions have rejected the notion that "required information" is limited to actual, timely knowledge of a bankruptcy filing. *See In re* Arch Wireless, Inc. 534 F.3d 76 (1st Cir. 2008) (relying on the general rule for adequate notice set forth in *Mullane* and holding that due process requirements do not place the burden on the creditor to investigate proceedings to determine whether and when to present a claim to a bankruptcy court); *see also In re* Intaco P.R., Inc., 494 F.2d 94, 99 (1st Cir. 1974) ("[T]he creditor has a right to assume that proper and adequate notice will be provided before his claims are forever barred.").

168 *See* United States v. Huggins, 607 F. Supp. 2d 660, 667 (D. Del. 2009).

169 18 U.S.C. § 983(a)(2)(C) (2012). The seizing agency may proceed with the administrative forfeiture if the claim filed is not timely or in proper form. *See* United States v. Thompson, 351 F. Supp. 2d 692, 694 (E.D. Mich. 2005) (where the court denied the motion for return of property because the claim was not made under oath and did not articulate a clear interest in the property).

170 United States v. All Assets Held at Bank Julius Baer & Co., 772 F. Supp. 2d 205, 212 (D.D.C. 2011) (citing United States v. 475 Martin Lane, 545 F. 3d 1134, 1140 (9th Cir. 2008)).

proceeding, strains the guarantee of an opportunity to be heard under the Due Process Clause.[171]

C. *Learning from the Standard for Notice in Judicial Forfeitures*

The flaws in composition of § 983(e) are underscored by a comparison to the notice requirements for judicial forfeitures proceedings.[172] Supplemental Rule G(4)(b)[173] provides that the government must send direct notice of the action and the complaint to any person who reasonably appears to be a potential claimant.[174] The required content for the forfeiture announcement is stated in the rule, and compels the inclusion of both the deadline for filing the claim and the name of the government attorney to whom a claim and answer should be directed.[175] While there is a provision limiting the ability of claimants to seek relief on the grounds that the government failed to send notice, it only applies to those who had actual notice of the forfeiture action itself (as distinct from the seizure).[176] The Advisory Committee on Civil Rules weighed due process requirements carefully during the drafting period, which is reflected in both the language and the recognition that notice must be sent to all persons who may reasonably be considered a potential claimant.[177]

In the context of judicial forfeitures, courts have also been clear that "actual notice" should be interpreted to mean notice of the

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171 Some district courts have liberally construed the requirement for a valid claim in order to alleviate the imbalance. *See* United States v. Thirty-Four Thousand Nine Hundred Twenty-Nine & 00/100 Dollars ($34,929.00) in U.S. Currency, No. 2:09-CV-734, 2010 WL 481250 (S.D. Ohio Feb. 5, 2010) (holding that a claim signed by counsel but accompanied by an affidavit signed by the claimant is valid, despite CAFRA's requirement that claims be made under the oath of the claimant because the two documents incorporated one another); Calash v. DEA, No. 08–61196–CIV, 2009 WL 87596 (S.D. Fla. Jan. 12, 2009) (holding that a verified claim was valid and appropriately subject to the penalty of perjury even though the government asserted the claim lacked the specific phrase "subject to the penalty of perjury").

172 Supplemental Rule G became effective on December 1, 2006 and creates a unified framework for the pretrial procedures governing civil judicial forfeitures. *See* John K. Rabiej, *Supplemental Rule G Governing Pretrial Procedures in Forfeiture In Rem Actions*, 19 NO. 3 PRAC. LITIGATOR 47 (2008).

173 The Advisory Committee on Civil Rules added Rule G in 2006 "to bring together the central procedures that govern civil forfeiture actions." FED. R. CIV. P. SUPP. A.M.C. G.

174 *Id.* at G(4)(b)(i). For an application of Supplemental Rule G, see United States v. 7215 Longboat Drive (Lot 24), 750 F.3d 968, 972–73 (8th Cir. 2014).

175 FED. R. CIV. P. SUPP. A.M.C. Rule G(4)(b)(ii).

176 FED. R. CIV. P. SUPP. A.M.C. Rule G(4)(b)(v); United States v. 15010 Sw. 168th St., Miami, Fla., No. 07-20613-CIV, 2008 WL 659472, at *2 (S.D. Fla. Mar. 6, 2008) (holding that Rule G bars a person with actual knowledge of the forfeiture action from seeking the return of property summarily forfeited to the government in a default judgment).

177 Rabiej, *supra* note 172, at 53–54.

forfeiture proceeding itself, and not notice of the seizure of property.[178] The language of the rule represents a more reasonable restriction on potential claimants who seek to challenge the government's failure to provide adequate notice.[179] Arguably, administrative forfeitures, where there is no comfort of automatic review by the courts and no guarantee that the government will be required to meet any burden of proof for the seizure,[180] should involve heightened safeguards for notice as compared to judicial forfeiture proceedings. The divergence between the two standards of notice becomes even more puzzling after considering that most judicial forfeitures begin as administrative forfeitures and are only converted to judicial proceedings after a claim is filed.[181] Presumably, the claimant received some kind of notice of the forfeiture prior to filing the answer and triggering the judicial proceeding. Yet the Advisory Committee on Civil Rules enhanced the notice standard for judicial forfeitures, while the standard of notice for the administrative forfeitures that often precede judicial action remains unchanged.

V. PROPOSAL AND CORRECTING DISPROPORTIONATE BURDENS

A. *The Need for Action*

Despite the vocal support asserted by proponents of the current asset forfeiture model, changes are necessary to guarantee fairness in the

178 United States v. One Star Class Sloop Sailboat, 458 F.3d 16, 22–23 (1st Cir. 2006) ("[A] claimant's knowledge of a seizure, without more, is insufficient to defeat a challenge premised on an absence of actual notice.").

179 By using parallel language, Rule G codifies the constitutional requirements for sending notice established in the line of Supreme Court cases setting forth the procedural due process standard. *See* United States v. Muckle, 709 F. Supp. 2d 1371, 1373 (M.D. Ga. 2010). Further, the language suggests that courts must look beyond mere knowledge of a seizure and weigh the totality of the circumstances to determine if adequate notice was provided. *See One Star Class Sloop Sailboat*, 458 F.3d at 23.

180 CAFRA offers safeguards against government abuse in judicial forfeiture proceedings by requiring the government to meet its burden by presenting admissible proof that the property is subject to forfeiture by a preponderance of the evidence. If the forfeiture remains nonjudicial in nature, the government may successfully forfeit property by meeting the standard of probable cause at the time of seizure. *See* United States v. Melrose E. Subdivision, 357 F.3d 493, 504 (5th Cir. 2004) ("Property subject to forfeiture can in many cases be seized by the government, pending trial, upon no more than an initial showing of probable cause."); *see also* 18 U.S.C. § 981(b)(2) (2012). The government strongly favors administrative forfeiture because "[t]he government . . . need never bring evidence to support an uncontested forfeiture . . . other than the recitation of facts that support seizing the property in the first place." Pimentel, *supra* note 13, at 7.

181 Before the government settles on the tool of judicial forfeiture, an administrative forfeiture is typically attempted first because the process is more efficient. If no one comes forward to file a timely claim for the seized property, the property is automatically forfeited without the oversight of a judicial body. Gaumer, DOJ BULLETIN, *supra* note 2, at 63–64.

system, especially with regard to the procedural elements of administrative forfeiture. Law enforcement agencies endorse the view that the low number of contested administrative forfeitures is an indication that the system is working, not that there is a glitch.[182] Proponents of administrative forfeiture suggest that the proceedings deter criminal activity, and any imposition of heavier burdens on the government would hinder the effectiveness of an essential tool, while rewarding criminals.[183] But this hypothetical result is exaggerated for many reasons, chiefly because even if a claimant successfully moved to set aside a forfeiture pursuant to § 983(e), the government is not obliged to return the seized property if it is subject to criminal forfeiture or is referenced in a criminal indictment against the owner.[184]

Yet, the stance of many attorneys in the DOJ is that the steady number of unchallenged seizures reflects the fact that the only people who would hesitate to come forward to claim large sums of money—or other seized items—are criminals seeking to evade arrest and indictment.[185] A similar argument was often raised prior to the 2000 reforms of asset forfeiture, but was met with sharp criticism.[186] Over a decade later, the argument remains weak in light of the procedural obstacles faced by all claimants, not just those potentially facing criminal charges. This Note does not advocate for an elimination of any component of the administrative forfeiture system, but rather a

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182 Authorization to Seize Property Involved in Drug Offenses for Administrative Forfeiture, 77 Fed. Reg. 51,698–99 (Aug. 27, 2012) (codified at 28 C.F.R. pt. 0) (new rule granting administrative forfeiture powers to the Bureau of Alcohol, Tobacco, Firearms, and Explosives).

> Forfeiting the assets of criminals is an essential tool in combating criminal activity and provides law enforcement with the capacity to dismantle criminal organizations . . . . The Attorney General has decided to adopt a one-year delegation of administrative seizure and forfeiture authority to permit ATF to make expedient and effective use of this crucial law enforcement tool.

Id.

183 In a *Wall Street Journal* article, a former federal prosecutor, who is now an asset recovery specialist, was quoted as saying that even an imprisoned criminal "'can have a smile on his face because he is going to be able to enjoy the proceeds of his crime when he gets out.'" Emshwiller & Fields, *supra* note 82.

184 *See* United States v. Winkelman, 242 F. App'x 821, 823 (3d Cir. 2007). Furthermore, a CAFRA provision allows for delayed notice if notice would jeopardize an ongoing criminal investigation. 18 U.S.C. § 983(a)(1)(B).

185 "Often, criminals will not contest an administrative forfeiture because of the requirement that they swear to their interest in the property under penalty of perjury." Douglas A. Leff, *Money Laundering and Asset Forfeiture: Taking the Profit Out of Crime*, 61 U.S. ATT'YS' BULL., Sept. 2013, at 4, 8.

186 Rulli, *supra* note 43, at 88 ("While some prosecutors contend that a high default rate is a tribute to their judgment and an admission of wrongdoing by property owners, others believe that it proves just how difficult it is for property owners to mount a defense against the government in the face of inadequate access to legal help . . . and a fear of encouraging criminal charges and even potential self-incrimination. Without counsel, property owners must navigate a maze of forfeiture procedures on their own, which explains why they often just give up.").

reevaluation of how it is administered in the context of forfeitures following seizures. There is a need for greater disclosure in the notification system for administrative forfeitures, so that more proceedings are heard on the merits and fewer property owners are deprived of an opportunity to be heard. Reforming the notice guidelines in CAFRA to meet constitutional standards represents a modest step towards enforcing forfeiture laws not only effectively, but also fairly.

B. *Section 983(e) Should Be Struck Down as Unconstitutional*

In assessing whether a challenged administrative forfeiture is invalid due to improper notice, reviewing courts should rely exclusively on the constitutional standard developed by *Mullane* and subsequent precedent. The statutory notice provisions in § 983(e) collapse when measured against the fundamental fairness guaranteed by a system that ensures notice of the actual forfeiture proceeding against a property owner. Though striking down language in a statute that has remained enforceable for over a decade may seem drastic, the inclusion of the provision in the first place was never justified by firm reasoning. The legislative history of CAFRA indicates that the decision to bar relief to claimants with actual notice of a seizure rests on the logic of merely two cases, both from the Second Circuit.[187] Such a justification is hardly convincing in light of the numerous instances where courts have found that actual notice of the forfeiture proceeding itself is necessary to excuse any shortcomings in due process.[188] Yet the statutory structure is still relied upon to justify the denial of claims challenging administrative forfeitures for failure to provide notice.[189]

This Note proposes that requiring the government to make a reasonable attempt to provide written notice in all circumstances would enhance the likelihood that potential claimants receive clear instructions

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187 H.R. REP. NO. 105-358, pt. 1, at 43 n.77 (1997). The first was an appeals case from 1992, in which the court declined to address the merits of a due process claim after the government neglected to publish notice as required, but the claimant had actual knowledge of the seizure. DEA v. *In re* One 1987 Jeep Wrangler Auto., 972 F.2d 472 (2d Cir. 1992). The second case relied upon in the legislative history affirmed *Wrangler* and held that since claimants had actual notice of a seizure, the government's failure to send notice did not constitute a due process violation. Lopes v. United States, 862 F. Supp. 1178, 1188 (S.D.N.Y. 1994).

188 In fact, the Second Circuit later amended its position that knowledge of a seizure precludes the right to challenge a completed forfeiture. Ikelionwu v. United States, 150 F.3d 233, 238 (2d Cir. 1998) ("This knowledge, however, does not imply that he was aware of the *forfeiture proceedings* or his right to challenge those proceedings."); *see also* Gonzalez-Gonzalez v. United States, 257 F.3d 31 (1st Cir. 2001).

189 *See supra* Part III.B; *see also* United States v. One Hundred Forty Thousand Dollars in U.S. Currency, No. 06-CV-3247 (NG)(RLM), 2007 WL 2261650, at *4, n.13 (E.D.N.Y. Aug. 2, 2007) (relying on the legislative history of CAFRA to conclude that motion to set aside a forfeiture may be precluded based on actual knowledge of a seizure).

for how to make a claim, including the necessary steps to challenge a forfeiture and a clear indication of the agency handling the proceeding. This would open the door for an administrative forfeiture framework where more attempts by the government to provide notice would pass constitutional muster,[190] and more property owners would receive the opportunity to fairly contest seizures.

C. *Striking Down Section 983(e) Will Curb the Effect of Forfeiture Abuse*

Eliminating the carve-out provision in § 983(e) in order to meet constitutional standards for notice is especially important given current flaws in the administrative forfeiture system resulting from equitable sharing programs.[191] From a procedural perspective, a central criticism of equitable sharing is that it cuts out state legislatures that are in a better position to create state-tailored forfeiture laws designed to curb abuse.[192] For example, in Washington state, where the forfeiture laws offer specific guidance on notice requirements for forfeitures handled by the state, equitable sharing or collaboration with the federal government leading up to the seizure could result in the application of the comparatively lax standard offered by CAFRA.[193] But if adequate notice of the federal forfeiture proceeding were required, even if state officials executed the actual seizure of the property, then claimants could more easily learn of the necessary procedures to contest the forfeiture, despite the interference of equitable sharing.[194]

There are critics of civil forfeiture law who encourage the complete elimination of equitable sharing,[195] but this Note proposes that strict adherence to the constitutional standard of notice could curb some

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190 Courts have rejected constitutional challenges where notice clearly documented the forfeiture and explained the necessary procedures and remedies to contest it. *See* Upshaw v. U.S. Customs Serv., 153 F. Supp. 2d 46, 51 (D. Mass. 2001) (holding that the minimal due process requirements were met because the claimant was informed "precisely how to file a claim, yet he failed to do so").

191 *See supra* Part I.E and accompanying footnotes.

192 *See* WILLIAMS ET AL., *supra* note 86, at 26 (suggesting that states "circumvent" their own civil asset forfeiture laws through equitable sharing with the federal government because adoptive forfeitures or joint investigations often occur when state law enforcement is unlikely to succeed under state forfeiture law due to heightened protections for claimants).

193 *See* WASH. REV. CODE ANN. § 69.50.505 (West 2012).

194 The current statutory language of § 983(e)(1)(B) precludes a claimant with knowledge of a seizure from setting aside a subsequent forfeiture, even if the claimant was unaware of which agency possessed the property and initiated forfeiture proceedings. *See* Johnson v. United States, No. 1:03-CV-00281-LJM VS, 2004 WL 2538649 (S.D. Ind. Oct. 22, 2004) (relying exclusively on § 983(e) to deny the claimant's defense that, though he was present at the time of the seizure, the agency involved in the execution of the seizure was not the same agency he was required to contact in an effort to contest a forfeiture).

195 *See* WILLIAMS ET AL., *supra* note 86, at 26.

undesirable consequences of the equitable sharing program.[196] Ensuring notice of a forfeiture proceeding, beyond notice of a seizure that occurred prior to any action by a federal agency, is an effective course for reform in guaranteeing due process. If notice of the forfeiture proceeding, along with the necessary procedure to contest, was sent to every claimant, then the ambiguity associated with the involvement of multiple law enforcement agencies could be avoided. Concurrent involvement of state and federal law enforcement can compromise the quality of any constructive or actual notice that a claimant gathers at the time of seizure, serving as yet another justification for stringently enforced notice requirements in the context of administrative forfeitures.[197]

D. *Disproportionate Burdens on Government Versus Claimant*

Construing notice requirements in a way that is favorable to the claimant by striking down § 983(e)(1)(B) is reasonable given that the government has an opportunity to commence a subsequent forfeiture proceeding if the first attempt is unsuccessful.[198] The opportunity for the government to correct its failure to adequately notify a claimant is codified in 18 U.S.C. § 983(e)(2)(A),[199] and if a motion to set aside a declaration of forfeiture is indeed granted, the declaration must be set aside without prejudice to the government to commence another proceeding against the claimant on the same set of facts.[200] A generous,

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196 Additionally, it would be difficult to contend that the adoption of a forfeiture proceeding by the federal government following a joint investigation with a state agency is itself a constitutional violation, even if the seizure occurs under state law. Courts have held that a claimant's due process rights concern the actual forfeiture of property, not the "adoption of the seizure by one sovereign after actual seizure by another." Madewell v. Downs, 68 F.3d 1030, 1039 (8th Cir. 1995).

197 The available window to contest an administrative forfeiture is quite short, making it even more important that the claimant does not face utter confusion during the process. *See* VanHorn v. Florida, 677 F. Supp. 2d 1288, 1296–97 (M.D. Fla. 2009) (pointing out that the claimant attempted to recover currency from local law enforcement following a seizure, indicating that he was unaware that the DEA, a federal agency, had in fact initiated a forfeiture proceeding against the funds seized).

198 25 AM. JUR. 2D *Drugs and Controlled Substances* § 227 (2014).

199 The language of the statute states:

> Notwithstanding the expiration of any applicable statute of limitations, if the court grants a motion under paragraph (1), the court shall set aside the declaration of forfeiture as to the interest of the moving party without prejudice to the right of the Government to commence a subsequent forfeiture proceeding as to the interest of the moving party.

18 U.S.C. § 983(e)(B)(2)(A) (2012).

200 The original House version of CAFRA provided that failure of notice by the government would result in dismissal of the action with prejudice. H.R. 1658, 106th Cong. (1999). Perhaps an effective strategy to ensure prompt and adequate notice by the government would be to void

six-month limitations period is granted to the government to initiate a supplemental judicial forfeiture action, and if the proceeding is nonjudicial, then the government is allotted sixty days.[201] The courts recognize this right for the government, though they strictly enforce the limitation that the additional period to commence a forfeiture will only be granted if the motion to set aside a forfeiture pursuant to § 983(e)(1) is invoked.[202] Having a second opportunity to pursue a forfeiture that originally failed due to inadequate notice provides the government flexibility and latitude to correct any statutory or constitutional deficiencies.[203]

In contrast, insufficient notice resulting in a claimant missing or overlooking a deadline results in more drastic consequences. At a judicial proceeding, a claimant has the opportunity to raise important concerns, such as the legality of the seizure, but if a property owner fails to file a claim the forfeiture is completed as a nonjudicial action.[204] Strict construction of deadlines imposed on claimants has the draconian effect of barring any further action to contest a forfeiture, despite constitutionally questionable efforts by the government to provide notice or the receipt of delayed notice for any number of reasons. The harsh nature of the burdens placed on claimants versus those placed on the government is disconcerting given the strong preference for disputes to be resolved on the merits, as opposed to being dismissed on procedural grounds.[205] This Note proposes that an effective way to balance the rigid standard for compliance with deadlines would be to reasonably reconsider the quality and effectiveness of the government's attempts to notify claimants of forfeiture proceedings.

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administrative forfeitures that failed to meet constitutional standards for notice, effectively vacating the forfeiture with prejudice.

201 3 CRIM. PRAC. MANUAL § 107:11 (2014).

202 *See* United States v. Contents of Two Shipping Containers Seized at Elizabeth, N.J., 113 F. App'x 460, 464 (3d Cir. 2004) (stating that the six month limitations period at § 983(e)(2)(B)(ii) does not apply if a § 983(e)(1) motion is never made).

203 Volpe v. United States, 543 F. Supp. 2d 113, 120 (allowing the government to commence a new forfeiture proceeding after vacating the administrative forfeiture due to an unconstitutional provision of notice).

204 If a property owner fails to file a claim, a district court cannot adjudicate the merits of the underlying seizure. *See* H.R. REP. NO. 105-358, pt. 1, at 42–43 (1997) (establishing that judicial review of administrative forfeitures is limited to a court determination that that the government complied with the statutory notice provisions, and not whether the declaration of forfeiture passes on the merits). Case law has also confirmed that a claimant is precluded from challenging the legality of a seizure if he failed to respond to notice of an administrative forfeiture. *See* Caraballo v. DEA, 62 F. App'x 362, 363 (1st Cir. 2003).

205 *See, e.g.*, United States v. $39,480.00 in U.S. Currency, 190 F. Supp. 2d 929, 933 (W.D. Tex. 2002) (relaxing the ninety-day deadline on the government to file a response on the claimant's complaint in order to avoid a release of the seized property without a civil forfeiture hearing).

CONCLUSION

The growth of administrative forfeiture has been met with both praise and criticism. This Note has argued that respecting constitutional standards of notice following the seizure of property by federal or state agencies will help ensure that the subsequent administrative proceedings offer necessary protections to property owners. In a time when civil forfeiture practices are facing scrutiny in popular media[206] and congressional representatives are expressing increased concern that the current asset forfeiture regime requires added safeguards,[207] there is a window of opportunity for change. An essential area for reform involves the guarantee that property owners whose assets are seized on the basis of probable cause alone receive procedural notice in accordance with the Due Process Clause, along with the knowledge of required steps to contest any administrative forfeiture proceeding initiated against them.

206 Michael Sallah et al., *Stop and Seize*, WASH. POST, Sept. 7, 2014, at A1; Sarah Stillman, *Taken: A Reporter at Larger*, NEW YORKER, Aug. 2013; *Last Week Tonight with John Oliver: Civil Forfeiture* (HBO television broadcast Oct. 5, 2014), http://www.hbo.com/last-week-tonight-with-john-oliver/episodes/1/20-october-5-2014/video/ep-20-clip-civil-forfeiture.html#.

207 The Civil Asset Forfeiture Reform Act of 2014 was introduced in the House on July 28, 2014, but was not enacted. The bill sought to reform civil asset forfeiture laws by strengthening the innocent owner defense, raising the burden of proof on the government, improving access to counsel, and ensuring due process of law. H.R. 5212, 113th Cong. (2014).