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## Procedural Whipsaw: Allocating the Burden of Proving Reasonable Notice to Prisoners of Forfeiture Proceedings and the (Renewed) Call for Actual Notice

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## Procedural Whipsaw: Allocating the Burden of Proving Reasonable Notice to Prisoners of Forfeiture Proceedings and the (Renewed) Call for Actual Notice\*

*In 2019, the Second Circuit determined that the government should bear the burden of proving the prison mail distribution procedures it employed to provide inmates with notice of forfeiture proceedings were constitutionally adequate. This was the most recent decision involved in a circuit split on this burden-allocation issue, with other circuits dictating that a presumption of adequacy exists when notice is sent by mail to the inmate's institution of incarceration. This Recent Development argues that the Second Circuit was correct in refusing such a presumption for multiple reasons, including normative and long-standing legal principles. Moreover, the Second Circuit came to the correct result within the bounds set by the Supreme Court on this issue, which include the Court's previous holding that actual notice is not required in this context. However, given the distinct circumstances in which inmates find themselves, for a myriad of reasons, placing the burden on the government is not enough, and actual notice should be required in this forfeiture context. Longstanding Due Process notice principles, fairness concerns, judicial economy, and specifically the Court's holding in *Mathews v. Eldridge*, all point to why actual notice should be required in this context. This discussion occurs against the backdrop of the troubled civil asset forfeiture system, which is rife with ill incentives for the government to forfeit the property of its citizens, often without much required in the way of proof that the property was actually connected to criminal activity. Given the problems of the civil asset forfeiture system generally, as well as the factually distinct situations of inmates by virtue of their confinement, at a minimum the government should bear the burden in this context, but ideally actual notice should be required.*

### INTRODUCTION

In 2018, the federal government took in \$1.38 billion in proceeds from asset forfeiture,<sup>1</sup> a process by which the government confiscates a citizen's property that allegedly was connected to a crime. Even that extraordinary figure pales in comparison to the peak numbers from 2014, when the haul was a staggering \$4.47 billion.<sup>2</sup> Additionally, those numbers are only for the federal

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1. U.S. DEP'T OF JUST., 10-YR SUMMARY OF FINANCIAL REPORT DATA 1 (2020), [https://www.justice.gov/afp/file/10-yr\\_summary\\_of\\_reporting.pdf/download](https://www.justice.gov/afp/file/10-yr_summary_of_reporting.pdf/download) [https://perma.cc/CM8M-LML4].

2. *Id.*

government. State asset forfeiture income, from the mere fourteen states for which such data was public, totaled \$250 million in 2013.<sup>3</sup>

These numbers become troubling, however, when considering actual circumstances under which property has been seized for the purposes of forfeiture.<sup>4</sup> A student named Charles Clark had saved \$11,000 from financial aid, various jobs, gifts from family, and educational benefits. He was carrying the cash with him as he boarded a flight, and after claiming his bag smelled like marijuana, police officers seized his cash despite not finding any evidence of a crime.<sup>5</sup> Likewise, Victor Guzman, a church secretary, had \$28,500 in church-goers donations seized by police after he was pulled over while en route to buy a parcel of land for the church.<sup>6</sup> The cases grow even more concerning from there. An elderly couple, Mary and Leon Adams, were evicted from their home by a SWAT team without notice, and then the home was seized, all because their adult son had sold twenty dollars of marijuana to a confidential informant (“CI”) on the front porch.<sup>7</sup> The State initiated civil forfeiture proceedings against the Adams’ home a month later, and the trial court approved the forfeiture, holding that the State “proved by a preponderance of the evidence” that a connection existed between the crime and the property solely “based on the CI’s . . . purchase of narcotics from the property.”<sup>8</sup> In yet another case, police seized a gold cross from a woman after pulling her over for a minor traffic violation.<sup>9</sup> Nothing illegal was reported, no criminal charges were filed, and the woman received no traffic ticket, but her property was still seized.<sup>10</sup>

One of the most concerning occurrences is the case of Jennifer Boatright and her boyfriend, Ron Henderson. The two were pulled over for a minor traffic violation by police and had \$6,037 seized, which was intended for purchasing a car when they arrived at their destination.<sup>11</sup> The two were taken to the police station for “fit[ting] the profile of drug couriers,” and the district attorney told them they could either face charges for money laundering and

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3. DICK M. CARPENTER II, LISA KNEPPER, ANGELA C. ERICKSON & JENNIFER McDONALD, INST. FOR JUST., *POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE* 11 (2d ed. 2015), <https://ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd-edition.pdf> [<https://perma.cc/QLY4-W4J4>].

4. It is important to note that the following stories are not solely examples involving federal seizure, even though, for the sake of brevity, this Recent Development focuses on federal forfeiture statutes and federal forfeiture. Instead, they are simply used for illustrative purposes to detail instances of seizures that have occurred.

5. CARPENTER ET AL., *supra* note 3, at 8.

6. Sarah Stillman, *Taken*, *NEW YORKER* (Aug. 5, 2013), <https://www.newyorker.com/magazine/2013/08/12/taken> [<https://perma.cc/W25E-22BL>].

7. *Id.*

8. *Commonwealth v. 2314 Tasker Street*, 67 A.3d 202, 205 (Pa. Commw. Ct. 2013).

9. Stillman, *supra* note 6.

10. *Id.*

11. *Id.*

child endangerment (and lose their child), or sign over their cash to the city.<sup>12</sup> Boatright and Henderson signed over their cash to avoid losing their child to Child Protective Services.<sup>13</sup> Later, they brought a class action suit against the City of Tenaha, Texas,<sup>14</sup> when it was discovered that the city's police department regularly employed this policy of "cash-for-freedom" deals to intimidate people into forfeiting their valuable property.<sup>15</sup>

These examples—just a few of the many instances of out-of-control civil asset forfeiture practices—show the very tenuous connection, at best, that is required for property to be seized for the purposes of forfeiture. As if this was not concerning enough, when a state or the federal government initiates a civil asset forfeiture proceeding, if one does not show up to contest the forfeiture of their property, then such property can be *administratively* forfeited,<sup>16</sup> which is usually accomplished by simple paperwork without any judicial involvement.<sup>17</sup> In these cases, the only entity who makes a seizure determination is the seizing agency itself, with no judicial review of the merits.<sup>18</sup>

And why then, one might wonder, is it problematic that the seizing agency is the sole determiner of such administrative forfeiture claims? The answer is simple. At both the state and federal level, these agencies have a massive incentive to push for forfeiture of any valuable property: they get a sizeable cut of the proceeds or get to keep the property if it can be used by the agency.<sup>19</sup> Indeed, when the federal government takes property via forfeiture, law enforcement can keep one hundred percent of the proceeds; the same one-hundred percent rule is in effect for law enforcement in twenty-five states.<sup>20</sup> While in the abstract one would hope this incentive would not alter civil asset forfeiture practices, as seen by the cases above and by the admission of the entities who use such practices,<sup>21</sup> it undoubtedly has.

Some of the comments from individuals who benefit from civil asset forfeiture make this starkly clear. One city attorney referred to civil asset

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12. *Id.*

13. *Id.*

14. *See* *Morrow v. Washington*, 277 F.R.D. 172, 172 (E.D. Tex. 2011).

15. Stillman, *supra* note 6.

16. The federal government allows administrative forfeiture. *Types of Federal Forfeiture*, U.S. DEP'T JUST., <https://www.justice.gov/afp/types-federal-forfeiture> [https://perma.cc/N7XT-QV9N] (last updated Feb. 28, 2020). This Recent Development does not discuss state administrative forfeiture.

17. CARPENTER ET AL., *supra* note 3, at 12–13; *Types of Federal Forfeiture*, *supra* note 16.

18. *See* CARPENTER ET AL., *supra* note 3, at 12–13.

19. *See id.* at 11–14.

20. *See id.* at 14.

21. *See* *Sometimes Cops Find Your Stolen Car. Sometimes Cops Stole It*, AM. C.L. UNION (Oct. 28, 2013), <https://www.aclu.org/video/sometimes-cops-find-your-stolen-car-sometimes-cops-stole-it> [https://perma.cc/822A-L2S3].

forfeiture as a “gold mine.”<sup>22</sup> A drug task force supervisor was noted as saying, “We want the cash . . . Good agents chase cash.”<sup>23</sup> And a city police chief noted

It’s usually based on a need—well, I take that back. There [are] some limitations on it. . . . Actually, there’s not really on the forfeiture stuff. We just usually base it on something that would be nice to have that we can’t get in the budget, for instance. We try not to use it for things that we need to depend on because we need to have those purchased. It’s kind of like pennies from heaven—it gets you a toy or something that you need is the way that we typically look at it to be perfectly honest.<sup>24</sup>

While civil asset forfeiture may do some good in deterring crime by imposing a harsh financial burden, among other potential justifications,<sup>25</sup> these comments make clear that the motive is all too often filling the coffers of law enforcement as opposed to actually deterring crime.

Given the huge incentive in place to seize the property of citizens,<sup>26</sup> the problems with civil asset forfeiture become even more profound when considering the possibility that some people are unaware their property is at risk of being forfeited.<sup>27</sup> If someone is unaware that their property is subject to

22. CARPENTER ET AL., *supra* note 3, at 15.

23. Michael Haugen, *When Cops Seize Property*, NAT’L REV. (Aug. 16, 2016, 8:00 AM), <https://www.nationalreview.com/2016/08/civil-asset-forfeiture-unfair/> [<https://perma.cc/9UFN-A7ZD>].

24. CARPENTER ET AL., *supra* note 3, at 15.

25. Roger Pilon, *Can American Asset Forfeiture Law Be Justified?*, 39 N.Y. L. SCH. L. REV. 311, 318 (1994) (naming as potential justifications taking the profit out of crime, denying criminals the means of crime, and punishing criminals for crimes they commit).

26. The Arizona Prosecuting Attorney’s Advisory Council exemplified how great the incentive is in a training presentation document, which stated,

When your bosses can’t find any money in their budget they get depressed. When they get depressed they tell you to start doing forfeiture cases . . . . When you feel like a winner you go back to your jurisdiction and just start seizing everything in sight. When you just start seizing everything in sight you screw up and lose everything. When you screw things up and lose everything you ruin forfeitures for all of us. Don’t ruin forfeitures for all of us.

CARPENTER ET AL., *supra* note 3, at 15. In another example, the U.S. Immigration and Customs Enforcement’s Asset Forfeiture Handbook also emphasizes profit maximization as an essential part of forfeiture decisions: “[The] handbook outlines six key factors agents should consider[, of which] four involve how much a property is worth.” Note, *How Crime Pays: The Unconstitutionality of Modern Civil Asset Forfeiture as a Tool of Criminal Law Enforcement*, 131 HARV. L. REV. 2387, 2392 (2018) [hereinafter *How Crime Pays*] (quoting Nick Sibilla, *Leaked Handbook Reveals How ICE Uses Forfeiture To Seize Millions*, FORBES: #THEVERDICT (Oct. 16, 2017, 1:52 PM), <https://www.forbes.com/sites/instituteforjustice/2017/10/16/leaked-handbook-reveals-how-ice-uses-civil-forfeiture-to-seize-millions/#50618fbb498c> [<https://perma.cc/GW5V-DM87>]).

27. It is important to note that this Recent Development is not insinuating that a lack of notice is a huge problem with every single forfeiture proceeding or that a lack of notice is the only reason people do not contest these proceedings. There are many reasons to contest a forfeiture, such as a lack of resources or fear of self-incrimination. See David Pimentel, *Civil Asset Forfeiture Abuses: Can State Legislation Solve the Problem?*, 25 GEO. MASON L. REV. 173, 183 n.55 (2017). Any one of these

a forfeiture proceeding, and thus does not contest it, their property can be administratively forfeited with no judicial review, so long as it qualifies as property that can be administratively forfeited.<sup>28</sup> As is discussed at the end of Section II.B., such summary forfeitures permit the government to “whipsaw”<sup>29</sup> property owners on the front end by forfeiting property without needing to prove a connection from the property to the crime and on the back end by making the forfeiture more difficult to contest. Additionally, such notice problems are even more concerning when the lack of notice involves a currently incarcerated citizen, over whom the government—the same entity that is seeking to forfeit their property—has complete custodial control. In this context, there is simply no justification for a lack of notice.

This Recent Development proceeds in three Parts. Part I gives a general overview of forfeiture proceedings. It also discusses how the federal circuit courts have struggled with what constitutes adequate notice of forfeiture proceedings to inmates and are currently split on who has the burden of proof. Part II discusses why the burden of proving adequate notice should always be on the government in these scenarios, which is why the recent Second Circuit case on the issue, *United States v. Brome*,<sup>30</sup> is correct in that regard. Finally, Part III covers why notice by mail, without more, to an incarcerated inmate is insufficient, both normatively and legally. It also shows how *Mathews v. Eldridge*<sup>31</sup> can help inform this conversation about procedural adequacy, in addition to the general notice standard from *Mullane v. Central Hanover Bank & Trust Co.*<sup>32</sup>

#### I. OVERVIEW OF FORFEITURE, ADEQUATE NOTICE, AND BURDEN OF PROOF

This part informs the discussion by providing an overview of how the various types of forfeiture work, as well as what constitutes adequate notice in civil-legal proceedings generally. Then this part considers what constitutes adequate notice in forfeiture proceedings specifically involving prison inmates

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reasons, including lack of notice, could be the reason that the overwhelming majority of federal forfeitures—around eighty percent—go uncontested. *See id.*; Alice W. Dery, *Overview of Asset Forfeiture*, A.B.A. (June 30, 2012), [https://www.americanbar.org/groups/business\\_law/publications/blt/2012/06/02\\_dery/#:~:text=The%20vast%20majority%20of%20federal%20forfeiture%20cases%20go%20uncontested.&text=Houses%20and%20other%20real%20property,that%20engage%20in%20administrative%20forfeitures](https://www.americanbar.org/groups/business_law/publications/blt/2012/06/02_dery/#:~:text=The%20vast%20majority%20of%20federal%20forfeiture%20cases%20go%20uncontested.&text=Houses%20and%20other%20real%20property,that%20engage%20in%20administrative%20forfeitures) [https://perma.cc/EEX4-E6YA].

28. CARPENTER ET AL., *supra* note 3, at 12–13. For an explanation of what property can be administratively forfeited, see *infra* note 37 and accompanying text.

29. To “whipsaw” someone is to victimize or disadvantage that person in two opposite ways at once. *Whipsaw*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/whipsaw> [https://perma.cc/T4YN-LE4Z].

30. 942 F.3d 550 (2d Cir. 2019).

31. 424 U.S. 319 (1976).

32. 339 U.S. 306 (1950).

by analyzing the leading case on the issue, *Dusenbery v. United States*,<sup>33</sup> and the circuit split that has developed regarding which party has the burden of proving adequacy of notice to prisoners.

#### A. Overview of Forfeiture Generally

There are three types of forfeiture: criminal forfeiture, civil forfeiture, and administrative forfeiture.<sup>34</sup> While criminal forfeiture requires a criminal conviction for connected property to be forfeited, civil forfeiture does not require a conviction. Instead, the government institutes an *in rem* civil forfeiture action against the property itself merely for its alleged connection to a crime.<sup>35</sup>

In the federal context, for property to qualify as being subject to civil forfeiture, there must be a proper connection between the property and a crime for which civil forfeiture is allowed.<sup>36</sup> For most crimes, property that facilitated the crime, was involved in the commission of the crime, or is representative of proceeds derived from such criminal activity is subject to forfeiture.<sup>37</sup> Generally, the government has the burden of proving by a preponderance of the evidence that seized property is subject to civil forfeiture.<sup>38</sup> Additionally, if the government's forfeiture theory is that the property was used to facilitate or was involved in the commission of a crime, the government must also establish that there was a "substantial connection between the property and the

33. 534 U.S. 161 (2002).

34. *How Crime Pays*, *supra* note 26, at 2389; *Types of Federal Forfeiture*, *supra* note 16. This Recent Development does not further discuss criminal forfeiture but instead focuses on civil and administrative forfeiture.

35. *How Crime Pays*, *supra* note 26, at 2389.

36. See 18 U.S.C. § 981. This statute provides a general overview of some criminal violations that subject properly connected property to civil forfeiture. It is important to note that I discuss this federal statute as well as § 983 to represent the requirements for civil forfeiture in general, though state forfeiture statutory requirements vary. For a general overview of each state's civil forfeiture statute, see generally *Asset Forfeiture Laws by State*, FINDLAW, <https://criminal.findlaw.com/criminal-rights/asset-forfeiture-laws-by-state.html> [<https://perma.cc/LGJ7-8XN6>] (last updated Feb. 6, 2019).

37. See Karis Ann-Yu Chi, *Follow the Money: Getting to the Root of the Problem with Civil Asset Forfeiture in California*, 90 CALIF. L. REV. 1635, 1640 (2002); *How Crime Pays*, *supra* note 26, at 2389; Pilon, *supra* note 25, at 313. Summarizing all the ways property can be connected to crime is especially complicated considering that there is both no uniform description of property that is subject to forfeiture for all crimes and that the various forfeiture provisions are spread throughout the U.S. Code. Stefan D. Cassella, *Asset Forfeiture Law in the United States*, in THE PALGRAVE HANDBOOK OF CRIMINAL AND TERRORISM FINANCING LAW 427, 431 (Colin King, Clive Walker & Jimmy Gurulé eds., 2018).

38. 18 U.S.C. § 983(c)(1). The significance of the preponderance of the evidence standard cannot be overlooked. This standard, often called the "fifty-one percent standard," means in the civil forfeiture context that it is merely more likely than not that the property is connected to a crime—a relatively low burden to meet. *Grading State & Federal Civil Forfeiture Laws*, INST. FOR JUST., <https://ij.org/report/policing-for-profit/grading-state-federal-civil-forfeiture-laws/> [<https://perma.cc/UQR7-NC8D>]. All that is required to prevail is evidence slightly better than the odds of a coin flip. *Id.* Thirty-one states and the federal government abide by this standard for civil asset forfeiture proceedings (and some states go even lower, following a probable cause standard). *Id.*

offense.”<sup>39</sup> This substantial connection requirement is an attempt to ensure that “the property must have more than an incidental or fortuitous connection to criminal activity.”<sup>40</sup> The government may establish a substantial connection by showing that the property made the criminal act “less difficult or more or less free from obstruction or hindrance.”<sup>41</sup>

The third type of forfeiture is administrative forfeiture, which is a subset of civil forfeiture. An administrative forfeiture occurs where no claim in protest is filed by the property owner and the seizing agency can finalize the forfeiture without judicial review.<sup>42</sup> If a timely claim to the property is filed, however, the administrative forfeiture ends, and the forfeiture must continue into a judicial proceeding.<sup>43</sup> Only certain types of property may be administratively forfeited, including property that is illegal to import; property used to import, transport, or store a controlled substance; a monetary instrument; and other property that does not exceed \$500,000 in value.<sup>44</sup> Real property cannot be administratively forfeited.<sup>45</sup>

#### B. *Adequate Notice Principles Generally*

Notice is a concept at the heart of procedural due process. Adequate notice procedures must be employed to inform a party of a proceeding against their protected interests in order to comply with due process requirements.<sup>46</sup> The intent behind this notice requirement is to provide citizens with a realistic opportunity to contest a deprivation of their protected interests. The general standards that outline what is required for such notice to be adequate are described below.

The standard for adequate notice comes from the seminal case *Mullane*, which held that “[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the

39. 18 U.S.C. § 983(c)(3).

40. *United States v. Schifferli*, 895 F.2d 987, 990 (4th Cir. 1990).

41. *Id.*; see *United States v. 3639-2nd St.*, 869 F.2d 1093, 1097 (8th Cir. 1989). While this “substantial connection” requirement seems to impose an onerous burden, it is quite easy to imagine how almost any property used in any manner during the commission of a crime could be characterized as making the crime less difficult to commit or more free from hindrance. See NAT’L CRIM. JUST. ASS’N, ASSETS SEIZURE & FORFEITURE: A CASE LAW COMPENDIUM 39 (1998), <https://www.ncjrs.gov/pdffiles1/Digitization/180539NCJRS.pdf> [<https://perma.cc/P5F7-RXMS>].

42. See Dery, *supra* note 27; *How Crime Pays*, *supra* note 26, at 2389.

43. Cassella, *supra* note 37, at 435–36; *How Crime Pays*, *supra* note 26, at 2389.

44. *Types of Federal Forfeiture*, *supra* note 16.

45. Dery, *supra* note 27.

46. Such procedures include notifying parties to the pendency of the action, affording an opportunity to object, and enabling someone to prevent deprivation of their interests. See Cornell L. Sch., *The Requirements of Due Process*, LEGAL INFO. INST., <https://www.law.cornell.edu/constitution-conan/amendment-14/section-1/the-requirements-of-due-process> [<https://perma.cc/7JS4-D3GV>].

pendency of the action and afford them an opportunity to present their objections.”<sup>47</sup> Further, “due[] process which is a mere gesture is not due process.”<sup>48</sup> Rather, when providing notice, one must employ means that “one desirous of actually informing the absentee” would utilize, given the “practicalities and peculiarities” of the case.<sup>49</sup> In addition, the adequacy of a given notice method “may be defended on the ground that it is in itself reasonably certain to inform those affected.”<sup>50</sup> Where reasonable certainty is not possible, the method chosen should not be “substantially less likely to bring home notice” than alternative methods.<sup>51</sup>

At issue in *Mullane* was how a trustee administering a trust needed to inform beneficiaries of their interest in the trust.<sup>52</sup> Some beneficiaries’ addresses were known while others were not.<sup>53</sup> The *Mullane* Court held that “personal service . . . serves the end of actual and personal notice,” but such service is not required in every circumstance.<sup>54</sup> It was adequate to give notice by publication to beneficiaries whose addresses were unknown, whereas for those beneficiaries whose addresses were known, more effort—at least informing them by ordinary mail—was required.<sup>55</sup> Subsequently, in *Menmonite Board of Missions v. Adams*,<sup>56</sup> the Court confirmed the holding of *Mullane*, stating that “[n]otice 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.”<sup>57</sup>

Depending on the particular facts of a case, one method of notice may be required over another. Actual notice, the form of notice which provides for the strongest procedural protections, occurs when the party providing notice ensures that the receiving party in fact learns of a legal action.<sup>58</sup> This can be achieved by the party providing notice physically handing notice to the receiving party or by sending notice via a third party, who must obtain a record confirming the receiving party actually got the notice. This is in contrast to constructive notice, in which a party theoretically has the opportunity to learn

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47. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950).

48. *Id.* at 315.

49. *Id.* at 314–15.

50. *Id.* at 315.

51. *Id.*

52. *Id.* at 317–18.

53. *Id.*

54. *Id.* at 319.

55. *See id.* at 317–18.

56. 462 U.S. 791 (1983).

57. *Id.* at 800.

58. W.P. Wade, *Actual Notice*, 19 AM. L. REV. 73, 74 (1885) (discussing the definition of actual notice).

of legal action through publication in a public record, such as a newspaper.<sup>59</sup> Providing notice by standard mail falls somewhere in between actual and constructive notice. Additionally, certified mail goes a bit closer toward actual notice than normal mail, by providing the sender with a receipt of delivery to its destination.<sup>60</sup>

C. *Adequate Notice of Forfeiture Proceedings to Inmates Specifically, Before Dusenbery*

Receiving notice of forfeiture proceedings is essential in allowing parties the opportunity to contest the attempted property deprivation. Thus, a thorough explanation of how notice operates in forfeiture proceedings is key. In an administrative forfeiture, property “may be forfeited by the seizing agency if proper notice of the seizure and intent to forfeit is given and no person files a claim to the property . . . within the allotted time period.”<sup>61</sup> After such a nonjudicial forfeiture proceeding has concluded, the only ground on which to attack the forfeiture and have it set aside is for a lack of adequate notice.<sup>62</sup> Although courts have been somewhat inconsistent in their procedural method of analysis in reviewing the adequacy of notice, they agree that notice is the only proper ground of review after closure of an administrative forfeiture.<sup>63</sup>

59. See *Mullane*, 339 U.S. at 314–15.

60. *What is Certified Mail?*, USPS.COM (Nov. 9, 2018), <https://faq.usps.com/s/article/What-is-Certified-Mail> [<https://perma.cc/7VJF-TVJH> (staff-uploaded archive)].

61. *Weng v. United States*, 137 F.3d 709, 712 (2d Cir. 1998) (quoting *United States v. Idowu*, 74 F.3d 387, 394 (2d Cir. 1996)).

62. See 18 U.S.C. § 983(e)(1); Rebecca Hausner, *Adequacy of Notice Under CAFRA*, 36 CARDOZO L. REV. 1917, 1926–27 (2018). 18 U.S.C. § 983(e)(1) provides the requirements for a motion to set aside forfeiture:

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.

This shows explicit statutory consideration of potential notice procedure deficiencies in the context of nonjudicial forfeiture proceedings. Because inmates can do nothing to ensure they receive notice, mandating heightened procedural protections in this context is important. While this Recent Development is principally concerned with due process issues that are relevant under subsection (A) of § 983(e)(1), subsection (B) of § 983(e)(1) is also problematic. Subsection (B) only requires that the moving party know about the *seizure*. Therefore, a party contesting forfeiture will fail under § 983(e)(1) and be unable to have the forfeiture set aside for lack of adequate notice if they knew about the seizure—even if they were completely unaware of the forfeiture proceeding itself.

63. The cases are somewhat convoluted here, so an explanation is in order. Under 18 U.S.C. § 983(e)(5), a § 983(e) motion is the exclusive remedy to set aside an administrative forfeiture lacking “reasonable notice” as outlined in § 983(e)(1). However, courts differ on how they procedurally analyze such notice claims, whether via the statutory vehicle or not. Compare *United States v. Brome*, 942 F.3d

Accordingly, the protections provided by adequate notice are important in the forfeiture context generally, but especially when it comes to administrative forfeitures. After the administrative proceeding is complete, courts cannot conduct a review of the forfeiture on the merits but, instead, may only review procedural deficiencies concerning a lack of adequate notice, which leaves a great deal of room for mistake.<sup>64</sup> Additionally, but in a different manner, completed judicial civil forfeitures may also be contested after the fact for notice deficiencies.<sup>65</sup>

In the context of apprising inmates of such forfeiture proceedings specifically, the standard for providing adequate notice has often been debated. Prior to *Dusenbery*, some circuits held that actual notice to inmates who were potential parties to forfeiture proceedings was required.<sup>66</sup> Other circuits held

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550, 552–53 (2d Cir. 2019) (analyzing whether both statutory notice requirements and general due process principles are complied with under § 983(e)), *Mesa Valderrama v. United States*, 417 F.3d 1189, 1196–98 (11th Cir. 2005) (same), *Payne v. United States*, 2012 WL 12905298, at \*2–3 (C.D. Cal. Apr. 30, 2012) (same), *United States v. Weimer*, 2006 WL 562554, at \*3–5 (E.D. Penn. Mar. 7, 2006) (same), and *Bermudez v. N.Y.C. Police Dep't*, 2008 WL 3397919, at \*3–6 (S.D.N.Y. Aug. 11, 2008) (same), with *Dusenbery v. United States*, 534 U.S. 161, 165–174 (2002) (invoking equitable powers to review whether adequate notice was provided), *United States v. McGlory*, 202 F.3d 664, 670 (3d Cir. 2000) (same), and *Walker v. U.S. DEA*, 2002 WL 1870131, at \*2–3 (S.D.N.Y. Aug. 14, 2002) (using a federal civil due process notice analysis without using the § 983(e) procedural vehicle). Regardless, well before § 983(e) went into effect in August 2000, it had already been established that administrative forfeitures can only be contested after the fact if they are deficient of statutorily required or due process-required notice. See *McGlory*, 202 F.3d at 670 (“A district court ordinarily lacks jurisdiction to review . . . [the merits of] administrative forfeiture proceedings”); *United States v. Woodall*, 12 F.3d 791, 793 (8th Cir. 1993) (“[T]he federal courts have universally upheld jurisdiction to review whether an administrative forfeiture satisfied statutory and due process requirements.”); *Sarit v. U.S. DEA*, 987 F.2d 10, 17 (1st Cir. 1993) (“Whereas most challenges to [administrative] forfeiture would be foreclosed by . . . failure to utilize the [statutory] mechanism, courts have entertained challenges to the adequacy of notice, reasoning that the mechanism is not available to a plaintiff who is not properly notified of the pending forfeiture.”). This long-established principle was ultimately enacted by statute in § 983(e). Thus, while § 983(e) is the proper procedural vehicle for relief, courts sometimes utilize other procedures for analyzing the adequacy of notice. See *Hausner*, *supra* note 62, at 1938 (“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.”).

64. *Hausner*, *supra* note 62, at 1919.

65. See *United States v. One Toshiba Color Television*, 213 F.3d 147, 156–57 (3d Cir. 2000) (explaining that although the forfeiture of claimant’s property was void for lack of sufficient notice, claimant would still have to pursue further proceedings to recover his property because a motion under Federal Rule of Civil Procedure 60(b) is not a claim for the return of property); *Keszthelyi v. United States*, 2011 WL 1884007, at \*12–19 (E.D. Tenn. May 17, 2011) (detailing how to contest lack of notice after a concluded judicial civil asset forfeiture proceeding); *United States v. Madden*, 95 F.3d 38, 40 (10th Cir. 1996) (confirming much of the procedure mentioned in *Keszthelyi* for contesting a judicial forfeiture proceeding, although not specifically covering notice). The procedure for contesting notice as it relates to a completed judicial proceeding is different from an administrative proceeding because § 983(e) does not apply to forfeitures conducted judicially. See 18 U.S.C. § 983(e).

66. See *Weng*, 137 F.3d at 710 (“We conclude that at least when a property owner is in federal custody on the very charges that gave rise to the seizure of his property, absent special justifying circumstances, notice of forfeiture sent to him at the federal institution will not be deemed sufficient

that simply mailing notice of the forfeiture proceeding to an inmate at the prison facility constituted sufficient notice.<sup>67</sup>

D. *Adequate Notice of Forfeiture Proceedings to Inmates Specifically, Under Dusenbery*

The question of what measures are required for forfeiture notice to inmates to be adequate under the Due Process Clause ultimately reached the Supreme Court. In *Dusenbery*, an individual's house was raided, and the FBI seized cash found during the raid.<sup>68</sup> The FBI sent notice of an administrative forfeiture proceeding by mail to the individual at his institution of incarceration and, after receiving no response, turned over the cash to the U.S. Marshals Service.<sup>69</sup> The *Dusenbery* Court noted that the main question in forfeiture cases where notice is contested is whether notice of the forfeiture comports with the Due Process Clause, which requires the government to provide notice that is "reasonably calculated under all the circumstances" to apprise prisoners of the pendency of a forfeiture action and afford them an opportunity to contest it.<sup>70</sup>

The Court went on to hold that actual notice to inmates was not required in the context of asset forfeiture proceedings.<sup>71</sup> The Court stated that mail addressed to the petitioner at the penitentiary was "clearly acceptable"<sup>72</sup> because although the mail goes through the extra step of prison internal delivery, that does not in and of itself make mailing notice constitutionally inadequate. The Court concluded that the seizing agency's use of the prison mail distribution system described was reasonably calculated, under all the circumstances, to apprise the petitioner of the action.<sup>73</sup> "Due process require[d] no more."<sup>74</sup>

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unless actually received by him."); *Woodall*, 12 F.3d at 794–95 ("[F]undamental fairness surely requires that either the defendant or his counsel receive actual notice of the agency's intent to forfeit in time to decide whether to compel the agency to proceed by judicial condemnation.").

67. The First, Sixth, Seventh, and Tenth Circuits have all held that a presumption of adequate notice exists when notice is sent via certified mail to the proper prison facility. *See Whiting v. United States*, 231 F.3d 70, 76–77 (1st Cir. 2000); *United States v. Tree Top*, 1997 WL 702771, at \*1–2 (6th Cir. 1997) (unpublished table decision); *Chairez v. United States*, 355 F.3d 1099, 1101–02 (7th Cir. 2004); *United States v. Clark*, 84 F.3d 378, 381 (10th Cir. 1996).

68. *Dusenbery*, 534 U.S. at 163.

69. *Id.* at 164.

70. *Id.* at 168.

71. *See id.* at 170 ("We note that none of our cases cited by either party has required actual notice in proceedings such as this.").

72. *Id.* at 172 ("Short of allowing the prisoner to go to the post office himself, the remaining portion of the delivery would necessarily depend on a system in effect within the prison itself relying on prison staff.").

73. *Id.* at 173.

74. *Id.* at 172–73.

E. *Adequate Notice of Forfeiture Proceedings to Inmates Specifically, After Dusenbery*

While, momentarily, it seemed as if *Dusenbery* had definitively resolved the questions surrounding adequacy of notice to inmates of forfeiture proceedings, a split among the circuits has persisted on a related question: which party to a proceeding contesting notice has the burden of proving the adequacy or inadequacy of notice given by certified mail? Indeed, the Eighth Circuit explicitly noted this split: “*Dusenbery* does not address the question of whether courts need to inquire into prisons’ mail-distribution procedures, so it is not controlling on this point.”<sup>75</sup> The First, Sixth, Seventh, and Tenth Circuits have generally continued to use a seemingly irrebuttable presumption that adequate notice exists when notice is sent via certified mail to the proper prison facility (absent evidence that the seizing agency actually knew of prison mail delivery system deficiencies).<sup>76</sup> Thus, in those jurisdictions, once certified mail is sent to the correct prison, the government does not have to prove adequate prison mail distribution procedures, and the inmate has no ability to introduce evidence to the contrary. The Eighth Circuit uses a similar but slightly different standard by employing an explicitly rebuttable presumption that delivery of notice by certified mail is adequate, which places the burden on the inmate contesting notice to prove inadequacy of prison mail delivery systems.<sup>77</sup>

Under the two standards named above, when notice is sent to an inmate by certified mail, and thus a presumption of adequate notice arises, the burden is placed on the inmate contesting notice to prove either that the seizing agency had knowledge of inadequate prison mail delivery systems (if irrebuttable) or that the prison employed inadequate internal mail distribution systems (if rebuttable). Regardless of which form the presumption takes, overcoming it is a high bar to meet.

On the opposite end of the spectrum, the Third and Fourth Circuits have declined to apply *any* presumption that adequate notice exists. Rather, they place the burden directly on the government to show that the prison’s internal procedures for delivering mail are reasonably calculated to notify the prisoner.<sup>78</sup>

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75. *Nunley v. Dep’t of Just.*, 425 F.3d 1132, 1138 (8th Cir. 2005).

76. See *Whiting v. United States*, 231 F.3d 70, 76–77 (1st Cir. 2000); *United States v. Tree Top*, 1997 WL 702771, at \*2 (6th Cir. 1997) (unpublished table decision); *Chairez v. United States*, 355 F.3d 1099, 1101–02 (7th Cir. 2004); *United States v. Clark*, 84 F.3d 378, 381 (10th Cir. 1996). The Seventh Circuit most explicitly employs an irrebuttable presumption. See *Chairez*, 355 F.3d at 1101 (refusing to “inquire into the details of [the] internal mail delivery systems of jails and prisons”).

77. *Nunley*, 425 F.3d at 1137–38.

78. See *United States v. One Toshiba Color Television*, 213 F.3d 147, 155 (3d Cir. 2000); *United States v. Minor*, 228 F.3d 352, 358 (4th Cir. 2000).

II. THE SECOND CIRCUIT CORRECTLY REFUSED ANY PRESUMPTION OF ADEQUATE NOTICE IN *UNITED STATES V. BROME*

In *United States v. Brome*,<sup>79</sup> the inmate challenged notice of an administrative forfeiture proceeding against \$21,019 of his property after the administrative proceeding had concluded.<sup>80</sup> Brome and his wife had been stopped by police, pulled out of their car, and searched for weapons because Brome was on parole, at which point the police seized their cash.<sup>81</sup> The property was taken via administrative forfeiture by the DEA after notice was sent to Brome's place of incarceration and no claim in protest was filed.<sup>82</sup> The *Brome* court, after noting the current circuit split on burden of proof, sided with the Third and Fourth Circuits in holding that the government has the burden of proving adequacy of prison mail distribution systems.<sup>83</sup> The court ultimately held that the government met its burden by showing the prison had adequate procedures in place to reasonably apprise Brome of the forfeiture action, akin to those approved in *Dusenbery*.<sup>84</sup>

This part advances the discussion by explaining various reasons why the Second Circuit was correct in refusing any presumption of adequate notice: First, the *Dusenbery* Court suggested that prison mail distribution systems should be inquired into for purposes of determining adequacy of mailed notice. And second, normative considerations, as well as a settled legal principle regarding burden shifting, dictate that the burden of proving adequate prison mail distribution procedures should be on the government.

A. *The Supreme Court in Dusenbery Suggested Courts Should Inquire into Adequacy of Notice via Prison Mail Distribution Systems*

First, the irrebuttable presumption that notice is adequate when certified mail is delivered to a prisoner's institution of incarceration, adopted by the Seventh Circuit in *Chairez v. United States*,<sup>85</sup> must be disposed of as an incorrect understanding of *Dusenbery*. While the Seventh Circuit is correct that *Dusenbery* does not explicitly mandate an inquiry into the adequacy of prison mail distribution systems,<sup>86</sup> a plain reading of the *Dusenbery* majority's reasoning leads to the inescapable inference that courts should inquire into internal mail distribution procedures in some manner. When determining if notice to the

79. 942 F.3d 550 (2d Cir. 2019).

80. *Id.* at 551–52.

81. *Id.* at 551.

82. *Id.* at 551–52.

83. *See id.* at 553.

84. *See id.* at 554.

85. 355 F.3d 1099 (7th Cir. 2004).

86. The Seventh Circuit's reading of *Dusenbery*, that there is no explicit requirement that courts inquire into internal mail distribution procedures, was adopted by the Eighth Circuit as well. *See Nunley v. Dep't of Just.*, 425 F.3d 1132, 1138 (8th Cir. 2005).

inmate in *Dusenbery* was constitutionally adequate under *Mullane*, the *Dusenbery* Court did not stop after determining that certified mail was sent to the correct prison.<sup>87</sup> Instead, the *Dusenbery* Court did a deep dive into information provided by the government about the measures in place to promote proper mail delivery to inmates,<sup>88</sup> ultimately concluding that the FBI's use of the thoroughly examined mail distribution procedures was constitutionally adequate under *Mullane*.<sup>89</sup> It seems quite illogical that the Supreme Court would do a thorough examination of the mail distribution procedures in place and determine that use of such procedures resulted in the FBI's method of notice by mail being constitutionally adequate, only to not hold lower courts to the same level of examination.<sup>90</sup> While the *Dusenbery* majority held the use of mail sent to the inmate at the correct prison was "clearly acceptable," the Court also continued and explicitly noted that the seizing agency's "use of the [mail distribution] system described in detail" made the agency's method of notice sufficient under the *Mullane* reasonableness standard.<sup>91</sup>

Additionally, while ultimately rejecting the Seventh Circuit's sweeping declaration that *Dusenbery* did not require any inquiry into prison mail distribution systems, the Eighth Circuit concluded instead that *Dusenbery* did not address this question one way or the other, and thus it was not controlling on this issue.<sup>92</sup> The only source the Eighth Circuit cited for this notion<sup>93</sup> was

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87. *Dusenbery v. United States*, 534 U.S. 161, 168–69 (2002).

88. *Id.* The Court explained:

The FBI sent certified mail addressed to petitioner at the correctional facility where he was incarcerated. At that facility, prison mailroom staff traveled to the city post office every day to obtain all the mail for the institution, including inmate mail. The staff signed for all certified mail before leaving the post office. Once the mail was transported back to the facility, certified mail was entered in a logbook maintained in the mailroom. A member of the inmate's Unit Team then signed for the certified mail to acknowledge its receipt before removing it from the mailroom, and either a Unit Team member or another staff member distributed the mail to the inmate during the institution's "mail call."

*Id.* (citations omitted).

89. *Id.* at 172–73.

90. Beyond the analysis of *Dusenbery*, fairness concerns abound if such an irrebuttable presumption is applied. In such a case, it would be irrelevant if a prison had wholly inadequate procedures in place or had numerous complaints of inmates not receiving mail. Under the irrebuttable presumption, so long as the certified mail is received by the prison and the seizing agency did not make itself actually aware of such inadequacies, the conclusive presumption applies. Additionally, the Seventh Circuit's concern that inquiring into distribution systems would be "burdensome," *Chairez v. United States*, 355 F.3d 1099, 1101, is overstated. See *Nunley*, 425 F.3d at 1138.

91. *Dusenbery*, 534 U.S. at 172–73.

92. *Nunley*, 425 F.3d at 1138 ("Finally, we find *Chairez's* invocation of *Dusenbery* unpersuasive. *Dusenbery* does not address the question of whether courts need to inquire into prisons' mail-distribution procedures, so it is not controlling on this point.")

93. *Id.*

footnote five of *R.A.V. v. City of St. Paul*.<sup>94</sup> The footnote, in pertinent part, states that “[i]t is of course contrary to all traditions of our jurisprudence to consider the law on this point conclusively resolved by broad language in cases where the issue was not presented or even envisioned.”<sup>95</sup> However, this assertion seems to be quite a stretch when applied to the *Dusenbery* Court’s analysis of the issue. While it is true that the *Dusenbery* petitioner did not specifically present the issue of whether courts should inquire into prison mail distribution procedures,<sup>96</sup> it can hardly be said that the language used by the *Dusenbery* Court was simply “broad language” in a case where the issue was “not . . . even envisioned.”<sup>97</sup>

First, the petitioner in *Dusenbery*, as well as the government, both clearly “envisioned” this issue in their respective arguments, as the Petitioner cited unreliable internal mail procedures as one reason notice by mail was constitutionally inadequate,<sup>98</sup> and the government cited the procedures in place as evidence supporting the reasonableness of its notice under *Mullane*.<sup>99</sup> Both parties plainly “envisioned” that distribution procedures should be inquired into as they are relevant to determining the reasonableness of the notice employed. Second, the *Dusenbery* Court considered the specific details of the prison’s mail distribution procedures and relied on that inquiry to hold that use of that mail distribution system was “reasonably calculated” under *Mullane*.<sup>100</sup> For these reasons, while the circuits obviously disagree on what exactly *Dusenbery* prescribes, it seems clear that, at a minimum, the issue was indeed “envisioned” by the Court and parties. Therefore, while the Court did not explicitly mandate

94. 505 U.S. 377, 386–87 n.5 (1992). This case is about First Amendment jurisprudence, an issue unrelated to the topic of this Recent Development. *See id.*

95. *Id.*

96. Brief for Petitioner at i, *Dusenbery*, 534 U.S. 161 (No. 00-6567), 2001 WL 521455, at \*i.

97. *R.A.V.*, 505 U.S. at 386–87 n.5 (1992). Additionally, specific presentation of a given issue in the parties’ arguments does not seem to be an overriding concern of the Supreme Court, considering the Court often strays from the parties’ specific arguments when deciding cases. *See* Timothy Macht & Derek Borhardt, *Can Courts Introduce Legal Issues Not Raised by the Parties?*, LAW.COM (July 2, 2020), <https://www.law.com/newyorklawjournal/2020/07/02/can-courts-introduce-legal-issues-not-raised-by-the-parties/?slreturn=20200907201222> [<https://perma.cc/ZZU9-ALFC>].

98. Brief for Petitioner, *supra* note 97, at 15–16, 2001 WL 521455, at \*15–16 (“[A]lthough the Government, through the testimony of one mailroom employee, introduced evidence of the procedures in place at the prison for handling certified mail, it offered nothing to show that the procedures were followed or effective in this case, or in general. . . . [T]he lower courts held that the procedures were constitutionally adequate based on their intuition about fairness, notwithstanding the absence of any evidence to show that the procedures worked in reality—that is, evidence that the procedures used did not carry an undue risk that a forfeiture notice sent to the prison would not be delivered to the inmate for whom it was intended.”) (citations omitted).

99. Brief for the United States at 11, *Dusenbery v. United States*, 534 U.S. 161 (2002) (No. 00-6567), 2001 WL 811711, at \*11 (“[T]he BOP’s current mail procedures and the record in this case convincingly demonstrate that mailing a forfeiture notice to the inmate at his prison is ‘reasonably calculated’ to reach the inmate.”).

100. *Dusenbery*, 534 U.S. at 172–73.

such an inquiry, at a minimum, the Court's language clearly implies that lower courts should conduct the same analysis in this context, and thus, that an irrebuttable presumption of adequacy is an incorrect standard.

It is true that the *Dusenbery* Court was reviewing a grant of a summary judgment motion, and thus the movant, the government, bore the burden at that stage of proving "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."<sup>101</sup> While one could argue that this high standard of proof at summary judgment is why the *Dusenbery* majority went beyond simply analyzing proof that the notice was mailed to the correct prison and inquired into the mail distribution procedures in place, there would be no reason for the Court to do so. If the *Dusenbery* majority believed, as the Seventh Circuit held, that an irrebuttable presumption was the correct standard to follow when notice is mailed to the correct prison and that the inquiry should end there, the inquiry would have stopped. If the *Dusenbery* Court agreed with the Seventh Circuit, then even with the high standard of proof at the summary judgment stage, proof of certified mail reaching the prison would be all that is required to show no reasonable trier of fact could find for the nonmovant that notice was unreasonable.

Instead the Court continued to analyze the mail distribution procedures in place at the prison. This suggests that the procedures must be analyzed in order to fully show the notice method employed by the government (certified mail) is "reasonably calculated" under *Mullane*.<sup>102</sup> Thus, because the Second Circuit in *Brome* followed the *Dusenbery* majority's analysis by inquiring into the prison mail distribution procedures, thereby refusing such an irrebuttable presumption of adequacy when notice is mailed, the Second Circuit came to the correct result.<sup>103</sup>

Now that we have funneled the discussion away from an irrebuttable presumption that completely disregards the adequacy of prison mail

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101. FED. R. CIV. P. 56(a). To grant summary judgment, a court must be satisfied that no reasonable trier of fact could find for the nonmoving party. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

102. Indeed, Justice Ginsberg went even further in her dissent, arguing that the assertion that the government showed the mail distribution procedures used were adequate was groundless, for the government did not introduce anything to show the reasonableness or reliability of the mailroom to cell delivery at the prison at the time of the relevant forfeiture. *See Dusenbery*, 534 U.S. at 180 (Ginsberg, J., dissenting). This gives further support to the assertion that the notice method used by the government can only be "reasonable" under *Mullane* if the relevant prison's mail distribution procedures are adequate. Only after they are inquired into and found to be adequate will certified mail be "reasonable."

103. The Third and Fourth Circuits also placed this burden on the government. *See United States v. One Toshiba Color Television*, 213 F.3d 147, 155 (3d Cir. 2000); *United States v. Minor*, 228 F.3d 352, 358 (4th Cir. 2000).

distribution systems,<sup>104</sup> we turn to which party must prove the adequacy of such mail distribution systems.<sup>105</sup>

B. *Normative and Legal Considerations Dictate That the Government Should Prove Adequacy of Notice Through Prison Mail Distribution Procedures*

By refusing a *rebuttable* presumption of adequacy, the Second Circuit in *Brome* also supported a long-standing principle of law that conveys why the government should bear the burden of proving adequacy of notice via its prison mail procedures.<sup>106</sup> The principle, originally stated in *United States v. New York, New Haven & Hartford Railroad Co.*,<sup>107</sup> reads as follows: “It is well settled that in the interest of fairness the burden of proof ordinarily resting upon one party as to a disputed issue may shift to his adversary when the true facts relating to the disputed issue lie peculiarly within the knowledge of the [adversary].”<sup>108</sup>

However, this well-settled principle of law, explicitly stated by the Supreme Court on multiple occasions<sup>109</sup> is “qualified” in certain

104. Such as the conclusive presumption explicitly adopted by the Seventh Circuit in *Chairez*, 355 F.3d 1099, 1101 (7th Cir. 2004).

105. Only one circuit has explicitly adopted the standard that an inmate must overcome a rebuttable presumption by proving inadequacy of mail distribution systems. *See* *Nunley v. Dep’t of Just.* 425 F.3d 1132, 1138 (8th Cir. 2005). Other circuits have adopted the standard that the onus is entirely on the government to prove the adequacy of notice by showing adequate mail distribution systems. *See* *United States v. Brome*, 942 F.3d 550 (2d Cir. 2019); *One Toshiba Color Television*, 213 F.3d at 155; *Minor*, 228 F.3d at 358.

106. Indeed, the Eighth Circuit in *Nunley* made passing mention that this doctrine could potentially be relevant in the context of inmates suing for inadequate notice of forfeitures, specifically regarding who has the burden of proving adequacy. *See* *Nunley*, 425 F.3d at 1138. While the *Nunley* court summarily concluded that, ultimately, the doctrine was inapplicable, for the reasons displayed in this section, fairness dictates that the doctrine should apply in this context.

107. 355 U.S. 253 (1957).

108. *United States v. Hayes*, 369 F.2d 671, 676 (9th Cir. 1966).

109. *See, e.g.*, *United States v. N.Y., New Haven & Hartford R.R. Co.*, 355 U.S. 253, 256 n.5 (1957) (“Such information is peculiarly within the knowledge of plaintiff (respondent) and/or the initial carrier . . . .’ The ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary.”); *Selma, Rome & Dalton R.R. v. United States*, 139 U.S. 560, 566–67 (1891). In *Selma*, the Court stated that

as the fact of payment or non-payment by the Confederate government was peculiarly within the knowledge of the claimant of[r] within his power—if in the power of any one—to establish, it may well be supposed that Congress intended that a claimant, as a condition of payment by the United States, should show that his demand belonged to the class for which the act of 1877 provided. But there was no proof on the subject by the plaintiff, nor does it appear, if that fact were material, that such proof was impossible. It prepared the case and went to a hearing upon the theory that it was entitled to judgment, upon proof simply of the services rendered, unless the United States showed that the claim in suit had been, in fact, paid by the Confederate government. We cannot accept that interpretation of the act.

*Id.* The principle can be traced back further still. *See* *Greenleaf’s Lessee v. Birth*, 31 U.S. (6 Pet.) 302, 312 (1832) (“That in many cases the bur[d]en of proof is on the party within whose peculiar knowledge and means of information the fact lies, is admitted.”). Further, in a 2014 case, the Supreme Court noted

circumstances.<sup>110</sup> This qualification arose in *Schaffer ex rel. Schaffer v. Weast*,<sup>111</sup> where a child's parents challenged the adequacy of a school district's individualized education program (IEP), which was guaranteed by law for certain students, such as their child with special needs.<sup>112</sup> The Supreme Court held that the burden of proof remained with the parents asserting inadequacy, reasoning: "[While s]chool districts have a 'natural advantage' in information and expertise . . . schools [are obligated] to safeguard the procedural rights of parents and to share information with them . . . ."<sup>113</sup> The *Schaffer* Court then pointed out the procedural safeguards in place to protect parents' right to information, including the ability to review all school records about their child as well as the right to an independent educational evaluation of their child by an expert if they disagree with the school's evaluation.<sup>114</sup> The Court ultimately reasoned, due to those protections, that "[parents] are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition."<sup>115</sup> Additionally the Court described other protections in place, including that school districts must answer a parent's complaint in writing, provide their reasoning behind the contested school action, provide details about other IEP options considered, and describe all evaluations, reports, and other factors the school used to decide on the IEP in question.<sup>116</sup> The *Schaffer* Court concluded that the protections "ensure that the school bears no unique informational advantage" over the parents.<sup>117</sup>

The above analysis from the Supreme Court makes clear the circumstances under which the rule originally stated in *New York, New Haven & Hartford Railroad Co.* is so "qualified."<sup>118</sup> In such circumstances where one party who would normally bear the burden of proof on an issue is at an informational disadvantage to their adversary, this alone is not enough. This exception to the general rule will only apply when a party truly lacks the information "peculiarly" in possession of their adversary.

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the language from *New York, New Haven & Hartford Railroad Co.* was an exception to the general rule that plaintiffs have the burden of proving the facts establishing the elements of their claim. See *Medtronic, Inc. v. Mirowski Family Ventures*, 571 U.S. 191, 202 (2014).

110. See *Greenleaf's Lessee*, 31 U.S. (6 Pet.) at 312.

111. 546 U.S. 49 (2005).

112. *Id.* at 52–53.

113. *Id.* at 60 (citation omitted).

114. *Id.*

115. *Id.* at 61.

116. *Id.*

117. *Id.* at 60–61.

118. *United States v. N.Y., New Haven & Hartford R.R. Co.*, 355 U.S. 253, 256 n.5 (1957) ("The ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary.").

Another case illustrates this burden of proof principle even further. In *Browzin v. Catholic University of America*,<sup>119</sup> a tenured engineering professor sued his former university employer for breach of contract, claiming they did not do everything possible to find him another “suitable position” at the university, which was required by law.<sup>120</sup> While this was not a ground the court ultimately decided on appeal, after citing the rule from *New York, New Haven & Hartford Railroad Co.*,<sup>121</sup> the D.C. Circuit noted the possibility that the burden of proof on the issue was allocated incorrectly and explicitly stated that the university was “plainly” in a much better position to know “what efforts were or were not undertaken to find for [the plaintiff] another post within the University.”<sup>122</sup>

The applicability of the burden-shifting rule to the *Browzin* case is further supported by a case out of the Ninth Circuit. In *United States v. Cortez-Rivera*,<sup>123</sup> the plaintiff sued the government for damage that occurred to his vehicle as a result of a search.<sup>124</sup> After citing the rule from *New York, New Haven & Hartford Railroad Co.*, the court held that

placing the burden on the government would require that it prove a negative fact—that the search did not affect the vehicle’s safety or operability. ‘[A]s a practical matter it is never easy to prove a negative. . . . For this reason, fairness and common sense often counsel against requiring a party to prove a negative fact, and favor, instead, placing the burden of coming forward with evidence on the party with superior access to the affirmative information.’<sup>125</sup>

The court reasoned that the plaintiff claiming damage in this case was clearly in a better position to know the condition of the vehicle prior to the search, and thus the extent of the resulting damage after, because the plaintiff was aware of the defects the car already had.<sup>126</sup> On the other hand, the government had no way of knowing what defects the car had prior to the search, and thus had no way of “proving a negative”—that there was no damage caused.<sup>127</sup>

*Schaffer*, *Browzin*, and *Cortez-Rivera* all indicate exactly why the burden of proving the adequacy of prison mail systems should be placed firmly on the government in the context of forfeiture cases. First, placing the burden on the plaintiff-inmate in such cases would do exactly what *Browzin* (impliedly) and *Cortez-Rivera* (explicitly) warned against: it would require the plaintiff to

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119. 527 F.2d 843 (D.C. Cir. 1975).

120. *Id.* at 844–45.

121. *See N.Y., New Haven & Hartford R.R. Co.*, 355 U.S. at 256 n.5.

122. *Browzin*, 527 F.2d at 849–50.

123. 454 F.3d 1038 (9th Cir. 2006).

124. *Id.* at 1041.

125. *Id.* at 1041–42 (quoting *Sissoko v. Rocha*, 440 F.3d 1145, 1162 (9th Cir. 2006)).

126. *Id.*

127. *Id.*

“prove a negative.” Just like the government in *Cortez-Rivera* would have had to prove a negative (that there was an absence of damage to the vehicle), inmates in proceedings to set aside a forfeiture for lack of notice, if bearing the burden, would also be required to prove a negative (the nonexistence of adequate prison mail systems that reasonably ensure notice is provided). Just as the government in *Cortez-Rivera* would have little way of knowing if anything on the car was damaged as a result of the search or instead damaged prior to the search, the inmate in proceedings to set aside a forfeiture would have little, if any, way of knowing the inner workings of the prison mail facility procedures and thus would have no way of showing, absent a particularized and isolated incident (which would be insufficient to prove the overarching procedures are inadequate), the facts required to prove inadequacy. The same concern was seen in *Browzin* because the professor had no way of knowing the facts surrounding what actions were taken to find him another job at the university and thus would have no way of proving how those steps were inadequate.

Secondly, in accordance with the general rule from *New York, New Haven & Hartford Railroad Co.*, placing the burden on an inmate in proceedings to set aside a forfeiture would require them to establish facts peculiarly within the knowledge of their adversary. Again, in these types of proceedings, the government is plainly in the better position to establish facts proving the adequacy of *its own systems*, as opposed to an inmate who has little, if any, idea how the systems internally function. While the government could easily have a prison official testify as to the particular steps in the mail delivery process, as an official in *Dusenbery* did,<sup>128</sup> an inmate has no real access to that internal information in order to show how the systems are inadequate. Moreover, not only is the government simply in a better position to demonstrate the adequacy of its systems, but how a given prison’s internal mail distribution system functions is knowledge “peculiarly” in the government’s possession. Thus an inmate is entirely dependent on the government to provide accurate and relevant information in order to make a case for inadequate notice procedures. Not to mention inmate movement is extremely restricted, and prison officials would likely be unreceptive to any requests for additional information. If anything, the only information an inmate may be aware of is what the very last stage of mail delivery looks like, when they are physically handed their mail.

Additionally, in the case where inmates contest forfeiture for a lack of notice, the facts are not present, as they were in *Schaffer*, to show informational

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128. *Dusenbery v. United States*, 534 U.S. 161, 165–66 (2002) (“[The prison official] testified that he signed the certified mail receipt for the FBI’s notice to petitioner regarding the cash. He also testified about the procedures within [the prison] for accepting, logging, and delivering certified mail addressed to inmates. [The official] explained that the procedure would have been for him to log the mail in, for [the inmate’s] ‘Unit Team’ to sign for it, and for it then to be given to [the inmate].”) (citations omitted).

symmetry between an inmate and the government. Instead, there is a huge resource imbalance between the two parties regarding access to the relevant evidence. While in *Schaffer* the parents were able to review all the school's records about their child, were entitled to an independent review of their child's needs, and were entitled to receive an explanation of the reasoning behind the school's contested decisions,<sup>129</sup> an inmate in a proceeding to set aside a forfeiture is entitled to no similar protective measures to ensure they are sufficiently informed about the prison mail delivery system.<sup>130</sup> There is clear asymmetry in access to such information. Thus, given that the protections which "disqualified" the parents in *Schaffer* from the burden-shifting rule are not present in the context of an inmate contesting forfeiture, such inmates are "left to challenge the government without a realistic opportunity to access the necessary evidence"—exactly what the *Schaffer* Court warned against.<sup>131</sup>

Finally, and from a normative standpoint, if the government truly believes its forfeiture of an inmate's property is justified and truly intended to provide notice, the government should be required to show that adequate mail delivery procedures were in place to reasonably ensure notice. After all, the government initiates administrative forfeiture proceedings. If an inmate actually receives notice and challenges the action, it would be converted into a judicial action, and the government, as plaintiff, would be required to prove a connection between the property and a crime.<sup>132</sup> The government should not be allowed to not only skirt its burden of proof through administrative forfeiture<sup>133</sup> but then also have that forfeiture upheld by throwing the burden on an inmate in the second instance when they contest the adequacy of notice.<sup>134</sup> Considering the concern the government has with getting whipsawed in other circumstances, such as in the collection of tax income for example,<sup>135</sup> it should not be allowed

129. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 60–61 (2005).

130. This Recent Development is not arguing a complete discoverability problem. Certainly, an inmate could gain some information regarding internal prison mail distribution systems during a formal discovery process. However, this does not, in and of itself, ameliorate the concerns necessitating the burden-shifting rule. The resource imbalance between prisoners and the government was displayed in both an unreasonable search case, *Cortez-Rivera*, 454 F.3d at 1041–42, and a breach of contract case, *Browzin v. Cath. Univ. of Am.*, 527 F.2d 843, 849 (D.C. Cir. 1975). Surely both the government in *Cortez-Rivera* and the professor in *Browzin* could have obtained information to help them prove their respective cases through some form of discovery, yet the resource imbalance as far as access to the relevant information resulted in the salience of burden-shifting doctrine in *Browzin* and its application (in the negative) in *Cortez-Rivera*. If the burden of proof is placed on the inmate, they will be entirely dependent on the cooperation of the government to provide the information necessary to carry the burden, the same entity who financially benefits from the forfeiture of the inmate's property.

131. *Schaffer*, 546 U.S. at 61.

132. *See supra* Section I.A.

133. *See supra* Section I.A.

134. *See supra* note 65 and accompanying text.

135. *See supra* note 29 and accompanying text. Whipsaw concerns arise for the government when two taxpayers have claimed the same benefit. If the government allowed both, it would be unable

to flip the script and whipsaw inmates on the front end by taking their property without adequate notice and on the back end by making it harder to contest. This is especially troubling when considered against the backdrop of the massive financial incentives in place for the government to seize property that encourages overreach.<sup>136</sup>

### III. WHY THE *DUSENBERY* COURT WAS WRONG THAT MAIL PROVIDES ADEQUATE NOTICE AND THE UTILITY OF *MATHEWS V. ELDRIDGE*

This part contributes to the discussion surrounding adequate notice of forfeiture proceedings to prisoners by showing why actual notice should be required in this context, as the petitioner in *Dusenbery* argued.<sup>137</sup> Section A covers why actual notice best meets the principles prescribed by *Mullane*. Section B discusses how, simply from a fairness standpoint, actual notice should be required. Section C lays out why judicial economy favors actual notice. Finally, Section D covers how the three factors announced in *Mathews v. Eldridge* lend support for actual notice.

#### A. *Actual Notice Best Complies with General Due Process Notice Principles in the Inmate Context*

To restate the general notice standard from *Mullane*, “[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice 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.”<sup>138</sup> Accordingly, the particular circumstances of a given case should dictate what level of notice is required; one should not gloss over specific facts that lend themselves to requiring more (or less) strenuous notice procedures. While the Supreme Court in *Dusenbery* held actual notice was not required to inmates whose property is subject to a forfeiture proceeding, given the particular facts and circumstances involved in such a case, actual notice should be required. The *Mullane* Court also stated that “process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.”<sup>139</sup> While the *Dusenbery* majority made only one passing

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to collect tax income from either party. See Harvey S. Gilbert & Steve Mather, *Whipsaw Revisited*, 43 TAX L. 343, 343–44 (1990); IRS, INTERNAL REVENUE MANUAL pt. 5, ch. 20, § 6 (2017), [https://www.irs.gov/irm/part5/irm\\_05-020-006#idm140576771453648](https://www.irs.gov/irm/part5/irm_05-020-006#idm140576771453648) [<https://perma.cc/MW5Z-S25A>].

136. See *supra* notes 22–23 and accompanying text.

137. See generally Brief for Petitioner, *supra* note 97, at 12–25, 2001 WL 521455, at \*12–25 (arguing for actual notice in prisoner forfeiture proceedings).

138. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950).

139. *Id.* at 315.

note of this key phrase from *Mullane*, as Justice Ginsberg noted in her dissent,<sup>140</sup> the phrase is crucial when considering the facts and circumstances surrounding forfeiture proceedings involving inmates' property.

The facts and circumstances involved in a typical civil litigation scenario<sup>141</sup> where notice is required, and those of an inmate whose property is subject to a forfeiture proceeding, are two worlds apart. If a party is attempting to provide "reasonable notice" to their counterparty in a given situation, the *Mullane* Court's holding suggests that when the person's location of residence is known, resorting to anything less than the mail is inadequate. On the other hand, when the person's location is not known or reasonably ascertainable, constructive notice by publication is sufficient.<sup>142</sup> However, an "average" situation in which the recipient's location of residence is known is factually quite distinct from that of an inmate. Notice by mail in the former situation is reasonable under the circumstances because it is common for the average citizen to check their own mail; requiring more (such as personal service) could be rife with problems, considering people often leave their places of residence, sometimes for extended periods, or move.

The circumstances—specifically the exact known location—of an inmate make all of the typical justifications for notice by mail when location of residence is known disappear. As Justice Ginsberg noted, the government, which is "attempting" to provide notice to such an inmate, knows exactly where the inmate is at all hours of the day;<sup>143</sup> they know based on government records exactly which prison they are at, and, if need be, their exact location within the prison could be ascertained by a phone call to the facility. These circumstances are plainly different than those of the typical situation described above because, while a free citizen can leave their "known" location, an inmate has no such luxury by virtue of their confinement and thus cannot frustrate attempts to provide actual notice. Given these particularly salient facts, it seems obvious that "one desirous of actually informing the absentee" would simply ensure that actual notice of the forfeiture proceeding was received.

Additionally, while the *Dusenbery* majority pointedly stated that due process does "not require . . . heroic efforts by the [g]overnment,"<sup>144</sup> no such heroic efforts are required here. A simple acknowledgement by the inmate that they received the notice of forfeiture proceedings by mail would meet the requirements of actual notice. The majority was also concerned that requiring actual notice to inmates could be a slippery slope leading to requiring actual

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140. See *Dusenbery v. United States*, 534 U.S. 161, 173 (2002) (Ginsberg, J., dissenting).

141. By typical civil litigation scenario, I mean a situation in which one of the parties is not an inmate.

142. *Mullane*, 339 U.S. at 317–18.

143. See *Dusenbery*, 534 U.S. at 174 (Ginsberg, J., dissenting).

144. *Id.* at 162 (majority opinion).

notice to all those “in the custody of the government.”<sup>145</sup> The majority provided the example of active-duty military members, who are technically in the custody of the government while they are serving, both at home and overseas.<sup>146</sup> This example hardly supports the slippery slope argument, as the circumstances of an incarcerated inmate are still distinguishable: the majority of military members are not confined in the government’s custody in the same sense as an inmate. While quite often military members are required to be certain places or else face court-martial, they also can go off base during nonworking hours, take leave for vacation or family obligations, or be in the process of changing base assignments. While true that a military member who is actively deployed to a war zone will be much more controlled than one who is stationed at home or in a friendly country, as a whole, military members are far less accounted for. There is little risk of a true slippery slope, even accounting for a more controlled deployment context, as the sheer numbers indicate.<sup>147</sup> In sum, while the concern justifying notice by mail is still present with others in the “custody” of the government, such as military members, that concern is irrelevant with inmates, whose exact location is always known.

B. *Fairness Dictates that Actual Notice Should Be Required for Inmates*

While someone not in confinement has the ability to check the mail at their known residence for notice of proceedings, inmates have no such ability and depend entirely on the internal mail systems of the prison for such delivery of notice.<sup>148</sup> Given that inmates are in the custodial control of the government—the same entity that is trying to forfeit their property—and that they can do nothing themselves to check for notice of such proceedings, they should not be at risk of administrative forfeiture due to lack of notice when they are dependent on the forfeiting entity for such notice. Additionally, given that such inmates may have no one else to safeguard their property rights, unlike the beneficiaries with unknown locations in *Mullane*, this concern is even greater.<sup>149</sup>

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145. *Id.* at 170.

146. *Id.*

147. Of the roughly 1.3 million active duty military members, as of 2016 only around 193,000 are deployed overseas, with an even smaller portion deployed to an active war zone. Kristen Bialik, *U.S. Active-Duty Military Presence Overseas is at its Smallest in Decades*, PEW RSCH. CTR. (Aug. 22, 2017), <https://www.pewresearch.org/fact-tank/2017/08/22/u-s-active-duty-military-presence-overseas-is-at-its-smallest-in-decades/> [<https://perma.cc/2E5L-K5HB>]. Additionally, that number will shrink even further when considering that few of those deployed to an active war zone will be subjected to a civil suit such as a forfeiture proceeding. *Cf.* *Dusenbery*, 534 U.S. at n.5 (Ginsberg, J., dissenting) (“It is at least doubtful, however, that a soldier, oblivious to a pending action, would return home to find her property irrevocably forfeited to her Government because she had the misfortune to be in a combat zone too long.”).

148. *Dusenbery*, 534 U.S. at 179 (Ginsberg, J., dissenting).

149. *Id.* at 178.

Additionally, many prisons have already implemented procedures that ensure inmates get actual notice, such as requiring prisoners to sign a log acknowledging their receipt of legal mail.<sup>150</sup> The viability of this practice has received support from Federal Bureau of Prisons (“BOP”) Regulations,<sup>151</sup> and the Bureau of Prisons Mail Management Manual explicitly states that an inmate’s signature is required on incoming certified mail.<sup>152</sup> While this BOP regulation does not require confirmation of actual notice by inmate signature, it clearly contemplates this as a feasible option for ensuring inmates actually receive their legal mail, and the BOP Mail Management Manual confirms that federal prisons are expected to abide by this procedure.<sup>153</sup> Thus, an agency pressing for forfeiture of an inmate’s property could easily take advantage of these procedures by verifying compliance to ensure its notice cannot be defective, as far as the method of notice is concerned. After actual notice has been documented, the agency can simply request the documentation be forwarded to them, to keep for future reference in the event a notice challenge is raised.

The Second Circuit illustratively summarized these fairness concerns in *Weng v. United States*:<sup>154</sup>

at least where the owner [of forfeited property] is in federal custody on the very charges that justify a federal agency in seeking the forfeiture, there is no undue hardship to the agency in insuring [sic] that the owner-prisoner actually receive the legally required notification. When such an investigating agency wishes to secure such a prisoner’s cooperation in testifying against some important wrongdoer, it has no difficulty delivering the message in a manner that insures receipt. On the other hand, when the agency employs the administrative procedure to forfeit up to a half million dollars of the prisoner’s property, it is content to use the mails, with no assurance that the notice will reach the addressee.<sup>155</sup>

150. *See id.* at 180–81; *United States v. Brome*, 942 F.3d 550, 553 (2d Cir. 2019).

151. 28 C.F.R. § 540.19(a) (2018) (“[Prison s]taff shall mark each envelope of incoming legal mail (mail from courts or attorneys) to show the date and time of receipt, the date and time the letter is delivered to an inmate and opened in the inmate’s presence, and the name of the staff member who delivered the letter. The inmate may be asked to sign as receiving the incoming legal mail.”).

152. U.S. DEP’T OF JUST., FED. BUREAU OF PRISONS, MAIL MANAGEMENT MANUAL § 4.9(b) (Apr. 5, 2011), [https://www.bop.gov/policy/progstat/5800\\_016.pdf](https://www.bop.gov/policy/progstat/5800_016.pdf) [<https://perma.cc/9C9A-3NY4>].

153. Justice Ginsberg made note of both the BOP Manual policy as well as the BOP regulation as clear evidence of the viability of improved procedures requiring inmates to sign for certified mail. *Dusenbery*, 534 U.S. at 180 (Ginsberg, J., dissenting).

154. 137 F.3d 709 (2d Cir. 1998).

155. *Id.* at 715.

C. *Judicial Economy Weighs in Favor of Actual Notice*

Because the only way to contest an administrative forfeiture after the fact is to claim inadequacy of notice,<sup>156</sup> if the government provides actual notice (which as stated above, is relatively simple in this context), then after-the-fact claims that such a forfeiture was improper (which would have to allege notice deficiencies) could be dismissed, either for failure to state a claim or on a motion for summary judgment.<sup>157</sup> Under Federal Rule of Civil Procedure 12(b)(6), a motion to dismiss a plaintiff's claim will be granted where that claim constitutes a "failure to state a claim upon which relief can be granted."<sup>158</sup> For a plaintiff to overcome a motion to dismiss, "[the] complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face."<sup>159</sup> Additionally, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."<sup>160</sup>

Here, assuming actual notice is adopted as the standard in this context and that a document signed by an inmate to record receipt would be considered proof of actual notice under this standard, then no valid claim can exist over an inadequate method of notice when such actual notice has been provided and documented. An inmate would be unable to assert a nonfrivolous claim that the method of notice used by the government was unreasonable, so long as the government consistently followed such documentation procedures.<sup>161</sup> Even so, if an inmate did attempt to allege deficient notice in a proceeding to set aside a forfeiture, but a signed receipt existed as evidence of actual notice, then any allegation that the method of notice was improper would fail. While evidence extrinsic to the complaint typically cannot be considered in the context of a 12(b)(6) motion (except in very specific circumstances), and thus the signed receipt should not be considered at that stage, the government could petition

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156. 18 U.S.C. § 983(e) (2018).

157. For examples of cases where a motion to dismiss for failure to state a claim under Federal Rule Civil Procedure 12(b)(6) was used as a valid ground to attack a plaintiff's claim that a forfeiture should be set aside for lack of adequate notice, see *Walteros v. DEA*, No. 17-23641, 2018 WL 555515, at \*3 (S.D. Fla. Jan. 23, 2018); *King v. Does*, No. 07-4155, 2009 WL 6849444, at \*1-4 (D.S.C. Jan. 14, 2009), *aff'd*, *King v. DEA*, No. 6:07-CV-4155, 2009 WL 6849443, at \*1 (D.S.C. Feb. 3, 2009), *aff'd*, *King v. Does*, 331 Fed. App'x. 242 (4th Cir. 2009).

158. FED. R. CIV. P. 12(b)(6).

159. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 570 (2007)).

160. *Id.*

161. It would seem that the only nonfrivolous dispute that could still exist would be an inmate's claim that the procedures employed were unreasonable because the guards forged inmate signatures on the receipts. However, competent evidence must be presented to show a genuine dispute at this stage, and it is unlikely that such evidence would exist.

the judge for admission of this extrinsic evidence for rebuttal purposes.<sup>162</sup> If the evidence is admitted, the motion would typically be converted into a motion for summary judgment,<sup>163</sup> at which stage the claim would fail because, with a signed receipt as evidence of actual notice, no reasonable trier of fact could find for the nonmoving party as the procedures employed were “reasonably calculated” to provide notice under *Mullane*.<sup>164</sup> In sum, actual notice is always a sufficient method of notice, and thus, so long as the notice sent was timely per the relevant forfeiture statute, actual notice will ensure virtually no lengthy dispute over the adequacy of notice can exist.<sup>165</sup>

D. *The Mathews v. Eldridge Factors Lend Support for Actual Notice*

In the seminal case *Mathews v. Eldridge*, the plaintiff’s disability benefits were terminated, and he claimed the administrative procedures in place for making that determination were constitutionally inadequate.<sup>166</sup> The plaintiff asserted that his benefits should have been reinstated pending the outcome of a hearing regarding termination.<sup>167</sup> The Supreme Court disagreed, holding that the procedures in place satisfied due process and no pre-deprivation hearing was required.<sup>168</sup> The Court held the procedures were adequate because (1) disability benefits are not based on financial need and a terminated recipient could apply for welfare, (2) the disability eligibility determination mostly turns on routine evaluations of data which reduces error, and (3) the costs of providing a pre-deprivation hearing would be high.<sup>169</sup>

This holding created the three-prong *Mathews* test, which helps courts determine the constitutional adequacy of procedures currently in place under the Due Process Clause. Courts balance three considerations:

162. Joel A. Blanchet & James J. Doody, *The Use of Extrinsic Documents in a Motion To Dismiss*, LEXOLOGY (Feb. 27, 2019), <https://www.lexology.com/library/detail.aspx?g=a99ddbc7-1043-46d9-aecd-9acff311759c> [<https://perma.cc/PS56-LP6F>].

163. *Id.*

164. *See supra* note 99 and accompanying text.

165. To address a potential counterpoint, it could be argued that adopting an actual notice standard in this context is foreclosing an inmate’s ability to contest what they believe to be improper methods. This is because, so long as a signed writing is obtained to document receipt, adequate notice is established and there is no avenue left to contest the forfeiture proceeding. Nevertheless, it seems that providing actual notice would do more to protect inmates from the potential shortcomings of failed internal prison mail distribution systems rather than forgoing this standard because of the risk of receipt of actual notice somehow being forged by the prison.

166. 424 U.S. 319, 319–20 (1976).

167. *Id.*

168. *Id.* at 321.

169. *Id.* at 339–49.

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation<sup>170</sup> of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>171</sup>

For clarity, the "procedures" that are the topic of this section are those employed to provide notice to inmates of forfeiture proceedings. While the current procedure approved by the Supreme Court in *Dusenbery* is to mail notice, this Recent Development is asserting that under *Mathews*, the procedure should be improved so that the government is required to ensure actual notice to an inmate of a forfeiture proceeding.

The *Dusenbery* majority refused to consider the *Mathews* factors based on the understanding that the more simplistic test from *Mullane*<sup>172</sup> was the correct test for determining what method of notice is constitutionally adequate.<sup>173</sup> However, the *Mullane* opinion makes note of several factors that should be considered alongside the general test to determine the notice required, including "the nature of the interests involved, the likelihood that others similarly situated will protect a property owner's interests, and the reasonableness of imposing more onerous requirements on the entity obligated to give notice."<sup>174</sup> Essentially, the *Dusenbery* majority rejected the *Mathews* three-factor test, when in reality *Mullane*, the case relied upon, covers roughly the same factors, just not stated as explicitly.<sup>175</sup> Indeed, the only factor from

170. Erroneous deprivation is essentially the idea that one is mistakenly and wrongfully deprived of their interest through the procedures currently being used. The risk of erroneous deprivation, if present, demonstrates why additional heightened procedures are necessary.

171. *Mathews*, 424 U.S. at 335.

172. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314–15 (1950).

173. *Dusenbery v. United States*, 534 U.S. 161, 167–68 (2002). The *Dusenbery* Court was arguing that the *Mullane* "reasonableness" test is proper for determining if the *method* of notice employed was constitutionally adequate, whereas the *Mathews* test would be more proper for determining the "dictates of due process," such as when notice is required to satisfy due process (in the above example, pre-deprivation versus post-deprivation). See *Grayden v. Rhodes*, 345 F.3d 1225, 1242 (11th Cir. 2003).

174. *Weng v. United States*, 137 F.3d 709, 714 (2d Cir. 1998) (citing *Mullane*, 339 U.S. at 314–20).

175. While stating the three considerations from *Mullane* somewhat differently, the petitioner in *Dusenbery* made this connection, but the Court summarily rejected the argument that *Mathews* applied. Reply Brief for Petitioner at 5, *Dusenbery*, 534 U.S. 161 (No. 00-6567), 2001 WL 950934, at \*5. The petitioner in *Dusenbery* also cited a D.C. Circuit case which explicitly stated that it was error for *Mathews* not to be utilized in this notice context. *Id.* at 7, 2001 WL 950934, at \*7 (citing *Lepelletier v. FDIC*, 164 F.3d 37, 45–46 (D.C. Cir. 1999)). Specifically, the *Lepelletier* court stated that the form of notice "depends upon a balancing of the competing public and private interests involved, as defined by the now familiar *Mathews* factors." 164 F.3d at 46. Additionally, academic articles and some courts have noted that the considerations under *Mathews* and *Mullane* are essentially the same. See *James v. City of Dallas*, 2003 WL 22342799, at \*15 (N.D. Tex. Aug. 28, 2003) (finding that the choice of test between *Mullane* and *Mathews* did not affect the outcome of the analysis); *Salt Lake City Corp. v.*

*Mullane* that doesn't explicitly track to a *Mathews* factor is "the likelihood that others similarly situated will protect a property owner's interests." However, taking a conceptual leap back, in the context of *Mullane*, with this factor the Court was concerned about ensuring that if some people did not receive notice, other similarly situated plaintiffs would protect their interests.<sup>176</sup> This is essentially preventing erroneous deprivation, the second *Mathews* factor. Thus, it seems to be that the decision relied upon to decide *Dusenbery—Mullane—* already covers the three *Mathews* factors, and thus they are appropriate to consider in this context.

At the outset of the *Mathews* analysis, it is important to note that the petitioner in *Dusenbery* argued *Mathews* applied, and thus conducted a detailed *Mathews* analysis.<sup>177</sup> The Supreme Court did not accept this argument and instead applied *Mullane*. What follows are the strongest arguments under each factor, which ultimately support the notion that procedures ensuring actual notice to inmates should be required under *Mathews*.

The first *Mathews* factor considers the private interests that would be affected by the government action—here the inmates' property interests that would be affected by a forfeiture proceeding. Inmates with property involved in forfeiture proceedings have a significant interest in retaining their property. As recognized by the Supreme Court, property is a significant, constitutionally protected, fundamental right.<sup>178</sup> Given that private property is a fundamental right that cannot be taken by the government without due process of law, an inmate's interest in their private property that may be forfeited is very significant. Thus, this factor weighs heavily in inmates' favor. Indeed, this is even truer when considering the amount of property that can be forfeited under certain civil forfeiture statutes—under one such statute regarding property connected to narcotics, up to \$500,000 of property could be administratively forfeited.<sup>179</sup>

The second *Mathews* factor concerns the risk of erroneous deprivation of the private interest involved and the value of substitute procedural safeguards. Under this factor, while the risk of erroneous deprivation is not extremely high under current Supreme Court-approved procedures which consider mailing

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Jordan River Restoration Network, 99 P.3d 990, 1007 n.9 (Utah 2012) ("But *Mullane*, as applied by the Court, is notably similar to *Mathews*."); Philip P. Ehrlich, *A Balancing Equation for Social Media Publication Notice*, 83 U. CHI. L. REV. 2163, 2178 (2016) ("Although *Mathews* and *Mullane* use different language, both cases create the same cost-benefit test for courts to evaluate whether parties provided the best notice practicable.").

176. *Mullane*, 338 U.S. at 310.

177. Brief for Petitioner, *Dusenbery*, 534 U.S. 161 (No. 00-6567), 2001 WL 521455, at \*12–25.

178. *Kelo v. City of New London*, 545 U.S. 469, 510–511 (2005) (quoting *Calder v. Bull*, 3 U.S. 386, 388 (1798)) ("[T]he Framers[ had an] understanding that property is a natural, fundamental right, prohibiting the government from 'tak[ing] property from A[] and giv[ing] it to B.')."

179. *Weng*, 137 F.3d at 714.

notice to a prison as adequate notice (so long as *some* distribution procedures are in place), the risk is still quite present, and substitute procedures would have great value in terms of procedural protections. The risk is still present because inmates have to rely on a prison mail delivery system over which they have no control. Prison employees only conduct mail delivery as an ancillary part of their job, secondary to their security functions, so is likely not an important priority as far as timeliness or accuracy are concerned.<sup>180</sup> Under currently approved procedures, inmates are solely relying on prison employees accurately handling their legal mail between receipt and delivery, as well as when delivering their mail from mailroom to inmate, with no way to verify the mailroom to inmate delivery is reliable.<sup>181</sup> Justice Ginsberg highlighted this risk, stating:

Today's decision diminishes the safeguard of notice, affording an opportunity to be heard, before one is deprived of property. As adequate to notify prisoners that the Government seeks forfeiture of their property, the [majority] condones a procedure too lax to reliably ensure that a prisoner will receive a legal notice sent to him.<sup>182</sup>

In this context, the erroneous deprivation prong is concerned specifically with how the contested procedures used at the time of the initial deprivation promote wrongful deprivation of the private interest involved. In addition, there is an important related issue that retroactively contributes to potential erroneous deprivation under those procedures. The risk of erroneous deprivation is much greater in jurisdictions that follow a presumption of adequacy when notice is mailed, which requires the inmate to bear the burden of proof when contesting forfeiture after the fact. This is because, in those jurisdictions, unless an inmate can prove a prison employs generally inadequate mail distribution procedures, or that the government actually knew a prison employed inadequate procedures, the inmate will have no opportunity to contest a forfeiture on the merits, regardless of whether they actually received notice or not.

For example, under the current Supreme Court-approved notice-by-mail procedure, assume an inmate did not receive notice of a forfeiture proceeding against their property due to a failure in the prison mail distribution process, and thus the property was administratively forfeited. In this scenario, the only way for the inmate to even have a chance of proving the property was wrongfully forfeited would be to first successfully petition a court to have the forfeiture set aside for lack of notice, which in jurisdictions that apply a presumption of adequacy will require the inmate overcoming the burden of

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180. See *Nunley v. Dep't of Just.*, 425 F.3d 1132, 1137–38 (8th Cir. 2005).

181. See *Dusenbery*, 534 U.S. at 182–83 (Ginsberg, J., dissenting).

182. *Id.* at 173.

proof in that proceeding. In effect, this presumption retroactively contributes to the erroneous deprivation risk under the Supreme Court-approved notice by mail procedure: the risk of erroneous deprivation which exists due to inmate dependency on accurate mailroom-to-inmate delivery, is retroactively increased because a lack of notice will result in no adjudication on the merits of the forfeiture if the inmate cannot carry the burden of proving generally inadequate mail distribution procedures. In sum, the notice by mail procedure can cause a wrongful deprivation, and then that deprivation cannot be cured unless the inmate first carries the burden, thus making the notice by mail procedure more likely to promote erroneous deprivation in those presumption jurisdictions.

Additionally, substitute procedures that would ensure actual notice, including something as simple as having inmates sign a log for their certified mail,<sup>183</sup> would guarantee they are apprised of forfeiture proceedings against their property. This would make the risk of erroneous deprivation practically nonexistent, excusing the low burden of proof issues in civil judicial forfeiture proceedings<sup>184</sup> because now an inmate will be aware of and thus can contest the forfeiture. Thus, the forfeiting agency could simply request the record of the acknowledgement signature be forwarded to them to show actual notice was received, which makes this additional safeguard extremely valuable, at little to no additional cost.

The third *Mathews* factor is concerned with the government's interest and the fiscal and administrative burdens that the additional safeguard would entail. Under this factor, the government does have an interest here in timely and efficient disposition of forfeiture proceedings; however, simply requiring actual notice would in no way materially affect such timely disposition. Simply requiring inmates to sign an acknowledgement form for legal mail would effectively take no time at all.<sup>185</sup> The only true time delay this might cause is when an inmate actually exercises their rights to contest the forfeiture of their property in court (instead of not doing so, and it likely being administratively forfeited without judicial review). Likewise, the cost of these additional procedures which would ensure actual notice to inmates is negligible: all that is required is a few extra seconds to procure a signature of acknowledgement and to send that acknowledgement to the forfeiting agency.

While the government also clearly has an interest in deterring crime by forfeiting allegedly connected property, this interest will not be hindered at all

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183. As noted, many prisons already employ this very practical method. *See supra* notes 150–53 and accompanying text.

184. *See supra* note 38 and accompanying text (explaining how the typical burden of proof standard for the government is simply by preponderance of the evidence).

185. *Dusenbery*, 534 U.S. at 182 (Ginsberg, J., dissenting) (noting all that would be required is for the prison employee “to linger for the additional moments required to secure for each delivery a signature in a logbook”).

by requiring actual notice. If an inmate receives notice and contests the forfeiture, the government will simply have to prove the property can be validly forfeited. If the government cannot carry the burden in that proceeding, then forfeiture of that property would not serve the interest of deterring crime because there was not a sufficient connection between the property and the alleged crime to justify taking that property from its owner.

#### CONCLUSION

Going forward, if *Dusenbery* continues to remain the law, which is probable,<sup>186</sup> then the presumption of adequacy when notice is mailed to a prison should be done away with, as the Second Circuit did in *Brome*. For the reasons stated, the government should have to prove adequacy of prison mail distribution procedures in order to support the validity of the forfeiture.

However, normatively and legally, actual notice should be required specifically in proceedings involving inmates. This Recent Development offered many reasons, one of the most important being the utility of the *Mathews* factors and how they point towards requiring actual notice. Given the flaws of the civil forfeiture system generally, this method ensures the most protection for inmates who are subjected to forfeiture proceedings. Essentially, a requirement of actual notice correctly substitutes the substance of procedural due process (reasonable protection of citizens from inadequate procedures) over its current form (that actual notice typically does not apply).

Although the Supreme Court was clear in *Dusenbery* that actual notice is not required—thus expressly abrogating cases like *Weng* from the Second Circuit—there is still hope that actual notice could be a viable option in the context of notice of forfeiture proceedings to inmates. However, given the current constraints put in place by *Dusenbery*, it would be wise for the Supreme Court to take on a case that resolves the current circuit split and expressly refuse any presumption of adequacy.

JAMISON WYNN

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186. This is probable because the Supreme Court has never required actual notice in the civil context. *See id.* at 171 (2002) (majority opinion).