AUSTIN V UNITED STATES

SUPREME COURT OF THE UNITED STATES
509 U.S. 602
June 28, 1993

OPINION: Justice Blackmun...We are asked to decide whether the Excessive Fines Clause of the Eighth Amendment applies to **forfeitures** of property under *21 U.S.C. §§881*(a)(4) and (a)(7). **We hold that it does and therefore remand the case for consideration of the question whether the forfeiture at issue here was excessive.**

...Richard Lyle Austin was indicted on four counts of violating South Dakota's drug laws. Austin ultimately pleaded **guilty to one count of possessing cocaine with intent to distribute and was sentenced by the state court to seven years' imprisonment**...[Thereafter,] the United States filed an ***in rem*** action in the...District Court...**seeking forfeiture of Austin's mobile home and auto body shop**...

These statutes provide for the forfeiture of:

> (4) **All conveyances**, including aircraft, vehicles, or vessels, **which are used**, or are intended for use, **to transport**, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of **controlled substances**, their raw materials, and equipment used in their manufacture and distribution...
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> (7) **All real property**, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment...

Each provision has an "**innocent owner**" exception...

According to [Sioux Falls Police Officer Donald] Satterlee's affidavit, Austin met Keith Engebretson at Austin's body shop...and agreed to sell cocaine to Engebretson. Austin left the shop, went to his mobile home, and returned to the shop with two grams of cocaine which he sold to Engebretson.

State authorities executed a search warrant on the body shop and mobile home the following day. They discovered small amounts of marijuana and cocaine, a .22 caliber revolver, drug paraphernalia, and approximately $4,700 in cash. In opposing summary judgment, **Austin argued that forfeiture of the properties would violate the Eighth Amendment**. The District Court rejected this argument and entered summary judgment for the United States.

The...Court of Appeals...affirmed...[and] felt constrained from holding the forfeiture unconstitutional. It cited this Court's decision in *Calero-Toledo v. Pearson Yacht Leasing Co.*, for the proposition that, when the Government is proceeding against property *in rem*, the guilt or innocence of the property's owner "is constitutionally irrelevant." It then reasoned: "We are constrained to agree...that 'if the constitution allows *in rem* forfeiture to be visited upon innocent owners...the constitution hardly requires proportionality review of forfeitures."...We granted certiorari...

Austin contends that the Eighth Amendment's Excessive Fines Clause applies to *in rem* civil forfeiture proceedings. We have had occasion to consider this Clause only once before. In *Browning-Ferris Industries*[1] we held that the Excessive Fines Clause does not limit the award of punitive damages to a private party in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages...The Court concluded that both the Eighth Amendment and §10 of the English Bill of Rights of 1689, from which it derives, were intended to prevent *the government* from abusing its power to punish and therefore that "the Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government."

We found it unnecessary to decide in *Browning-Ferris* whether the Excessive Fines Clause applies only to criminal cases. The United States now argues that "any claim that the government's conduct in a civil proceeding is limited by the Eighth Amendment generally, or by the Excessive Fines Clause in particular, must fail unless the challenged governmental action, despite its label, would have been recognized as a *criminal* punishment at the time the Eighth Amendment was adopted."

It further suggests that the Eighth Amendment cannot apply to a civil proceeding unless that proceeding is so punitive that it must be considered criminal under *Kennedy v. Mendoza-Martinez*. We disagree.

Some provisions of the Bill of Rights are expressly limited to criminal cases. The Fifth Amendment's Self-Incrimination Clause, for example, provides: "No person...shall be compelled in any criminal case to be a witness against himself." The protections provided by the Sixth Amendment are explicitly confined to "criminal prosecutions." The text of the Eighth Amendment includes no similar limitation. Nor does the history of the Eighth Amendment require such a limitation...

The purpose of the Eighth Amendment, putting the Bail Clause to one side, was to limit the **government's** power to punish. *Browning-Ferris.* The Cruel and Unusual Punishments Clause is self-evidently concerned with punishment. The Excessive Fines Clause limits the government's

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[1]Case 8A-F-1 on this website.

power to extract payments, whether in cash or in kind, "as *punishment* for some offense. The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law." *United States v. Halper.* "It is commonly understood that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties." **Thus, the question is not, as the United States would have it, whether forfeiture under §§881(a)(4) and (a)(7) is civil or criminal, but rather whether it is punishment.**

In considering this question, we are mindful of the fact that sanctions frequently serve more than one purpose. We need not exclude the possibility that a forfeiture serves remedial purposes to conclude that it is subject to the limitations of the Excessive Fines Clause. We, however, must determine that it can only be explained as serving in part to punish. We said in *Halper* that "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." We turn, then, to consider **whether, at the time the Eighth Amendment was ratified, forfeiture was understood at least in part as punishment** and whether forfeiture under §§881(a)(4) and (a)(7) should be so understood today.

Three kinds of forfeiture were established in England at the time the Eighth Amendment was ratified in the United States: deodand, forfeiture upon conviction for a felony or treason, and statutory forfeiture. Each was understood, at least in part, as imposing punishment.

> At common law the value of an inanimate object directly or indirectly causing the accidental death of a King's subject was forfeited to the Crown as a **deodand**. The origins of the deodand are traceable to Biblical and pre-Judeo-Christian practices, which reflected the view that the instrument of death was accused and that religious expiation was required. The value of the instrument was forfeited to the King, in the belief that the King would provide the money for Masses to be said for the good of the dead man's soul, or insure that the deodand was put to charitable uses. When application of the deodand to religious or eleemosynary purposes ceased, and the deodand became a source of Crown revenue, the institution was justified as a penalty for carelessness.

As Blackstone put it, "such misfortunes are in part owing to the negligence of the owner, and therefore he is properly punished by such forfeiture."

The second kind of common-law forfeiture fell only upon those convicted of a felony or of treason. "The convicted felon forfeited his chattels to the Crown and his lands escheated to his lord; the convicted traitor forfeited all of his property, real and personal, to the Crown." Such forfeitures were known as forfeitures of estate. These forfeitures obviously served to punish felons and traitors and were justified on the ground that property was a right derived from society which one lost by violating society's laws.

Third, "English Law provided for statutory forfeitures of offending objects used in violation of the customs and revenue laws." The most notable of these were the Navigation Acts of 1660 that required the shipping of most commodities in English vessels. Violations of the Acts resulted in the forfeiture of the illegally carried goods as well as the ship that transported them. The statute was construed so that the act of an individual seaman, undertaken without the knowledge of the master or owner, could result in forfeiture of the entire ship. Yet Blackstone considered such forfeiture statutes "penal."

In *Calero-Toledo*, we observed that statutory forfeitures were "likely a product of the confluence and merger of the deodand tradition and the belief that the right to own property could be denied the wrongdoer." Since each of these traditions had a punitive aspect, it is not surprising that forfeiture under the Navigation Acts was justified as a penalty for negligence: "But the Owners of Ships are to take Care what Master they employ, and the Master what Mariners; and here Negligence is plainly imputable to the Master; for he is to report the Cargo of the Ship, and if he had searched and examined the Ship with proper care, according to his Duty, he would have found the Tea...and so might have prevented the Forfeiture."

Of England's three kinds of forfeiture, only the third took hold in the United States. "Deodands did not become part of the common-law tradition of this country." *Calero-Toledo.* The Constitution forbids forfeiture of estate as a punishment for treason "except during the Life of the Person attainted," U.S. Const., Art. III, §3, cl. 2, and the First Congress also abolished forfeiture of estate as a punishment for felons. "But 'long before the adoption of the Constitution the common law courts in the Colonies -- and later in the states during the period of Confederation -- were exercising jurisdiction *in rem* in the enforcement of [English and local] forfeiture statutes.'" *Calero-Toledo*.

The First Congress passed laws subjecting ships and cargos involved in customs offenses to forfeiture. It does not follow from that fact, however, that the First Congress thought such forfeitures to be beyond the purview of the Eighth Amendment. Indeed, **examination of those laws suggests that the First Congress viewed forfeiture as punishment**. For example, by the Act of July 31, 1789, ch. 5, §12, 1 Stat. 39, Congress provided that goods could not be unloaded except during the day and with a permit.

> And if the master or commander of any ship or vessel shall suffer or permit the same, such master and commander, and every other person who shall be aiding or assisting in landing, removing, housing, or otherwise securing the same, shall **forfeit** and pay the sum of four hundred dollars for every offence; shall moreover be disabled from holding any office of trust or profit under the United States, for a term not exceeding seven years; and it shall be the duty of the collector of the district, to advertise the names of all such persons in the public gazette of the State in which he resides, within twenty days after each respective conviction. And all goods, wares and merchandise, so landed or discharged, shall become forfeited, and may be seized by any officer of the customs; and where the value thereof shall amount to four hundred dollars, the vessel, tackle, apparel and furniture, shall be subject to like forfeiture and

seizure.

Forfeiture of the goods and vessel is listed alongside the other provisions for punishment. It is also of some interest that "forfeit" is the word Congress used for fine...Other early forfeiture statutes follow the same pattern.

Our cases also have recognized that statutory *in rem* forfeiture imposes punishment. In *Peisch v. Ware,* for example, the Court held that goods removed from the custody of a revenue officer without the payment of duties should not be forfeitable for that reason unless they were removed with the consent of the owner or his agent. Chief Justice Marshall delivered the opinion for a unanimous Court:

> The court is also of opinion that the removal for which the act punishes the owner with a forfeiture of the goods must be made with his consent or connivance, or with that of some person employed or trusted by him. If, by private theft, or open robbery, without any fault on his part, his property should be invaded, while in the custody of the officer of the revenue, the law cannot be understood to punish him with the forfeiture of that property.

The same understanding of forfeiture as punishment runs through our cases rejecting the "innocence" of the owner as a common-law defense to forfeiture. In these cases, forfeiture has been justified on two theories -- that the property itself is "guilty" of the offense, and that the owner may be held accountable for the wrongs of others to whom he entrusts his property. Both theories rest, at bottom, on the notion that the owner has been negligent in allowing his property to be misused and that he is properly punished for that negligence.

The fiction that "the thing is primarily considered the offender" has a venerable history in our case law. See *Harmony* ("The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner")...Yet the Court has understood this fiction to rest on the notion that the owner who allows his property to become involved in an offense has been negligent. Thus, in *Goldsmith-Grant Co.*, the Court said that "ascribing to the property a certain personality, a power of complicity and guilt in the wrong," had "some analogy to the law of *deodand*." It then quoted Blackstone's explanation of the reason for deodand: that "such misfortunes are in part owing to the negligence of the owner, and therefore he is properly punished by such forfeiture."

In none of these cases did the Court apply the guilty-property fiction to justify forfeiture when the owner had done all that reasonably could be expected to prevent the unlawful use of his property...The more recent cases have expressly reserved the question whether the fiction could be employed to forfeit the property of a truly innocent owner. *Calero-Toledo* (noting that forfeiture of a truly innocent owner's property would raise "serious constitutional questions"). If forfeiture had been understood not to punish the owner, there would have been no reason to reserve the case of a truly innocent owner. Indeed, it is only on the assumption that forfeiture serves

in part to punish that the Court's past reservation of that question makes sense.

The second theory on which the Court has justified the forfeiture of an "innocent" owner's property is that the owner may be held accountable for the wrongs of others to whom he entrusts his property. In *Harmony*, it reasoned that "the acts of the master and crew, in cases of this sort, bind the interest of the owner of the ship, whether he be innocent or guilty; and he impliedly submits to whatever the law denounces as a forfeiture attached to the ship by reason of their unlawful or wanton wrongs."

...Like the guilty-property fiction, this theory of vicarious liability is premised on the idea that the owner has been negligent. **Thus, in *Calero-Toledo*, we noted that application of forfeiture provisions "to lessors, bailors, or secured creditors who are innocent of any wrongdoing...may have the desirable effect of inducing them to exercise greater care in transferring possession of their property."**

In sum, even though this Court has rejected the "innocence" of the owner as a common-law defense to forfeiture, it consistently has recognized that forfeiture serves, at least in part, to punish the owner...We conclude, therefore, that forfeiture generally and statutory *in rem* forfeiture in particular historically have been understood, at least in part, as punishment.

We turn next to consider whether forfeitures under *21 U.S.C. §§881*(a)(4) and (a)(7) are properly considered punishment today. **We find nothing in these provisions or their legislative history to contradict the historical understanding of forfeiture as punishment**. Unlike traditional forfeiture statutes, §§881(a)(4) and (a)(7) expressly provide an **"innocent owner" defense**. ("No conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner")...These exemptions serve to focus the provisions on the culpability of the owner in a way that makes them look more like punishment, not less...The inclusion of innocent-owner defenses in §§881(a)(4) and (a)(7) reveals a...congressional **intent to punish only those involved in drug trafficking...**

The legislative history of §881 confirms the punitive nature of these provisions. When it added subsection (a)(7) to §881 in 1984, Congress recognized "that the traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs." It characterized the forfeiture of real property as "a powerful deterrent."...

The Government argues that §§881(a)(4) and (a)(7) are not punitive but, rather, should be considered remedial in two respects. First, they remove the "instruments" of the drug trade "thereby protecting the community from the threat of continued drug dealing." Second, the forfeited assets serve to compensate the Government for the expense of law enforcement activity and for its expenditure on societal problems such as urban blight, drug addiction, and other health concerns resulting from the drug trade.

In our view, neither argument withstands scrutiny. Concededly, we have recognized that the

forfeiture of contraband itself may be characterized as remedial because it removes dangerous or illegal items from society. The Court, however, previously has rejected government's attempt to extend that reasoning to conveyances used to transport illegal liquor. *One 1958 Plymouth Sedan v. Pennsylvania*. In that case it noted: "There is nothing even remotely criminal in possessing an automobile." The same, without question, is true of the properties involved here, and the Government's attempt to characterize these properties as "instruments" of the drug trade must meet the same fate as Pennsylvania's effort to characterize the 1958 Plymouth sedan as "contraband."

The Government's second argument about the remedial nature of this forfeiture is no more persuasive. We previously have upheld the forfeiture of goods involved in customs violations as "a reasonable form of liquidated damages." *One Lot Emerald Cut Stones v. United States.* But the dramatic variations in the value of conveyances and real property forfeitable under §§881(a)(4) and (a)(7) undercut any similar argument with respect to those provisions. The Court made this very point in *Ward*: **The "forfeiture of property...[is] a penalty that has absolutely no correlation to any damages sustained by society or to the cost of enforcing the law."**

Fundamentally, even assuming that §§881(a)(4) and (a)(7) serve some remedial purpose, the Government's argument must fail. "[A] civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." *Halper.* In light of the historical understanding of forfeiture as punishment, the clear focus of §§881(a)(4) and (a)(7) on the culpability of the owner, and the evidence that Congress understood those provisions as serving to deter and to punish, we cannot conclude that forfeiture under §§881(a)(4) and (a)(7) serves solely a remedial purpose. **We therefore conclude that forfeiture under these provisions constitutes "payment to a sovereign as punishment for some offense" (*Browning-Ferris*) and, as such, <u>is subject to the limitations of the Eighth Amendment's Excessive Fines Clause</u>.**

Austin asks that we establish a multifactor test for determining whether a forfeiture is constitutionally "excessive." We decline that invitation. Although the Court of Appeals opined that "the government is exacting too high a penalty in relation to the offense committed," it had no occasion to consider what factors should inform such a decision because it thought it was foreclosed from engaging in the inquiry. **Prudence dictates that we allow the lower courts to consider that question in the first instance.** The judgment of the Court of Appeals is reversed, and the case is remanded to that court for further proceedings consistent with this opinion.

In other words, having now decided that the Excess Fines Clause of the Eighth Amendment **<u>does</u>** apply to this sought forfeiture, the High Court is sending the case back to the lower courts for them to now determine whether this forfeiture is “excessive” and leaving it up to them to decide, for now, as to the Eighth Amendment’s proper interpretation of the word “excessive.” Justice Scalia provides some guidance on this issue in his Concurrence, below.

CONCURRENCE: Justice Scalia...We recently stated that, at the time the Eighth Amendment was

drafted, the term "fine" was "understood to mean a payment to a sovereign as **punishment** for some offense." *Browning-Ferris*. It seems to me that the Court's opinion obscures this clear statement, and needlessly attempts to derive from our sparse case law on the subject of *in rem* forfeiture the questionable proposition that the owner of property taken pursuant to such forfeiture is always blameworthy. I write separately to explain why I consider this forfeiture a fine, and to point out that the excessiveness inquiry for statutory *in rem* forfeitures is different from the usual excessiveness inquiry.

Whether any sort of forfeiture of property may be covered by the Eighth Amendment is not a difficult question. "Forfeiture" and "fine" each appeared as one of many definitions of the other in various 18th-century dictionaries. "Payment," the word we used in *Browning-Ferris* as a synonym for fine, certainly includes in-kind assessments. Webster's New International Dictionary 1797 (2d ed. 1950) (defining "payment" as "that which is paid; the thing given to discharge a debt or an obligation"). Moreover, for the Eighth Amendment to limit cash fines while permitting limitless in-kind assessments would make little sense, altering only the form of the Star Chamber abuses that led to the provision of the English Bill of Rights, from which our Excessive Fines Clause directly derives. *Browning-Ferris.* In *Alexander v. United States*, we have today held that an *in personam* criminal forfeiture is an Eighth Amendment "fine."

In order to constitute a fine under the Eighth Amendment, however, the forfeiture must constitute "punishment," and it is a much closer question whether statutory *in rem* forfeitures, as opposed to *in personam* forfeitures, meet this requirement. [*In personam* forfeitures] are assessments, either monetary or in kind, **to punish the property owner's criminal conduct**, while [*in rem* forfeitures] are confiscations of property rights **based on improper use of the property**, regardless of whether the owner has violated the law. Statutory *in rem* forfeitures have a long history. The property to which they apply is not contraband, ...nor is it necessarily property that can only be used for illegal purposes. The theory of *in rem* forfeiture is said to be that the lawful property has committed an offense...*The Palmyra* (forfeiture of vessel for piracy); *Harmony v. United States* (forfeiture of vessel, but not cargo, for piracy); *Dobbins's Distillery v. United States* (forfeiture of distillery and real property for evasion of revenue laws); *J. W. Goldsmith, Jr.* (forfeiture of goods concealed to avoid taxes).

However the theory may be expressed, it seems to me that this taking of lawful property must be considered, in whole or in part,...punitive. Its purpose is not compensatory, to make someone whole for injury caused by unlawful use of the property. Punishment is being imposed, whether one quaintly considers its object to be the property itself, or more realistically regards its object to be the property's owner. This conclusion is supported by Blackstone's observation that even confiscation of a deodand, whose religious origins supposedly did not reflect any punitive motive but only expiation, came to be explained in part by reference to the owner as well as to the offending property. Our cases have described statutory *in rem* forfeiture as "likely a product of the confluence and merger of the deodand tradition and the belief that the right to own property could be denied the wrongdoer." *Calero-Toledo*.

The Court apparently believes, however, that only actual culpability of the affected property owner can establish that a forfeiture provision is punitive, and sets out to establish that such culpability exists in the case of *in rem* forfeitures. In my view, however, the case law is far more ambiguous than the Court acknowledges. We have never held that the Constitution requires negligence, or any other degree of culpability, to support such forfeitures. A prominent 19th-century treatise explains statutory *in rem* forfeitures solely by reference to the fiction that the property is guilty, strictly separating them from forfeitures that require a personal offense of the owner. If the Court is correct that culpability of the owner is essential, then there is no difference (except perhaps the burden of proof) between the traditional *in rem* forfeiture and the traditional *in personam* forfeiture. Well-established common-law distinctions should not be swept away by reliance on bits of dicta. Moreover, if some degree of personal culpability on the part of the property owner always exists for *in rem* forfeitures, then it is hard to understand why this Court has kept reserving the (therefore academic) question whether personal culpability is constitutionally required, as the Court does again today.

I would have reserved the question without engaging in the misleading discussion of culpability. ***Even if*** **punishment of personal culpability is necessary for a forfeiture to be a fine; and** ***even if in rem*** **forfeitures in general do not punish personal culpability; the** ***in rem*** **forfeiture in** ***this*** **case is a fine.** As the Court discusses..., this statute, in contrast to the traditional *in rem* forfeiture, ***requires*** **that the owner not be innocent** -- that he have some degree of culpability for the "guilty" property...Here, the property must "offend" *and* the owner must not be completely without fault. Nor is there any consideration of compensating for loss, since the value of the property is irrelevant to whether it is forfeited. That is enough to satisfy the *Browning-Ferris* standard, and to make the entire discussion...dictum. Statutory forfeitures under §881(a) are certainly *payment* (in kind) *to a sovereign as punishment* for an *offense*.

That this forfeiture works as a fine raises the excessiveness issue, on which the Court remands. I agree that a remand is in order, but think it worth pointing out that on remand the excessiveness analysis must be different from that applicable to monetary fines and, perhaps, to *in personam* forfeitures. **In the case of a monetary fine**, the Eighth Amendment's origins in the English Bill of Rights, intended to limit the abusive penalties assessed against the King's opponents, demonstrate that **the touchstone is value of the fine in relation to the offense**. And in *Alexander* v. *United States*, we indicated that the same is true for *in personam* forfeiture.

Here, however, the offense of which petitioner has been convicted is not relevant to the forfeiture. Section §881 requires only that the Government show probable cause that the subject property was used for the prohibited purpose. The burden then shifts to the property owner to show, by a preponderance of the evidence, that the use was made without his "knowledge, consent, or willful blindness," or that the property was not so used, see §881(d) (incorporating *19 U.S.C. §1615).* **Unlike monetary fines, statutory** ***in rem*** **forfeitures have traditionally been fixed, not by determining the appropriate value of the penalty in relation to the committed offense, but by determining what property has been "tainted" by unlawful use, to which issue the value of the property is irrelevant. Scales used to measure out unlawful drug sales, for example, are**

confiscable whether made of the purest gold or the basest metal. But an *in rem* forfeiture goes beyond the traditional limits that the Eighth Amendment permits if it applies to property that cannot properly be regarded as an instrumentality of the offense -- the building, for example, in which an isolated drug sale happens to occur. Such a confiscation would be an excessive fine. The question is not *how much* the confiscated property is worth, but *whether* the confiscated property has a close enough relationship to the offense...

The relevant inquiry for an excessive forfeiture under §881 is the relationship of the property to the offense: Was it close enough to render the property, under traditional standards, "guilty" and hence forfeitable? I join the Court's opinion in part, and concur in the judgment.

CONCURRENCE: Justice Kennedy/Rehnquist/Thomas...At some point, we may have to confront the constitutional question whether forfeiture is permitted when the owner has committed no wrong of any sort, intentional or negligent. That for me would raise a serious question. Though the history of forfeiture laws might not be determinative of that issue, it would have an important bearing on the outcome. I would reserve for that or some other necessary occasion the inquiry the Court undertakes here. Unlike Justice Scalia, I would also reserve the question whether *in rem* forfeitures always amount to an intended punishment of the owner of forfeited property. With these observations, I concur in part and concur in the judgment.