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Nicholas A. Loyal
nloyal@slu.edu

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BILLS TO PAY AND MOUTHS TO FEED: FORFEITURE AND DUE PROCESS CONCERNS AFTER *ALVAREZ v. SMITH*

INTRODUCTION

Chermane Smith could be anyone. She could be a single mother working two jobs to make ends meet. She could be a volunteer at a nursing home on Tuesday nights and a deacon in her church on Sunday mornings. Chermane Smith could be anyone, and anyone could be Chermane Smith.[1] Anyone could trust their boyfriend or brother with their car for an afternoon. Anyone could have a fiancé or an aunt who needed a fix so badly that they had to find a ride. But mostly, anyone could wait restlessly into the night, pacing by the phone, only to get a midnight call: Your boyfriend is under arrest. We found him with a trunk full of drugs. We're going to have to hold on to your car for a while. Anyone could get that call. Chermane Smith could be anyone.

In *Alvarez v. Smith*, Chermane Smith and five other respondents challenged the seizure of their property by the Chicago Police Department and its officers without, they claimed on appeal, a grant of sufficient due process.[2] Chicago police, pursuant to Illinois's Drug Asset Forfeiture Procedure Act (DAFPA), seized Smith's car based on its connection with alleged drug activity and forced her to wait over a year for a hearing regarding its return.[3] Following an adverse ruling by the district court, the Court of Appeals for the Seventh Circuit held that the police had violated the procedural due process protections guaranteed by the Fourteenth Amendment and that the respondents were entitled to specific post-seizure hearings to determine whether their property should be released or subjected to forfeiture under DAFPA.[4] State's Attorney Anita Alvarez appealed that decision, and the Supreme Court granted certiorari.[5] After a contentious oral argument, the Court found the case to be

1. David G. Savage, *Deciding "What the Law Is"*, AMERICA.GOV (Oct. 15, 2009), http://www.america.gov/st/usg-english/2009/October/20091015150918wrybakcuh0.1189081 .html (describing the circumstances of the seizure of Chermane Smith's vehicle).

2. Alvarez v. Smith, 130 S. Ct. 576, 579 (2009).

3. Illinois Drug Asset Forfeiture Procedure Act, 725 ILL. COMP. STAT. 150/1–9 (2004) (Supp. 2005). In addition to Smith's property, the police seized the vehicles of respondents Edmanuel Perez and Tyhesha Brunston and cash held by respondents Michelle Waldo, Kirk Yunker, and Tony Williams. Respondents' Brief at 1, 3 Alvarez v. Smith, 130 S. Ct. 576 (2009) (No. 08-351).

4. Smith v. City of Chicago, 524 F.3d 834, 838 (7th Cir. 2008).

5. *Alvarez*, 130 S. Ct. at 576.

moot and dismissed the State of Illinois's appeal—but also unexpectedly vacated the opinion of the Seventh Circuit.[6]

Alvarez v. Smith was properly held moot for failing to present the Court with an active case or controversy, but it will likely lead to procedural dilemmas for future forfeiture claims.[7] Due to the interplay between time limits in forfeiture statutes and mootness doctrine, the Court's unexpected vacatur of the Seventh Circuit's opinion, and the procedural limitations on forfeiture claims, the Court's holding in *Alvarez v. Smith* is likely to complicate future forfeiture jurisprudence.

To properly address these complications, this Note will explore the relationship of forfeiture to due process. Part I will explore the history of civil forfeiture, which allows law enforcement officials at every governmental level to seize property associated with illegal activity under color of law, without resorting to the processes and burdens of the criminal courts.[8] Part II will trace the historical path that led the Court to grant certiorari in *Alvarez*, so as to better answer the question of whether the Court's determination was justified. While the Court stated that its holding would ease future litigation of forfeiture disputes,[9] Part III will detail the complications that have blossomed from the Court's holding. Finally, Part IV will examine whether the hearing framework presented in *Smith v. City of Chicago*[10] should have been upheld and then discuss whether it would have advanced due process as applied to forfeiture. Only by working through these issues can the questions that remain after *Alvarez v. Smith* be properly resolved.

I. FORFEITURE: FROM INCEPTION TO EXPANSION

To understand why *Alvarez* resulted in such a procedural morass, it is necessary to first have an understanding of the development and current use of forfeiture in criminal circumstances.

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6. *Id.* at 578. The real surprise in the opinion was not the mootness result but the vacatur of the Seventh Circuit's opinion. *See infra* notes 93–97 and accompanying text.

7. Both relitigation and future litigation of similar claims will be affected by the Court's decision due to the loss of the hearing requirement and the emphasis placed on class certification in similar claims. *See infra* Part IV.C.2.

8. While forfeiture has been used extensively by law enforcement agencies to supplement their funding, it also presents opportunities for violations of the due process rights of those from whom property is taken. *See* Eric Moores, Note, *Reforming the Civil Asset Forfeiture Reform Act*, 51 ARIZ. L. REV. 777, 779, 782 (2009) (detailing the expanded use and resultant dangers of civil forfeiture actions taken by law enforcement agencies).

9. *Alvarez*, 130 S. Ct. at 583.

10. 524 F.3d 834.

A. The Development of Forfeiture in America

In the United States, civil forfeiture commonly takes place concurrent with—rather than separate from—state or federal criminal prosecution.[11] As a result of this setup, forfeiture actions can both punish crimes[12] and—through the use of their proceeds—alleviate societal damages associated with criminal activity.[13]

Although early references to forfeiture were made in biblical texts,[14] the doctrine did not reach its current form until it was developed under the common law.[15] In common law England, proceeds from the sale of property associated with crimes were forfeited to the sovereign as "deodands," which acted as a tool of compensation for the costs resulting from the carelessness of subjects.[16] American forfeiture law developed from these common law beginnings, and continued not only the practice of forfeiting property to the government but also the tradition of identifying the property itself as the defendant in any claim.[17]

While forfeiture has existed in this country since its inception, forfeiture was not exercised extensively until the passage of the Comprehensive Drug Abuse Prevention and Control Act of 1970.[18] That law, which widened the acceptable circumstances for forfeiture, led to an unprecedented expansion of

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11. *Cf.* United States v. Ursery, 518 U.S. 267 (1996); Lobzun v. United States, 422 F.3d 503 (7th Cir. 2005).

12. *See* Melissa A. Rolland, Comment, *Forfeiture Law, the Eighth Amendment's Excessive Fines Clause, and* United States v. Bajakajian, 74 NOTRE DAME L. REV. 1371, 1374 (1999) ("[F]orfeiture law became a major tool in the war on crime and drugs.").

13. *Cf.* Moores, *supra* note 8, at 780–81 ("[O]bject[s] or animal[s] involved in a wrong against a human . . . . were given to the lord or king 'in the belief that the [k]ing would . . . insure that the [forfeited item] was put to [good] charitable uses.'") (fourth alteration in original) (footnotes omitted) (quoting Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 681 (1974)).

14. David Benjamin Ross, Comment, *Civil Forfeiture: A Fiction That Offends Due Process*, 13 REGENT U. L. REV. 259, 261 (2000) (citing *Calero-Toledo*, 416 U.S. at 681 n.17 (quoting *Exodus* 21:28)).

15. *Id.*

16. *Id.*; Moores, *supra* note 8 at 780–81. For further discussion of deodands, see *Calero-Toledo*, 416 U.S. at 681 n.16 ("Deodand derives from the Latin *Deo dandum*, to be given to God.") (internal quotations omitted).

17. Moores, *supra* note 8, at 781 (describing the adaptation of in rem proceedings to U.S. admiralty cases). For more recent examples, see United States v. $8,850 in U.S. Currency, 461 U.S. 555 (1983); *In re* Various Items of Pers. Prop., 282 U.S. 577 (1931); United States v. $191,910 in U.S. Currency, 16 F.3d 1051 (9th Cir. 1994).

18. Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified at 21 U.S.C. § 881 (2006)).

property seizure by law enforcement officials.[19] However, after public backlash began to grow over the excessive and improper use of forfeiture,[20] Congress passed the Civil Asset Forfeiture Reform Act in 2000 to provide more specific guidance as to when and under what circumstances forfeiture actions would be appropriate.[21]

Forfeiture actions originated at the federal level, however, numerous states have adopted statutes allowing state agencies to engage in forfeiture actions similar to those pioneered by the federal government.[22] Such legislation often serves to unify state and federal forfeiture practices and thereby ensures that state seizures will fulfill all federal requirements.[23]

This unification has led to a set of general standards as to when and under what circumstances forfeiture is appropriate:

> Three elements must be present in order to subject a claimant's property to civil forfeiture . . . : (1) the subject property must be moneys, negotiable instruments, securities, or other things of value; (2) there must be probable cause to believe that there exists illicit drug activity that renders the seized property subject to forfeiture; and (3) there must be probable cause to believe that a connection, or nexus, exists between the seized property and the predicate activity the government has identified.[24]

In the United States, much as in common law England, forfeiture encourages property owners to carefully manage their property by setting forth applicable consequences should that property be used for illicit purposes.[25] This history and purpose not only establish forfeiture as a unique process, but

19. *Cf.* Heather J. Garretson, *Federal Criminal Forfeiture*: *A Royal Pain in the Assets*, 18 S. CAL. REV. L. & SOC. JUST. 45, 46 (2008) (describing an "explosion of cases" related to federal and state forfeiture laws implemented in the 1970s).

20. *See* Brant C. Hadaway, Comment, *Executive Privateers: A Discussion on Why The Civil Asset Forfeiture Reform Act Will Not Significantly Reform the Practice of Forfeiture*, 55 U. MIAMI L. REV. 81, 81–84 (2000) (detailing abuses of forfeiture power leading up to the passage of the Act in 2000).

21. Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202 (codified at 18 U.S.C. §§ 981–984) (2006) (expanding forfeiture actions to include additional property types while establishing a set framework for forfeiture proceedings).

22. *See, e.g.*, Illinois Drug Asset Forfeiture Procedure Act, 725 ILL. COMP. STAT. 150/1–9 (2004) (Supp. 2005); FLA. STAT. ANN. § 932.703 (West 2001) (Supp. 2009).

23. *Compare* Illinois Drug Asset Forfeiture Procedure Act, 725 ILL. COMP. STAT. at 150/4(1), *with* Civil Asset Forfeiture Reform Act § 983(a)(1)(A)(i).

24. United States v. $10,700 in U.S. Currency, 258 F.3d 215, 222 (3d Cir. 2001) (citing inter alia 21 U.S.C. § 881(a)(6)). Although this provision deals with actions related to drug crimes, restrictions on all forfeiture actions were contained in Section 2 of the Civil Asset Forfeiture Reform Act. *Cf.* 18 U.S.C. § 983 (2006).

25. *See* Libretti v. United States, 516 U.S. 29, 41 (1995) (detailing the use of forfeiture as a punishment).

also provide government agencies with justification for taking advantage of forfeiture's substantial financial benefits.

B. Taking Back From Thieves: The Benefits of Effective Forfeiture

When properly performed, forfeiture fulfills the dual purposes of denying assets critical to criminal operations and providing law enforcement agencies with financial assistance.[26]

Soon after forfeiture was approved as a tool of law enforcement, federal agencies began seizing assets associated with criminal activity that were discovered in the course of investigations.[27] This practice became a phenomenal success, with the prime example being the DEA's ability to finance almost the entirety of its 1987 budget through funds obtained via seizure.[28] Not wanting to be left out, state governments quickly implemented programs allowing state and local authorities to engage in similar forfeiture actions.[29] With these additions, forfeiture rapidly expanded at both the state and federal levels to reach an impressive a financial scope. This could be seen in 2008, when the Department of Justice took possession of over $443 million in assets seized through just five civil forfeiture actions.[30]

In addition to its monetary benefits, authorities praise forfeiture for its effectiveness in disrupting the functional abilities of large-scale illegal operations.[31] While the confiscation of small amounts of narcotics may destroy the business of one drug dealer, proponents argue that forfeiture can even more efficiently assist in the war on drugs by enabling law enforcement to seize large amounts of cash, thereby crippling major trafficking operations.[32]

Based on forfeiture's financial and punitive effectiveness, it is no wonder that it is so commonly used by law enforcement agencies. It must be recognized, however, that while forfeiture can provide agencies with immense benefits when used properly, its self-serving nature also presents the temptation for misuse.[33]

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26. J. Mitchell Miller & Lance H. Selva, *Drug Enforcement's Double-Edged Sword: An Assessment of Asset Forfeiture Programs*, 11 JUST. Q. 313, 314–15 (1994).

27. *Id.* at 316–17.

28. Eric D. Blumenson & Eva S. Nilsen, *Contesting Government's Financial Interest in Drug Cases*, CRIM. JUST., Winter 1999, at 4, 6.

29. Miller & Selva, *supra* note 26, at 317 ("By 1985, 47 states had passed [forfeiture] legislation.").

30. OFFICE OF INSPECTOR GEN., U.S. DEP'T OF JUSTICE, AUDIT REP. 09-19, ASSETS FORFEITURE FUND AND SEIZED ASSET DEPOSIT FUND ANNUAL FINANCIAL STATEMENT FISCAL YEAR 2008, at 6 (2009).

31. *See* Miller & Selva, *supra* note 26, at 318.

32. *Id.*

33. Blumenson & Nilsen, *supra* note 28, at 5.

C. *Becoming Thieves Themselves: The Dangers of Excessive Forfeiture*

While forfeiture benefits society by financially supporting the efforts of law enforcement agencies, it also presents constitutional risks that cannot be ignored.[34] Individuals subjected to forfeiture face a direct threat to their Fourteenth Amendment right to due process if they are not given an opportunity to challenge the lawfulness of a seizure.[35] When property is seized and owners are denied a meaningful opportunity to explain their circumstances, the underlying deprivation imposes an unjustified burden on the individual subjected to forfeiture.[36]

In addition to these procedural dangers, forfeiture can adversely influence the motivations of law enforcement officials. While forfeiture's greatest advantage may be the financial windfall that law enforcement agencies reap from seizing assets associated with criminal activity, excessive dependence on forfeited funds can lead to questionable seizures of property unrelated to the crime committed or devoid of procedural protections.[37] In this way, forfeiture can create a perverse incentive for law enforcement officials to target certain criminal activity specifically because of its forfeiture implications.[38] Departments that rely excessively on funds obtained from such activities may be sapped with internal corruption and may be more prone to perform illicit searches, arrests, and seizures with the aim towards financial gain.[39] Forfeiture presents a "double-edged sword" to departments: It provides great financial benefits but also tempts them to obtain those benefits illicitly.[40]

While civil forfeiture can be a valuable and effective tool for fighting crime, the dangers it presents to both due process and the priorities of law enforcement agencies require that caution temper any praise given.

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34. There are some constitutional rights that are not implicated by forfeiture. Civil forfeiture actions do not constitute violations of an individual's Fifth Amendment right to avoid double jeopardy. United States v. Ursery, 518 U.S. 267, 274 (1996). Nor does forfeiture implicate the Fourth Amendment right to avoid unreasonable searches and seizures. *See* Florida v. White, 526 U.S. 559, 563–64 (1999).

35. U.S. CONST. amend. XIV, § 1; *see also* Miller & Selva, *supra* note 26, at 315 (citing journalistic accounts of civil liberties violations resulting from enforced asset forfeiture).

36. *See* Ward v. Village of Monroeville, 409 U.S. 57, 60 (1972) (detailing how a violation of due process can be associated with improper seizure and biased seizure procedures).

37. Blumenson & Nilsen, *supra* note 28, at 7.

38. Donald J. Boudreaux & A.C. Pritchard, *Civil Forfeiture and the War on Drugs: Lessons From Economics and History*, 33 SAN DIEGO L. REV. 79, 89 (1996). While this is most often seen in improperly motivated seizures, it can also be seen in where the police *do not* seize property. *Cf.* Blumenson & Nilsen, *supra* note 28, at 8 (describing the police practice of targeting budget-padding cash for seizure, rather than drugs that would be destroyed).

39. Blumenson & Nilsen, *supra* note 28, at 5.

40. Miller & Selva, *supra* note 26, at 313, 328–31.

II. RECENT DEVELOPMENTS IN THE RELATIONSHIP BETWEEN DUE PROCESS AND FORFEITURE

Forfeiture implicates a number of Constitutional freedoms—most notably the right to due process of the law.[41] The following section details the progression of due process rights within forfeiture matters, and pays particular attention to a recent case that allows those rights to leap forward.

A. Early Developments in Due Process and Forfeiture

There has been considerable controversy over what procedures are needed to guarantee due process during forfeiture actions, primarily on the questions of whether hearings are required before property is taken and how extensive those hearings might need to be.

In *Goldberg v. Kelly*, the Supreme Court held that procedural due process required that an evidentiary hearing be held before recipients of state or federal welfare programs were forced to forfeit benefits.[42] Justice Brennan wrote that it was irrelevant that benefits were a "privilege and not a right;"[43] so long as an interest that resembled property was seized by the government, relevant constitutional constraints applied.[44] Justice Brennan realized that not all property rights would be protected,[45] but he held that so long as an individual's "interest in avoiding that loss outweigh[ed] the government's interest in summary adjudication," due process required additional proceedings.[46]

Later, in *Mathews v. Eldridge*, the Court broke from the bare-bones procedure in *Goldberg* and set forth a more developed framework for determining what proceedings were necessary to protect due process in forfeiture actions.[47] Specifically, Justice Powell held that three factors had to be considered when determining whether a hearing was required under due process:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation 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

41. *See* Ross, *supra* note 14, at 263–64 (noting courts have avoided the requirements of due process to justify seizure).

42. Goldberg v. Kelly, 397 U.S. 254, 264 (1970).

43. *Id.* at 262 (quoting Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969)) (internal quotation marks omitted).

44. *Id.* at 262 & n.8 (referring to the property interest present in social security benefits).

45. *Id.* at 263 (referring to non-welfare government benefits).

46. *Id.*

47. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

> involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[48]

Through this framework, *Mathews* gave rise to an expanded set of circumstances where probable cause hearings would be necessary to protect due process rights.[49]

Mathews's elasticity becomes apparent in cases such as *United States v. Farmer*, where the plaintiff requested a probable cause hearing after officers confiscated a large amount of cash during a drug-related arrest.[50] Since the government was unable to show that this act would be unduly burdensome, the court ordered a hearing to determine if the seizure was proper.[51] Through the holding in *Farmer*, the court was able to demonstrate that the *Mathews* standard was flexible enough to apply to due process controversies stemming from disparate factual circumstances.[52] This flexibility, though, did not prevent the court from breaking away from *Mathews* under certain circumstances.

In *$8,850 in U.S. Currency* and *Von Neumann*, the Court diverged from *Mathews* by determining the need for hearings in accordance with speedy trial standards.[53] In those cases, the Court found that since due process would be primarily infringed upon by the delay between seizure and forfeiture proceedings, the speedy-trial test advanced in *Barker v. Wingo* should be invoked in order to balance the interests of both the prosecution and the defendant.[54] In weighing those interests, the Court in *Barker* based its analysis on four factors: 1) the length of delay; 2) the reason for the delay; 3) the defendant's assertion of his right; and 4) the prejudice to the defendant."[55] While the Court in *Barker* adjudged the necessity of hearings to support due process by balancing factors, it diverged from the frameworks set forth in

48. *Id.*

49. *See* Susan G. Haines & John J. Campbell, *Defects, Due Process, and Protective Proceedings: Are Our Probate Codes Unconstitutional?*, 14 QUINNIPIAC PROB. L.J. 57, 66–67 (1999) (describing *Mathews's* expansion of *Goldberg's* factors). Ironically, in *Mathews* itself, the Court applied these factors and determined that additional proceedings were not required due to the elaborate administrative benefits already in place. *Mathews*, 424 U.S. at 349.

50. United States v. Farmer, 274 F.3d 800, 802 (4th Cir. 2001). Specifically, the plaintiff requested a hearing as to whether all of his funds should have been subject to seizure, as he could not afford representation without at least a portion of the seized proceeds. *Id.* at 804.

51. *Id.* at 805.

52. For a similarly flexible application of the Mathews standard to real property, see United States v. James Daniel Good Real Prop., 510 U.S. 43, 53–55 (1993).

53. United States v. Von Neumann, 474 U.S. 242, 250 (1986); United States v. $8,850 in U.S. Currency, 461 U.S. 555, 564 (1983).

54. *Von Neumann*, 474 U.S. at 251; *$8,850 in U.S. Currency*, 461 U.S. at 564.

55. Barker v. Wingo, 407 U.S. 514, 530 (1972).

Mathews and *Farmer* by placing higher weight on the timing of the hearings themselves.[56]

Similarly, in *Dusenberry*, the Court further separated itself from a complete reliance on the hearing provisions in *Mathews* by stating that it "never viewed *Mathews* as announcing an all-embracing test for deciding due process claims."[57] The Court recognized that parties whose property had been seized were entitled to "notice and an opportunity to be heard,"[58] but it adopted a more straightforward test that allowed for the fulfillment of due process, so long as notice was reasonably calculated under all the circumstances to inform the party of the pending forfeiture.[59] This test gave the government a significantly lower burden of proof in order to deny additional hearings and seemed to lower the standard needed for fulfillment of due process.[60]

The difference between the due process standards in *Barker* and *Dusenberry* and the standard utilized in *Mathews* presented a conflict in need of an interpretive ruling. But, just like divergences in any other area of law, conflicts in due process and forfeiture can only be resolved by a case crystallizing the problem. For these topics, it seemed that *Smith v. City of Chicago* could have been that case.[61]

B. Smith v. City of Chicago—*A Turning Point*

Smith was a combination of six separate claims of allegedly improper forfeiture.[62] Each of the plaintiffs' property had been seized by Chicago police officers pursuant to DAFPA, which enabled law enforcement officials to subject drug-related property to forfeiture proceedings that would provide state agencies with a direct benefit.[63] After seizure, the plaintiffs were denied hearings related to their seized property and were forced to wait for more than a year to contest its forfeiture.[64]

56. *See id.*

57. Dusenbery v. United States, 534 U.S. 161, 168 (2002).

58. *Id.* at 167 (quoting United States v. James Daniel Good Real Prop., 510 U.S. 43, 48 (1993).

59. *Id.* at 167, 169.

60. *See id.* at 168–73 (finding that sending a letter by certified mail to the prison where the defendant was housed was reasonably calculated under the circumstances to inform the party of the forfeiture).

61. Smith v. City of Chicago, 524 F.3d 834 (7th Cir. 2008).

62. Respondents' Brief, *supra* note 3, at 3. Three of the plaintiffs had their automobiles seized by the police without being charged with an offense. *Id.* The other three had cash seized. *Id.*

63. *Id.*; *see also* 720 ILL. COMP. STAT. 570/505(g) (2004) (allocating proceeds from forfeitures: 65% to the law enforcement agency involved in the seizure; 25% to the prosecuting attorney's office, and 10% surrendered as court costs).

64. Respondents' Brief, *supra* note 3, at 3–4.

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The plaintiffs argued that DAFPA's timetable for resolving forfeiture disputes[65] violated due process by effectively preventing them from setting forth the innocent-owner defense permitted under Illinois law.[66] All six plaintiffs filed for injunctive relief to prevent the State from applying DAFPA, claiming that due process required an opportunity for prompt, post-seizure hearings to determine the propriety of forfeiture action.[67]

The district court was not convinced that this relief was necessary and rejected the plaintiffs' claims based on a prior contrary Seventh Circuit holding.[68] The Seventh Circuit, however, reversed the district court's dismissal,[69] noting that while it had previously refused to hear challenges to forfeiture policy, it had only done so because due process was generally satisfied when proceedings were instituted within a reasonable period after seizure.[70] The court expressed serious doubts that its own precedent was still controlling and used the *Mathews* framework to readdress the due process question.[71] After looking to previous opinions that applied *Mathews* to seizures involving automobiles, the court concluded that prompt post-seizure retention hearings, with adequate notice, were necessary for these seizures to satisfy due process.[72]

Due to the number of salient factors present in the seizure of an automobile, the court held that probable cause needed to be shown before full forfeiture could take place.[73] The hardship posed by the loss of transportation,

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65. 725 ILL. COMP. STAT. 150/5–6 (2004) (Supp. 2005). Following seizure, a state agency will have fifty-two days to decide whether to recommend that the prosecutor file a forfeiture action. *Id.* at 150/5. The prosecutor then has an additional forty-five days to review the forfeiture recommendation. *Id.* at 150/6. Only after the prosecutor decides to file for forfeiture is notice sent to the owner, who then has forty-five days to file a verified claim and post a cost bond. *Id.* at 150/6(C)(1). Bond is set at 10% of the value assigned to the property by Petitioner or $100, whichever is greater. *Id.* at 150/6(C)(2). Posting bond does not result in release of the seized property and functions, in effect, as a filing fee. *Id.* Following the issuance of a claim or bond, another forty-five days can pass before the hearing, allowing for 187 days total to pass between a seizure and any hearing on its propriety. *Id.*

66. Respondents' Brief, *supra* note 3, at 3–4; *see also* 725 ILL. COMP. STAT. at 150/8(A) (setting forth Illinois's innocent-owner defense).

67. Respondents' Brief, *supra* note 3, at 4; *see also* 725 ILL. COMP. STAT. at 150/9 (requiring an ultimate forfeiture proceeding).

68. *See* Smith v. City of Chicago, 524 F.3d 834, 835 (7th Cir. 2008) (noting that in the district court, plaintiffs conceded that their complaint should be dismissed); *see also* Jones v. Takaki, 38 F.3d 321, 324 (7th Cir. 1994) (rejecting claims for injunctive relief under DAFPA).

69. *Smith*, 524 F.3d at 839.

70. *Id.* at 836 (citing *Jones*, 38 F.3d at 324).

71. *Id.* at 836–38 (rejecting the application of the standard utilized in *Jones* in favor of that found in Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

72. *Id.* at 837.

73. *Id.* at 837–38. The court cited a number of salient factors in assessing the private interests, including the possibility that there may be an innocent owner of the seized automobile,

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the court held, required an opportunity for the owner to be heard.[74] This was particularly true when the driver of the vehicle, rather than its owner, was the individual engaged in the activity that justified the seizure.[75]

The court expressed its sympathy that such a hearing would impose an administrative burden on the city, but it noted that a governing entity is always burdened by due process.[76] The required hearing was not meant to be a protracted proceeding but merely an opportunity for authorities to notify the property owner of the seizure and provide them an opportunity to show why the property should be released.[77]

Smith represented a turning point in forfeiture jurisprudence by requiring post-seizure hearings in order to uphold due process. This requirement was a departure from Seventh Circuit precedent, and it represented a shift in the way that forfeiture actions would be applied.[78] To prevent such a result from occurring, the State promptly filed a petition for certiorari to the Supreme Court.[79] Those hoping that the law of due process and forfeiture could be modified, however, would soon be disappointed.

III. *ALVAREZ V. SMITH*: THE COURT'S OPINION

While the Seventh Circuit's opinion in *Smith v. City of Chicago* addressed the merits of the dispute by focusing on the due process implications of forfeiture under DAFPA, the Supreme Court made no such sweeping determinations on appeal. From the first moments of oral argument to the end of the majority opinion, the Court approached the controversy in a markedly different manner from that adopted by the Seventh Circuit.[80] In an opinion by Justice Breyer, the Court ultimately held that the injunctive claims of Smith

the importance of an automobile as a mode of transportation, the availability of hardship relief, and the length of the deprivation. *Id.* at 837.

74. *Smith*, 524 F.3d at 838.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Smith* had the potential to affect not only the DAFPA but also all forfeiture actions adjudicated by the Seventh Circuit. *Cf. id.* at 839 (stating that the Seventh Circuit circulated the *Smith* opinion to all judges of the court).

79. The petition was originally filed under the name of then State's Attorney Richard A. Devine who had been a named defendant in the initial action. Petition for Writ of Certiorari, Devine v. Smith, 130 S. Ct. 576 (2009) (No. 08-351).

80. The Court's choice to avoid the (comparatively exciting) due process issues addressed by the Seventh Circuit did not go unnoticed. *See* Nathan Koppel, *The Supreme Court Shows Off Its Dull Side*, WALL ST. J. L. BLOG (Oct. 15, 2009, 8:54 AM), http://blogs.wsj.com/law/2009/10/15/the-supreme-court-shows-off-its-dull-side (commenting that the justices seemed more focused on removing the case procedurally than deciding its substantive issues).

and the other respondents were moot and that the ruling (and hearing requirement) Judge Evans set forth for the Seventh Circuit should be vacated.[81]

Although the Court in *Alvarez v. Smith* initially granted certiorari to review the merits of the case, admissions by both counsels during oral argument that the underlying property claims of the respondents had been completed all but assured that the Court would ultimately declare the case moot.[82] Since the respondents could no longer present valid claims for relief on the merits, the Court held that an active "case or controversy" as required for standing under Article III was not present.[83] The Court further noted that since the respondents' attempt to file a class action had not been certified by the district court,[84] and since their actions for relief in the form of damages had not been attached to the injunctive claim at issue,[85] no controversy existed before it that would sufficiently justify a ruling.[86] Instead, the Court felt that by declaring the matter moot and leaving the damages issue open, a path would be cleared for relitigation.[87]

Although the Court can issue a ruling on the merits of a case in certain exceptional situations where an active controversy may not be present, the Court refused to review this claim under such an exception.[88] Specifically, the Court refused to hear this case as a matter "capable of repetition while evading review."[89] The Court noted that the parties presented no evidence that the individual claimants would be subject to subsequent victimization of seizure procedures and that the matter was, therefore, not capable of repetition.[90] Further, the Court held that the possibility of respondents litigating damages claims prevented the action from evading review.[91]

While the Court was unanimous in reaching its mootness holding, contention arose as to the proper treatment of the ruling below.[92] The majority held that since each of the listed claims had been resolved through their natural

81. Alvarez v. Smith, 130 S. Ct. 576, 578 (2009), *vacating as moot* Smith v. City of Chicago, 524 F.3d 834 (7th Cir. 2008).

82. Transcript of Oral Argument at 5, 57, *Alvarez*, 130 S. Ct. 576 (No. 08-351).

83. *Alvarez*, 130 S. Ct. at 580 (applying provisions of Article III, Section 2 of the U.S. Constitution).

84. *Id.*

85. *Id.* at 580.

86. *Id.* at 581.

87. *Id.* at 581, 583.

88. *Alvarez*, 130 S. Ct. at 581.

89. *Id.* (quoting Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 462 (2007)) (internal quotation marks omitted).

90. *Id.*

91. *Id.* at 581 (citing Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 8–9 (1978)).

92. *See id.* at 583 (Stevens, J., dissenting in part).

course, the decision of the lower court should be vacated.[93] Justice Stevens, dissenting in part, disagreed by noting that since at least one of the respondents' claims was resolved by discretionary settlement,[94] the holding in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership* required that the Court leave the Seventh Circuit's opinion intact.[95] The majority disagreed, holding that the settlement on which Justice Stevens keyed was little more than a "happenstance" occurrence through the natural progression of the seizure process—an occurrence that would not prejudice the ability of the parties to re-file their claims.[96] In the end, the Seventh Circuit's decision in *Smith* was vacated, the requirement that those subjected to forfeiture receive prompt post-seizure hearings was nullified, and the merits of the case were ignored.[97] By holding the matter moot, the Court attempted to make it so that the respondents' claims had never been filed. The ultimate effects of their decision, though, would be considerably more complicated.

IV. COMPLICATIONS WITH MOOTNESS AND RELITIGATION: *ALVAREZ*'S DOUBLE-EDGED HOLDING

Although the holding in *Alvarez* was intended to allow relitigation, it may inadvertently have led to complications for future litigants of forfeiture claims. To properly understand the implications of such a double-edged holding, multiple issues affected by *Alvarez* must be addressed. First, this part will explain why it was proper for the claims in *Alvarez* to be held moot. Second,

93. *Alvarez*, 130 S. Ct. at 583 (majority opinion). The Court noted that it could "direct the entry of any such appropriate judgment" that "may be just under the circumstances." *Id.* at 581 (quoting 28 U.S.C. § 2106 (2006)). As such, it could vacate the judgment of the lower court on a moot matter in order to clear the path for future litigation, provided that equity and fairness considerations did not tilt against such a ruling. *Id.* at 581, 583. If the lower court decision had become moot by way of settlement, vacating the lower court's decision could unfairly constrain equity and fairness by eliminating the very purpose for which a party had voluntarily forfeited his right to appeal. *Id.* at 582 (citing U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 24–26 (1994). The Court found that since the six cases making up the action before it had been remedied without any solid "procedural link" to the current dispute, they were mooted through "happenstance" rather than through settlement and, thus, did not prevent vacatur of the judgment below. *Id.*; *see also* United States v. Munsingwear, Inc. 340 U.S. 36, 39–40 (1950) (describing the manner in which lower decisions may be vacated).

94. *Alvarez*, 130 S. Ct. at 584 (Stevens, J., dissenting in part). The claim of respondent Michelle Waldo for $1,500 seized under DAFPA was resolved through a "compromise settlement" that resulted in the return of her cash after the evidence had been weighed. *Id.* at 582 (majority opinion).

95. *Id.* at 584 (Stevens, J., dissenting in part). Justice Stevens suggests that a more prudential action, if the Court had mootness concerns, may have been to dismiss the writ of certiorari as improvidently granted, which would have allowed the opinion of the Seventh Circuit to remain standing. *Id.*

96. *Id.* at 581–82 (majority opinion).

97. *Id.* at 583.

this part will address the propriety of the Court's decision to vacate the Seventh Circuit's opinion. Finally, this part will detail complications resulting from the vacatur so that the implications of *Alvarez* can come into full focus.

A. The Claim was Properly Held Moot

Alvarez is a case filled with constitutional concerns that failed to present an effective ruling on the controversial questions of law presented.[98] After looking at the absence of an active case or controversy and the difficulties presented by trying to apply an exception though, it is clear that the Court acted properly in holding respondents' claims moot.

1. There was No Active Case or Controversy Present

Under Article III of the Constitution, the Court is only allowed to issue rulings on actual "Cases" or "Controversies" that are actively contested at all stages of appellate review.[99] If the issue at stake is no longer active when it is presented to the Court, the parties lack a cognizable interest in the outcome of the matter and the case should be dismissed as moot.[100]

Since the respondents in *Alvarez* lacked class certification,[101] the Court could consider only the claims of the six individuals joined to the matter.[102] During oral argument, though, the Court confirmed that the individual claims had already been resolved.[103] After the resolution of these claims, including the return of Chermane Smith's car, there was no active controversy pending before the Court; thus, any claim for an injunction would amount to nothing more than an "abstract dispute about the law."[104]

While the respondents argued that they had a claim of damages pending in district court at the time of oral argument,[105] that claim would also be unlikely to provide the Respondents with any assistance in presenting a valid case or controversy. Since each of the Respondents had their property seized by law enforcement officials acting under DAFPA, any claims for damages against those officials would be subject to a defense of qualified immunity.[106] It is

98. *See* Koppel, *supra* note 80.

99. U.S. CONST. art. III, § 2; *see also* Preiser v. Newkirk, 422 U.S. 395, 401 (1975) (quoting Steffel v. Thompson, 415 U.S. 452, 459 n.10 (1974)) (finding that controversies that are active at the time the complaint is filed will not necessarily have standing throughout the litigation).

100. City of Erie v. Pap's A.M., 529 U.S. 277, 287 (2000) (describing when the mootness doctrine is properly used).

101. *Alvarez*, 130 S. Ct. at 580.

102. *Id.* at 580.

103. Transcript of Oral Argument, *supra* note 82, at 5.

104. *See id.*; *see also Alvarez*, 130 S. Ct. at 580.

105. *Alvarez*, 130 S. Ct. at 580.

106. *See* Wilson v. Layne, 526 U.S. 603, 609 (1999) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)) ("[G]overnment officials performing discretionary functions generally are

likely that even if the property had been seized in a manner that violated due process, damages would not be available unless said seizure constituted a clearly established violation of a constitutional right.[107] Since seizures under DAFPA are well supported by current law and since no hearing requirement existed for officers to violate through continued possession,[108] it is highly unlikely that a damages claim would be successful unless a separate clearly established violation occurred.[109] Based on the absence of a judiciable claim, the Court did not err in failing to find an active case or controversy.

2. The Claim Was Not Admissible Under a Mootness Exception

While a mootness holding usually prevents the Court from hearing the merits of a case, this result can be sidestepped in certain situations where a court otherwise might never be able to rule on a particular legal issue. Cases that are "capable of repetition, yet evading review" can be heard on appeal under an exception to the mootness doctrine despite the absence of a current controversy by the time they reach the appellate level.[110]

Here, the claim presented by the respondents is not repeatable to the extent that the individual actors are not likely to stand before a court at a later time and argue the same issue.[111] Although it is feasible that one of the respondent's property could again be subjected to forfeiture—particularly if

granted a qualified immunity and are 'shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"); *see also* Pearson v. Callahan, 555 U.S. 223, 231 (2009) (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)) ("[Q]ualified immunity is 'an immunity from suit rather than a mere defense to liability . . . .'").

107. *Wilson*, 526 U.S. at 609. Although an action against the municipality (City of Chicago) would be permitted, the city would likely elect to settle any claim for damages to ensure that an active controversy would not present the Court with an opportunity to limit available occasions for forfeiture. *See infra* Part IV.C.3.

108. At the time of the seizure of Respondents' property, the hearing requirement set forth by the 7th Circuit was not yet in place. *Cf.* Smith v. City of Chicago, 524 F.3d 834, 835 (7th Cir. 2008).

109. This lack of available action for damages also paradoxically supports the admission of the claim under a mootness exception. *See* United States v. Munsingwear, Inc., 340 U.S. 36, 37–40 (1950) (finding that a holding of mootness should not prevent a claim for damages). In *Munsingwear*, however, qualified immunity was not considered as a limiting factor, as the underlying action for control of commodities did not implicate 42 U.S.C. § 1983. *See id.*

110. *See, e.g.*, Fed. Election Comm'n v. Wis. Right To Life, Inc., 551 U.S. 449, 463–64 (2007) (ruling on constitutionality of campaign ads due to brevity of election cycle); Roe v. Wade, 410 U.S. 113, 125 (1973) (ruling on constitutionality of abortion statute due to length of human gestation period); Sloan v. Dep't of Transp., 666 S.E.2d 236, 240 (S.C. 2008) (ruling on constitutionality of emergency procurement of tax funds to road project due to limited time period of emergency).

111. Alvarez v. Smith, 130 S. Ct. 576, 581 (2009) ("[N]othing suggests that the individual plaintiffs will likely again prove subject to the State's seizure procedures.").

Smith and her compatriots continue to allow their vehicles to transport individuals involved in the drug trade—it is highly unlikely that such interactions with law enforcement would happen often enough to trigger the exception.[112] The seizure and forfeiture of property is not analogous to the natural occurrence of pregnancy or the passage of an election cycle—it is not something that is destined to occur again.[113] As such, it cannot be said that Respondents' claim was sufficiently "capable of repetition."

The respondents have a better argument that their circumstances are capable of evading review. Although the time constraints on individual forfeiture actions push them towards mootness,[114] the majority in *Alvarez* brushed aside the notion that the cause could evade review by pointing to the respondents' pending damages claim.[115] However, as discussed above, it is possible that such a claim for damages could be blocked by qualified immunity.[116] If the respondents (who were denied the class certification necessary to deliver a proper injunctive claim before the Court) were also unable to present a claim for damages, it is possible that their action may have evaded review in a manner that would trigger the exception.[117] Since the claimants here had a pending action below that would likely have been applicable against the municipality, since not every future claimant will evade class certification, and since the "capable of repetition, yet evading review"

112. *Cf.* City of Los Angeles v. Lyons, 461 U.S. 95, 105–06 (1983) ("[An individual] would have had not only to allege that he would have another encounter with the police but also to make the incredible assertion . . . that *all* police officers . . . *always* [violate the rights of] any citizen with whom they happen to have an encounter.").

113. *Compare Lyons*, 461 U.S. at 105–06, *with Roe*, 410 U.S. at 125 (pregnancy), *and Wis. Right to Life*, 551 U.S. at 463–64 (election cycle).

114. *See* cases cited *supra* note 110. If, as in *Roe*, a nine-month human gestation period will not allow enough time for an action to reach the Court, it follows that a forfeiture with a lifespan of 187 days is not likely to succeed either.

115. *Alvarez*, 130 S. Ct. at 581 ("[I]n any event, since those who are directly affected by the forfeiture practices might bring damages actions, the practices do not 'evade review.'").

116. *See supra* note 106 and accompanying text. For this to occur, though, outside forces (such as statutory excusal) would need to be present that would excuse the City of Chicago from liability as well, as it has been well established that municipalities cannot adopt sovereign immunity for themselves. Owen v. City of Independence, 445 U.S. 622, 649–50 (1980). The rarity of such an occurrence further supports the notion that the exception should not apply.

117. This fact cannot be the focus of an appeal by the present respondents as the Court's opinion is final and cannot be overturned. It could, however, be used by future litigants to fight a denial of class certification that would effectively function as a dismissal of a claim for injunctive relief. *See* discussion *infra* notes 145–49 and accompanying text.

standard suggests that both elements must be present for the rule to apply,[118] it seems that the exception was properly refused in this instance.[119]

Since the respondents were not certified as a class, had no existing damages claim, and could not present a live claim for injunctive relief, they were not able to present an active case or controversy before the Court. As the respondents' claim failed to fulfill the "capable of repetition, yet evading review" exception, the Court acted properly by holding the matter moot.[120] While this holding was sufficient and without controversy, the same cannot be said for the Court's decision to vacate the Seventh Circuit's opinion.[121]

B. The Court Should Not Have Vacated the Seventh Circuit's Opinion

If the first "edge" of mootness is its requirement that claims improperly before the Court be dismissed, the second is the need to act on those dismissed matters by summarily vacating their rulings.[122] Federal courts commonly vacate lower court decisions upon finding a matter moot to "clear[] the path for future relitigation."[123] While it is true that an absence of conflicting opinions can simplify relitigation, this logic should not have been applied in *Alvarez*. The Court made a correct determination, as detailed above, in finding the Respondents' claims moot.[124] However, as illustrated by Justice Stevens' dissent, it acted improperly in vacating the Seventh Circuit's opinion.[125]

The majority in *Alvarez* vacated the holding of the Seventh Circuit based on the proposition that lower court decisions should be vacated if a case becomes moot en route to the Supreme Court or while awaiting a decision on the merits.[126] By vacating the lower opinion, the majority noted that it cleared the path for future relitigation of the parties' issues while prejudicing none with a preliminary ruling.[127] The framework the majority used to vacate the moot holding is well-intentioned and consistently applied, but it needs to be

118. Meyer v. Grant, 486 U.S. 414, 417 n.2 (1988) (indicating that both elements of the test must be present).

119. Regardless of whether such a claim can actually "evade review," it is not likely to be "capable of repetition" and, therefore, still fails to fulfill the exception. *Cf.* City of Los Angeles v. Lyons, 461 U.S. 95, 105–06 (1983).

120. *See Alvarez*, 130 S. Ct. at 581.

121. *See, e.g.*, *id.* at 583 (Stevens, J., dissenting in part).

122. *See* DeFunis v. Odegaard, 416 U.S. 312, 319–20 (1974).

123. United States v. Munsingwear, Inc., 340 U.S. 36, 39–40 (1950). *See also id.* at 39 n.2 (listing examples). Much like for the initial finding of mootness, exceptions to the rule of vacatur exist that ensure the court is not required to vacate the lower court's opinion in every case that fails to present a case or controversy. *Id.*

124. *See supra* Part IV.A.

125. *Alvarez*, 130 S. Ct. at 583 (Stevens, J., dissenting in part).

126. *Id.* at 581 (citing *Munsingwear*, 340 U.S. at 39).

127. *Id.* (citing *Munsingwear*, 340 U.S. at 40).

remembered that said framework can be undermined in certain exceptional situations.

Justice Stevens, in his dissent, highlights one such situation while presenting a reasonable explanation as to why the lower decision should not have been vacated. In *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, the Court held that mootness determinations that were based on a controversy being resolved by settlement should not be vacated, as vacatur amounted to the government overruling a voluntary agreement between the involved parties.[128] For Stevens, the hand-waving that the majority used to circumvent the obvious settlement of one of the respondents' claims was not enough to disguise the fact that at least one of the claims below was completed via voluntary action, and the very case that the majority relied upon suggested that such a result should be left in place.[129]

Justice Stevens' opinion in this matter illustrates that the vacatur of the Seventh Circuit's opinion was wrong for two reasons. First, Justice Stevens points out that the majority entertained a misguided assumption that the agreement between Respondent Waldo and the State's Attorney was merely a "happenstance" result and not a settlement.[130] While it is true that the return of Waldo's property was a natural event that occurred at the end of the forfeiture proceedings,[131] it is nevertheless also true that this end was reached as a result of a discretionary agreement the parties entered into, where legal rights to certain property were exchanged for a particular litigation result.[132] Under *Bancorp*, Justice Stevens argues, the settlement should have been sufficient to uphold the decision of the lower court.[133]

Second, Justice Stevens notes that vacatur of the Seventh Circuit's opinion was improper because it was inappropriate to summarily dispose of a case where the judiciable issues were voluntarily abandoned.[134] Justice Stevens supported this from an equitable standpoint by stating that the public (and the law) are "better served by leaving appellate judgments intact."[135] While the

128. *Id.* at 583 (Stevens, J., dissenting in part) (citing U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 26, 29 (1994)).

129. *Id.* 584. Justice Stevens objects to the majority's failure to follow precedent, noting "[W]e will typically decline to vacate when 'the party seeking relief from the judgment below caused the mootness by voluntary action.'" *Id.* at 583 (quoting *Bancorp*, 513 U.S. at 24).

130. *Alvarez*, 130 S. Ct. at 584.

131. *Id.* The State returned the $1,500 seized from Waldo as part of a compromise settlement on March 19, 2007, fourteen months after the initial seizure. *Id.* at 582 (majority opinion).

132. *Id.* at 584 (Stevens, J., dissenting in part).

133. *Id.* at 584 (citing *Bancorp*, 513 U.S. at 24–26).

134. *Id.* at 583 (Stevens, J., dissenting in part). The mootness determination should particularly not be applied with such retroactive aplomb because the issue was still live at the time that the Seventh Circuit heard it.

135. *Alvarez*, 130 S. Ct. at 583 (Stevens, J., dissenting in part). "Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the

majority felt that vacating the Seventh Circuit's opinion would give the respondents the clearest possible path for relitigating the merits, it seems to have ignored the fact that it could have been hearing the merits itself had respondent Waldo not previously settled her claim.[136] By vacating the judgment, the Court seemed to tell the respondents to come back tomorrow, after quickly forgetting that their problem could easily have been solved today.

Because there was a settlement that should have prevented the Court's traditional vacatur of the lower court and because the law is better served by leaving decisions intact, Justice Stevens seems to be correct in his notion that the Court erred in vacating the Seventh Circuit's opinion. While the Court may have thought it was making relitigation of similar claims simpler, it may have done just the opposite.

C. Property Owners Subject to Forfeiture Face A Difficult Path for Relitigation

Although *Alvarez* intended to clear a path for relitigation, it gave rise to numerous procedural consequences that require discussion to decipher. The prospects for relitigation may not be clear, but they can at least be clarified to the point where they are understandable.

1. The Issues in *Alvarez* are Still Alive

While the respondents would be hard pressed to describe the Court's actions in holding their claims moot and vacating the ruling of the Seventh Circuit as a victory, the outcome of *Alvarez* could have been much less positive. Although the Court struck down the Seventh Circuit's probable cause hearing requirement, it did not reverse the lower court's reasoning on the merits by stating that pre-forfeiture hearings would never be required.[137] In this sense, the Court's claim that it was "clear[ing] the path for future relitigation"[138] rang true, as the legal issues that characterized the merits of

property of private litigants . . . ." *Id.* (Stevens, J., dissenting in part) (quoting *Bancorp*, 513 U.S. at 26).

136. Had respondent Waldo chosen not to settle but to instead pursue additional action, it is possible, albeit unlikely, that her claim could have been outstanding at the time this matter was heard. Regardless of the timing, though, the voluntary nature of the settlement should have prevented vacatur.

137. *See Alvarez*, 130 S. Ct. at 583. While vacatur of a lower court's decision is inevitably part of any reversal by the Supreme Court, such nullification of a holding neither applies outside the original jurisdiction nor carries the weight of precedent that a reversal does. For more on the differences between reversals and simple vacatur, see 5 AM. JUR. 2D *Appellate Review* §§ 791, 803 (2007).

138. *Alvarez*, 130 S. Ct. at 583 (alteration in original) (quoting United States v. Munsingwear, Inc., 340 U.S. 36, 40 (1950)).

Alvarez were left unresolved and remain ripe for review.[139] While the issues remain alive, the Court's finding of mootness may have indirectly made the relitigation process more complicated than originally expected.

2. The Problem with Relitigation: Mootness and Class Actions

Alvarez has created a circumstance where certain forfeiture claims can only be challenged in a particular procedural manner.[140] While the procedural aspects of litigation are always important, the mootness and vacatur holdings in *Alvarez* demonstrate that improperly advancing a forfeiture action will doom a party's claim and prevent substantive advancement of the law.[141] Parties litigating injunctive forfeiture claims in light of *Alvarez* must properly evaluate at an early stage whether they can act as a class, as proper pleading conventions will make all the difference in whether claims are heard by the Court.

As seen in *Alvarez*, individual claims for injunctive relief under DAFPA are unlikely to succeed. Unless a case is fast-tracked for an unforeseeable reason,[142] forfeiture claims under the statute are unlikely to reach the Supreme Court before an individual property dispute is resolved and subjected to a mootness determination.[143] Based on this unfortunate fact, any "clear[] path for future relitigation"[144] that would enable substantive changes in forfeiture law is not likely to come through an injunctive claim by individual plaintiffs.

139. Without ruling on the merits, an appellate court cannot issue an opinion fully reversing the legal reasoning of the lower court. Thus, future action is permissible because the controversy presented in *Alvarez* "has reached, but has not passed, the point that the facts have sufficiently congealed to permit an intelligent and useful decision to be made." 22A AM. JUR. 2D *Declaratory Judgments* § 32 (2003) (citing BKHN, Inc. v. Dep't of Health Servs., 3 Cal. App. 4th 301, 308 (Cal. Ct. App. 1992)).

140. It should be noted that if the opinion of the Seventh Circuit had not been vacated, relitigation may not have been necessary. The probable cause hearings established by the Seventh Circuit, if present, would have cured a good deal of the due process concerns associated with DAFPA. While it is true that some litigants may have tried to appeal the law itself (or that individuals from other circuits who had not received the benefit of the hearing requirement could file claims), a mootness holding that had followed *Bancorp* and upheld the Seventh Circuit would have likely prevented relitigation by removing the very need for the litigation.

141. *See Alvarez*, 130 S. Ct. at 580–81. Respondents' failure to litigate their case in a manner that presented an active controversy to the Court foreclosed the Court's ability to issue a substantive ruling on the merits. *Id.*

142. DAFPA, unlike certain federal statutes, does not have a provision for expedited review by the Supreme Court, and it should not be expected that actions filed under its provisions will make it before the Court with any unusual speed. *But see* Clinton v. City of New York, 524 U.S. 417, 428–29 (1998) (discussing expedited review of the constitutionality of the line item veto via a provision in the Line Item Veto Act, 2 U.S.C. § 691 (1994)).

143. *See supra* text accompanying note 65.

144. *Cf. Alvarez*, 130 S. Ct. at 583.

Class actions, on the other hand, face much better prospects. As acknowledged by Justice Scalia during the oral arguments for *Alvarez*, the formation of a class would have provided Respondents with advantages throughout litigation.[145] The nature of the class as a legal entity would have allowed the Court to assume that some of the class members still had active injunctive claims pending that could have been justifiably heard on the merits.[146] Since such a class was not certified, though, the respondents were forced to move forward as a group of individual actors—all but dooming their cases due to the time restraints placed on injunctive relief.[147]

The necessity of class action leads to an unusual concentration of procedural power. Because of the threat of mootness in forfeiture matters, the ability to certify or deny a class allows the district court judge to essentially determine whether litigation will continue.[148] It could be argued that this is not notable because district court judges have certification power in any case and because decisions on class certification can be appealed. But, because individual claims are so likely to be mooted due to the short window of time in which Illinois forfeiture actions are justiciable, the decision of a district judge takes on particular import.[149]

As far as forfeiture claims under DAFPA are concerned, then, a district court's denial of class certification effectively amounts to a *sua sponte* dismissal. After *Alvarez*, individuals facing forfeiture lost the ability to seek probable cause hearings[150] and effectively lost the ability to file individually due to the Court's mootness determination and the timing provisions of DAFPA.[151] The only realistic hope that remains for relitigating forfeiture claims after *Alvarez*, then, is through the proper certification of a class. As a result of *Alvarez*'s convoluted procedural effects, forfeiture relief can be effectively obtained only through class action, and the effectiveness of that class will depend heavily upon the certification decision of a single judge.

145. Transcript of Oral Argument, *supra* note 82, at 38.

146. County of Riverside v. McLaughlin, 500 U.S. 44, 51 (1991) ("[T]he termination of a class representative's claim does not moot the claims of the unnamed members of the class.").

147. *Alvarez*, 130 S. Ct. at 580 ("The District Court denied the plaintiffs' class certification motion. . . . Hence the only disputes relevant here are those between these six plaintiffs and the State's Attorney.").

148. *But see* U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 398 (1980) (acknowledging that the "capable of repetition, yet evading review" remains available where class certification is denied). Such an appeal could lead to the possibility of further litigation after the district court's initial determination.

149. *See* Smith v. City of Chicago, 524 F.3d 834, 836 (7th Cir. 2008) (detailing that claims under DAFPA will largely be resolved within the187-day time limit between seizure and the final forfeiture proceeding).

150. *Alvarez*, 130 S. Ct. at 583 (describing the Court's vacatur of the Seventh Circuit's Opinion).

151. *Cf. id.* at 581.

3. Damages, Qualified Immunity, and *Pearson* as a Roundabout Path to the Merits

While the success of a claim for injunctive relief is determined by whether it is brought by an individual or through a class action, claims for damages present a different story. Unlike claims for injunctive relief, claims for damages are evergreen in nature and not subject to dismissal for mootness.[152] Regardless of how appealing actions for damages may seem at the outset, though, they too face complications in providing a clear path back to the Supreme Court because of the protections that qualified immunity affords to state officials.[153]

To withstand a qualified immunity defense, a litigant must demonstrate that there was a clearly established constitutional violation by a state actor.[154] However, since DAFPA plainly grants officers the authority to engage in the seizure of property associated with certain crimes, it will be difficult for litigants to show clear due process violations without the aid of probable cause hearings like those advocated by the Seventh Circuit.[155] Plaintiffs can, therefore, still file claims for damages against the municipality or state agency that employed the officers,[156] but the chances of such a claim ever being appealed to the point where it could influence policy are slim. Government actors would likely choose to settle a few isolated claims over defending against actions that could lead to adverse rulings and thereby loss of funding from forfeiture activity.[157]

If courts were progressively inclined, though, judges at every level could adopt a procedural framework that might enable plaintiffs to receive a valid ruling on the merits of their claims, despite the presence of a legitimate qualified immunity defense. Traditionally, inquiries as to whether a damages

152. *Alvarez*, 130 S. Ct. at 581 (citing Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 8–9 (1978)).

153. Pearson v. Callahan, 555 U.S. 223, 231 (2009).

154. *See id.*

155. Had the Seventh Circuit's hearing requirement been upheld, it is possible that future litigants could claim a clearly established violation *if they were denied access to such a proceeding*. This is mere conjecture, though, as that requirement was vacated in *Alvarez*.

156. *Cf.* Owen v. City of Independence, 445 U.S. 622, 638 (1980) (noting that municipalities cannot use qualified immunity to claim protection from civil rights actions).

157. Such a scenario demonstrates how success for the respondents in such a suit would be different from what would be considered successful from a standpoint of constitutional progression. Respondents may find a settlement for damages inflicted by their inability to use their vehicles to be a successful resolution to the case. Yet, such a settlement would not be a success from a doctrinal standpoint, as it could not be appealed to the Supreme Court and thereby allow for a substantive change to forfeiture jurisprudence. *See* U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 21 (1994). In this sense, the City of Chicago could indefinitely receive extensive funding through DAFPA forfeiture so long as it generously settled claims properly filed against it.

claim should be negated by qualified immunity were separate and distinct from inquiries on the merits in those same causes of action.[158] Because qualified immunity was seen as immunity from suit and not just immunity from liability, courts could avoid ruling on the merits of a claim against a governmental agent entitled to qualified immunity, since the merits of that claim would never technically be at issue.[159] Thus, *Saucier v. Katz* required courts to decide qualified immunity claims first, as there was no point in ruling on the merits of a claim if later it could be found that the parties were immune from suit.[160]

As of early 2009, however, this procedural framework is no longer required. In *Pearson v. Callahan*, the Court overruled the *Saucier* doctrine by finding that judges "should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand."[161] Based on this, a court hearing a damages claim could rule on the merits of the seizure *before* qualified immunity even became a question.[162] While this holding would not rescue the respondents' damages claim in *Alvarez*, it could allow for the merits of a damages claim against an officer engaged in DAFPA forfeiture to climb the appellate ladder. If a court would be progressive enough to adopt this alternate framework, *Pearson* could provide a back door for relitigation.[163]

By holding the respondents' claims in *Alvarez* moot and vacating the judgment of the Seventh Circuit, the Court created a situation where the path to relitigation—that it touted so highly—became convoluted and heavily influenced by a very small number of procedural choices. While the Court made the correct determination in holding the matter moot, its reversal of the Seventh Circuit's decision and the challenging path it has forced relitigation efforts to follow will make it difficult for forfeitures under DAFPA to be challenged in the near future unless progressive changes to existing case law are voluntarily exercised. For this reason, the Court erred in failing to consider the merits of the respondents' claims.

158. *See* Saucier v. Katz, 533 U.S. 194, 200 (2001).
159. *Id.* at 200–01.
160. *Id.*
161. Pearson v. Callahan, 555 U.S. 223, 236 (2009).
162. *Id.*
163. *Pearson* merely gave courts the option to consider the merits first. *See id.* Courts remain free to follow the traditional framework. *Id.*

V. AN OPPORTUNITY MISSED: THE HEARING REQUIREMENT AND THE UNADDRESSED MERITS OF THE SEVENTH CIRCUIT'S OPINION

Until the Supreme Court takes up the interaction between due process and forfeiture in a case with a justiciable conflict, potential litigants will be forced to walk the convoluted path of forfeiture litigation without having any idea of what result awaits them. When that day comes, though, how should the court rule? To answer this question, the merits of *Alvarez* must be considered.

A. *Post-Seizure Hearings Protect the Due Process Rights of Those Subjected to Forfeiture*

It is clear that due process is "conferred, not by legislative grace, but by constitutional guarantee."[164] As such, there is no question that its constitutional authority will require certain procedural benchmarks for any seizure.[165] A more pressing question, though, is whether the statutory forfeiture proceedings are sufficient to satisfy due process.

In *Mathews v. Eldridge*, the Court held that determining whether due process required a statute to provide additional procedural protection depended on consideration of the parties' private interest, the risk of wrongful deprivation related to the benefits of additional safeguards, and the government's interest in avoiding further burdens on its seizure power.[166] This standard is flexible and calls for protections to be provided as a particular situation demands—ensuring that neither the government nor the party subject to forfeiture will be unduly burdened.

Mathews's pattern of requiring further procedural action was exemplified in *United States v. James Daniel Good Real Property*, when it was applied to determine what procedures were required prior to forfeiture.[167] There, the Court found that due process required individuals be given notice and an opportunity to be heard before the government deprived them of real property, and only in extraordinary situations—where a government interest was at stake—could that hearing be postponed until after a seizure occurred.[168] Although it was argued that the ultimate forfeiture proceedings in the seizure statute would fulfill this goal, the Court applied *Mathews* and held that an additional hearing was required for a government actor to engage in the seizure of real property.[169] The provision of an additional hearing prevented seizure of

164. Arnett v. Kennedy, 416 U.S. 134, 167 (1974) (Powell, J., concurring).

165. *Cf.* Goldberg v. Kelly, 397 U.S. 254, 263 (1970) ("[T]he [individual's] interest in avoiding . . . loss outweighs the governmental interest in summary adjudication.").

166. Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976).

167. United States v. James Daniel Good Real Prop., 510 U.S. 43, 53 (1993).

168. *Id.*

169. *Id.* at 55.

property where owners would have to wait months before presenting valid defenses at ultimate forfeiture proceedings.[170]

The application of this standard to personal property could later be seen in *Krimstock v. Kelly*.[171] There, the court applied *Mathews* to a New York forfeiture statute that was challenged after several automobiles were seized under its provisions.[172] Then-Judge Sotomayor, writing for the court, applied the *Mathews* test to balance the substantial individual interest in uninterrupted use of an automobile[173] against the government's interest in retaining vehicles that it believed it could eventually take possession of through forfeiture.[174] Under this framework, Judge Sotomayor found that since the procedures provided for by statute presented such a remarkably high risk of erroneous or excessive deprivation, and since this deprivation had the potential to so drastically affect the livelihood of those impacted, further procedural constraints on the statute were required to satisfy the concerns of due process.[175] Using *Mathews*, Judge Sotomayor was able to determine that a prompt, post-seizure hearing needed to be provided prior to final forfeiture proceedings to fulfill the requirements of due process.[176]

Because of *Mathews's* flexibility in application and its pedigree of use in due process actions, it could easily have been applied to the merits in *Alvarez* and very well could have lead to a similar result as in *Krimstock*.

170. *Id.* at 56.

171. 306 F.3d 40 (2d Cir. 2002).

172. *Id.* at 44, 60–68 (applying *Mathews*'s due process concerns to determine the propriety of N.Y.C. Code § 14-140).

173. Stypmann v. City & County of San Francisco, 557 F.2d 1338, 1342–43 (9th Cir. 1977) (finding that uninterrupted use of a vehicle needs to be protected as it is something on which the owner's "ability to make a living" may depend).

174. *Krimstock*, 306 F.3d at 64. The government's interest amounted to reluctance to release vehicles it believed it could eventually seize, out of fear that those vehicles might never come back into its possession. *Id.* (citing Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 679 (1974) (stating that when property is easily transportable, the need to retain custody to prevent its disappearance is heightened)).

175. *Id.* The Court justified the additional constraints by noting that the availability of forfeiture proceedings may not adequately compensate parties for losses caused by improper seizure.

> "Given the congested civil dockets in federal courts, a claimant may not receive an adversary hearing until many months after the seizure." . . . [And even then,] an owner cannot recover the lost use of a vehicle by prevailing in a forfeiture proceeding. The loss is felt in the owner's inability to use a vehicle that continues to depreciate in value as it stands idle in the police lot.

Id. (quoting United States v. James Daniel Good Real Prop., 510 U.S. 43, 56 (1993)).

176. *Id.* at 70.

B. Post-Seizure Hearings are Unnecessary and Redundant

Despite its flexibility, *Mathews* is not the only test that could be applied by the Court to determine whether post-seizure hearings are required to protect due process in forfeiture actions under DAFPA. A number of cases applying the speedy trial test of *Barker v. Wingo*[177] have found that forfeiture statutes' ultimate forfeiture proceedings provide a sufficient procedural opportunity for those from whom property has been seized to voice their complaints.[178] If the Court in *Alvarez* were to adopt this approach, post-seizure hearings, such as those provided for by the Seventh Circuit, would not be required.[179]

In *Barker*, the Court found that due process entitled a defendant to a speedy trial, and determining whether this standard was met necessitated balancing four factors: "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant."[180] Although initially limited to examination of delays in criminal trials, these factors have also been used to determine whether delays in civil proceedings represent violations of due process.[181]

In *United States v. Von Neumann*, the Court applied *Barker* in finding that the delay between the seizure of the plaintiff's car and the ultimate forfeiture proceedings did not represent a violation of due process.[182] In that case, the plaintiff's car was seized by customs agents and held subject to the payment of a bond or a forfeiture proceeding.[183] Although the plaintiff paid the bond, he filed suit for a violation of due process.[184] The Court, applying *Barker*, held that the delay between seizure and release of the vehicle did not violate due process, because the available forfeiture proceedings would have provided a sufficient forum for contesting the seizure, and because the delay between seizure and those proceedings did not prejudice the plaintiff's defense.[185]

Under *Barker*, only the most extreme delays between seizure and final disposition violate due process. Essentially, so long as the government provides a forfeiture proceeding that enables the plaintiff to eventually challenge the propriety of a seizure, the speedy trial standard will be

177. 407 U.S. 514, 530 (1972).

178. *See, e.g.*, United States v. Von Neumann, 474 U.S. 242, 250–51 (1986); United States v. $8,850 in U.S. Currency, 461 U.S. 555, 569–70 (1983).

179. This is not meant to suggest that no proceedings whatsoever would be required. Rather, the *Barker* line of cases puts forth the opinion that the ultimate forfeiture proceeding sufficiently fulfills all relevant due process concerns.

180. *Barker*, 407 U.S. at 530.

181. *See $8,850 in U.S. Currency*, 461 U.S. at 564.

182. *Von Neumann*, 474 U.S. at 250–51.

183. *Id.* at 245–46.

184. *Id.*

185. *Id.* at 250–51.

satisfied.[186] This was the case in *United States v. $8,850*, where the Court found that an eighteen-month delay between seizure and forfeiture proceedings did not violate *Barker*.[187] There, the Court recognized that the delay constituted a "substantial period of time," but found it reasonable as "[t]he Government must be allowed some time to decide whether to institute forfeiture proceedings."[188]

If *Barker* could apply to eighteen-month delays and cars seized by customs officials, it is only proper to think it could apply equally well to delays of up to 187 days and cars seized under state statute. Based on the simplicity of *Barker's* speedy trial result, it could very well have been applied by the Court in *Alvarez* to streamline forfeiture jurisprudence.

C. A Proper Result and an Opportunity Missed

Although determining which due process test to use is something of an outcome-determinative exercise, the Court should have used the *Mathews* test to determine whether the respondents in *Alvarez* were entitled to post-seizure hearings, because of *Mathews*'s inherent flexibility and the present similarities with cases that have adopted its provisions.[189]

If *Mathews's* balancing test were to be applied to *Alvarez*, the Court's ruling would likely track those of similar claims applying the same standard (particularly given the addition of Justice Sotomayor to the Bench).[190] Because *Krimstock* and *James Daniel Good Real Property* dealt with factual scenarios similar to those in *Alvarez*, the post-seizure hearing advocated by the Seventh Circuit would likely have been upheld under a *Mathews* analysis. Through such a holding, the Court would show that due process in forfeiture actions is concerned less with the timing of hearings and more with parties' ability to plead while their words still have an effect.[191]

Further, upholding the Seventh Circuit's hearing requirement would have allowed the Court to take a major step towards reducing government abuse of forfeiture as a fundraising mechanism. As Professors Miller and Selva pointed

186. *Id.* at 250.

187. United States v. $8,850 in U.S. Currency, 461 U.S. 555, 569–70 (1983).

188. *Id.* at 565, 569.

189. *See* Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976).

190. Justice Sotomayor, who wrote the opinion in *Krimstock*, was elevated to the Supreme Court by President Obama shortly before oral argument was heard in *Alvarez*. *Cf.* Charlie Savage, *Sotomayor Sworn in as Supreme Court Justice*, NYTIMES.COM (Aug. 8, 2009), http://www.nytimes.com/2009/08/09/us/politics/09sotomayor.html.

191. *Cf. $8,850 in U.S. Currency*, 461 U.S. at 556 (holding that an eighteen-month gap between seizure and forfeiture proceedings still allows an appropriate forum for review and the presentation of possible defenses). Although such a claim was justified under *Barker* from a timing standpoint, it is clear under *Mathews* that such a delay would not allow for the plaintiffs to obtain hearings on their claims that could be seen as upholding due process.

out, police departments, municipalities, and government agencies receive great returns from engaging in forfeiture activity.[192] In 2008 alone, the Chicago Police Department—which performed the seizures that were the subject of *Alvarez*—took in nearly $13.5 million in forfeiture assets.[193] These returns provide officers with the incentive to violate rights in order to seize valuable property.[194] By requiring post-seizure hearings, the Court would have forced officers to justify their seizures long before those subjected to forfeiture lose hope of reclaiming their property and agree to give up their rights to forfeiture proceedings in exchange for nominal settlements.[195] By regulating the self-interested nature of police action in this manner, the Court would use *Mathews* to strengthen due process without preventing agencies from collecting on properly seized assets—a regulation to which only dishonest organizations would likely object.

The *Barker* test could be applied to these circumstances, but it would allow them to properly affect ideas of due process. Granted, it would be convenient to apply the speedy trial standard to cases such as *Alvarez*, but it must never be forgotten that, although forfeiture actions run parallel to criminal ones, the forfeiture track contains parties with markedly different goals.[196] Applying *Barker* allows the Court to see if an unreasonable delay has occurred, but prevents it from ignoring such delays if proceedings are already in place.

Additionally, while applying *Barker* allowed the Court in *$8,850 in U.S. Currency* to declare delays up to eighteen months could be reasonable, the customs seizures of cash in that case cannot be compared to the vehicle seizure here.[197] As the Seventh Circuit stated in *Smith*, "Our society is, for good or not, highly dependent on the automobile. The hardship posed by the loss of one's means of transportation . . . is hard to calculate."[198] A delay this excessive, whether 187 days or 18 months, would violate due process by preventing parties from seeking relief, and *Barker* could not be applied in good conscience if it would permit such a ruling.[199]

To ensure the provision of due process and to reduce the number of seizures improperly motivated by officers' or municipalities' desire for monetary gain, the respondents in *Alvarez* should have been given an

192. *See* Miller & Selva, *supra* note 26, at 317–18.

193. Editorial, *Police for Profit*, WALL ST. J., Oct. 24–25, 2009, at A14.

194. *See* Miller & Selva, *supra* note 26, at 317–18.

195. *Cf.* Alvarez v. Smith, 130 S. Ct. 576, 582 (2009) (detailing Respondent Waldo's settlement). It is possible that had Waldo received a post-seizure probable cause hearing, she would have realized her claim had merit and refused to settle.

196. *See supra* Part I.A–C.

197. *See* United States v. $8,850 in U.S. Currency, 461 U.S. 555, 556 (1983).

198. Smith v. City of Chicago, 524 F.3d 834, 838 (7th Cir. 2008).

199. *See* Ilya Somin, *Forfeiture Laws, the War of Drugs, and* Alvarez v. Smith, FINDLAW.COM (Oct. 14, 2009), http://writ.news.findlaw.com/commentary/20091014_somin.html.

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opportunity for a hearing before a neutral party. Had the Court been able to issue a ruling on the merits in *Alvarez*, it would have done well by applying *Mathews* and upholding the Seventh Circuit's post-seizure hearing requirement.

CONCLUSION

The Supreme Court properly held *Alvarez v. Smith* moot because the case presented no active case or controversy, but by vacating the Seventh Circuit's decision, the Court did less to ease relitigation than it did to complicate the path of future forfeiture claims. As a result of the hurried timeframes of DAFPA forfeiture actions, the effect of qualified immunity on damages claims, and the Court's vacatur of the Seventh Circuit's hearing requirement, *Alvarez* complicated the process of challenging government forfeitures.

After wading through this quagmire, it becomes difficult to fathom that despite these complications, *Alvarez* had little effect on the substantive law of forfeiture. Granted, it is possible, based on the application of the *Mathews* standard and the recent elevation of Justice Sotomayor to the Court, that the Seventh Circuit's hearing requirement could have been upheld had the court reached the merits of the case. But without an opinion, this will never be certain. In *Alvarez*, the Court seems to have taken pride in further convoluting one of the already complicated paths to its door. Luckily, as long as police departments can wield the double-edged sword that is forfeiture, another civil action will inevitably allow for a ruling on the propriety of its use.

NICHOLAS A. LOYAL*

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