High Court Ruling Leaves Chance For Civil Forfeiture Reform

By **Chantel Febus, James Azadian and Joseph Duffy** (June 28, 2024)

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In Culley v. Marshall, the U.S. Supreme Court held last month that a timely forfeiture hearing satisfies 14th Amendment due process requirements for civil forfeiture proceedings.[1]

Writing for the six-justice majority, Justice Brett Kavanaugh's opinion concluded that a separate preliminary hearing to determine law enforcement's right to retain personal property pending a forfeiture hearing is not constitutionally mandated, although states may elect to adopt more procedural safeguards.

Justice Neil Gorsuch joined the court's opinion, but in a concurrence joined by Justice Clarence Thomas, he made pointed criticisms of some types of civil forfeiture proceedings.

Thus, even though the court declined to extend civil forfeiture protections here, a majority of the justices — the three dissenters, plus Justices Thomas and Gorsuch — voiced concerns about whether modern forfeiture practices pass constitutional muster under some circumstances, potentially leaving the door open to consider stricter limits in future cases.

The dispute started with Halima Tariffa Culley and Lena Sutton lending their cars to friends and family, who were then arrested for criminal offenses while driving the loaned vehicles.[2]

Culley lent her car to her college-aged son. Police officers stopped the car and, after discovering marijuana and a loaded handgun inside, arrested Culley's son and seized the car.[3] Similarly, police officers seized Sutton's vehicle, which was being driven by her friend, after discovering a large amount of methamphetamine.

In Alabama, where these events took place, officers may seize cars incident to arrest as long as the state promptly files a forfeiture action. That state's civil forfeiture laws do not require a preliminary hearing to determine whether law enforcement is justified in retaining the seized property.[4]

Alabama filed a civil forfeiture complaint against Culley's car 10 days after its seizure and against Sutton's car 13 days after its seizure.[5] To retrieve their cars, Culley and Sutton had two main options: They could post a bond at twice the car's value or prevail on an innocent-owner defense at a forfeiture hearing.[6]

Justice Kavanaugh noted that both Culley and Sutton moved slowly in responding to the forfeiture proceedings.[7] Culley, for instance, did not answer the complaint for six months, and did not raise the innocent-owner defense until she moved for summary judgment a year later.[8] About a month later, the court granted her motion and ordered the return of her car.[9]

In her case, Sutton at first failed to appear, resulting in a default judgment, which was later

set aside.[10] Sutton filed an answer and served discovery requests, but took no further action until the court set a forfeiture trial date.[11] Three weeks before the trial date, she moved for summary judgment asserting an innocent-owner defense.[12] The court granted her motion and she recovered her car.[13]

While those forfeiture proceedings were pending, Culley and Sutton sued the state of Alabama for violating their 14th Amendment due process rights by retaining possession of their vehicles during the civil forfeiture proceedings.[14] Before the federal district court and through appeal, they argued that due process entitled them to a promptly instituted preliminary hearing to determine law enforcement's right to retain their vehicles pending the forfeiture hearings.[15]

In both cases, the district court rejected those arguments and dismissed the cases. The Eleventh Circuit affirmed the lower courts. Because of disagreement among the circuit courts about "whether the Constitution requires a preliminary hearing in civil forfeiture cases," the Supreme Court agreed to take up the case.[16]

The majority of the Supreme Court likewise rejected the arguments of Culley and Sutton, citing precedent establishing that due process for personal property forfeiture requires a timely forfeiture hearing but not a separate preliminary hearing.[17] The court's previous decisions held that the timeliness of civil forfeiture proceedings are analogous to "a defendant's right to a speedy trial," and established four factors to evaluate that timeliness.[18]

The court further noted that "historical practices reinforce [these] holdings" because federal statutes and state law from both the founding era and the time of the 14th Amendment's ratification did not require a preliminary hearing.[19]

The court clarified that its decision did not preclude states from creating more legislative safeguards, including requiring preliminary hearings.[20] As the court noted, Alabama had recently done just that and amended its laws to allow an innocent owner to request an expedited hearing.[21] But while states remain free to innovate on this topic, the court emphasized that a preliminary hearing is not part of the 14th Amendment's baseline protection.[22]

Justice Gorsuch, joined by Justice Thomas, wrote a concurring opinion criticizing some aspects of civil forfeiture laws. While he agreed the majority properly decided the case on its facts, he also "agree[d] with the dissent that this case leaves many larger questions unresolved about whether, and to what extent, contemporary civil forfeiture practices can be squared with the Constitution's promise of due process."[23]

Besides raising some of the same concerns as the dissent, Justice Gorsuch noted that usually the government can deprive someone of property only after a trial in which the government had the burden of proof.[24] There are exceptions, he wrote, but typically those must "enjoy 'the sanction of settled usage both in England and in this country.'"[25]

Justice Gorsuch questioned whether modern civil forfeiture practices can "boast that kind of pedigree."[26] In the admiralty context, for example, authorizing the seizure of ships and cargo may have been justified because American courts lacked jurisdiction over the ship's crew or owners[27] and had no other means to "suppress the offence or wrong."[28] How, he wondered, does this support forfeiture when governments have jurisdiction and other means to address offenses?[29]

Justice Gorsuch also questioned whether other modern civil forfeiture practices square with historical practices. For instance, he observed, seizures formerly were limited to the "instrument[s] of the offence," but now law enforcement may seize facilitating property.[30] This, he explained, is the difference between seizing equipment used to manufacture drugs and seizing a car after it was used to conduct a drug transaction.[31]

Justice Gorsuch disclaimed any firm answers to the questions he raised, but hoped the court would, in a future case, assess how modern forfeiture satisfies traditional notions of due process.

Dissenting, Justice Sonia Sotomayor, joined by Justices Elena Kagan and Ketanji Brown Jackson, criticized the majority, writing that its decision "swe[pt] far more broadly than the narrow question presented," and relied on irrelevant authority.[32]

Based on the question presented, she argued that the court should have limited its decision to explaining what due process standard governs whether preliminary hearings should be had, not weighing in on the hearings themselves.[33]

Justice Sotomayor also noted that the principal cases the court cites involved claimants who admitted they broke the law and argued the U.S. Customs Service "took too long to resolve forfeiture proceedings" against seized property.[34] In those cases, she asserted, the seizures were "tied to the claimants' unlawful conduct," and have little to say about these cases in which "innocent owner[s]" seek return of their property.[35]

But Justice Sotomayor did more than just criticize the court's reasoning. Expressing some of the same concerns Justice Gorsuch raised about civil forfeiture, her dissent delved into what she described as civil forfeiture's murky place between criminal forfeiture and other government deprivations of personal property.[36] Up to 80% of forfeitures, she noted, are not tied to any criminal conviction.[37]

Justice Sotomayor believes the process is vulnerable to abuse because the federal, state and local governments all set their own procedures.[38] She elaborated that many law enforcement agencies keep the seized property, or sell it and keep the proceeds, which may create a financial incentive to seize as much property as possible.[39]

Takeaways

Although the court declined to require preliminary hearings for civil forfeiture cases, a majority of the justices authored or joined opinions critical of civil forfeiture proceedings. With a majority of the court's members on the record as skeptics of at least some aspects of modern civil forfeiture, it seems possible that the court will return to the topic of civil forfeiture in a future case.

First, Justice Sotomayor's commentary, at least, suggests a desire to standardize civil forfeiture procedures and clarify a murky space of the law.[40] According to the three dissenting justices, civil forfeiture is vulnerable to abuse because the federal government, states and localities all set their own civil forfeiture practices and attributes.[41] She added that other efforts to deprive an individual of property, as through criminal forfeiture, must follow more specific procedures.

The two concurring justices expressed a similar view, contrasting the strict procedural rules for deprivations such as fines, disgorgement and restitution with the more forgiving burden of proof in civil forfeiture cases.[42]

Second, the justices appear to be motivated by the practical impact of civil forfeiture proceedings. Justice Kagan expressed at **oral argument** that the court knows a lot more about how civil forfeiture is being used than when it last considered those issues, and suggested it should account for the real problems that have emerged.[43]

Justices Sotomayor and Gorsuch emphasized "real problems" in their separate opinions. Both suggested that civil forfeiture, as a significant funding source for some law enforcement agencies, could create perverse incentives that can steer enforcement priorities to undesirable ends.[44] They also observed that civil forfeiture carries the potential to disproportionately affect those without means who, even if innocent, may lack the resources to secure the return of their property.[45]

Third, if it follows the reasoning from Justice Gorsuch's opinion, the court could significantly limit civil forfeiture in future cases. According to Justice Gorsuch, civil forfeiture historically applied more narrowly than modern practice permits.

For instance, forfeiture was limited in scope, covering the "instruments of the offence," like equipment used to manufacture illegal drugs.[46] Modern forfeiture, on the other hand, extends to facilitating property, such as a car used as the locus of a single drug transaction.[47]

Justice Gorsuch also noted forfeiture had been employed when there was no jurisdiction over a defendant and courts lacked other adequate means to address the offense — concerns that are largely not present today.[48]

Justice Thomas expressed similar views in a 2017 opinion in Leonard v. Texas. He wrote that forfeiture laws traditionally covered only a few subject matters like customs and piracy, were justified based on a lack of personal jurisdiction, and applied to the "instrumentalities of the crime."[49]

Justice Thomas further suggested that, based on some of the court's earliest cases, forfeiture actions "were in the nature of criminal proceedings" and even may have required proof of guilt beyond a reasonable doubt.[50]

Advocates for civil forfeiture reform did not prevail in Culley, but the court seems primed to take another look if the right case presents itself — the next time with a more detailed focus on the particular circumstances and "real problems" that may have emerged in some jurisdictions when property is subject to civil forfeiture proceedings.

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Disclosure: Dykema represents the county of Wayne in Ingram v. Wayne County, which is cited in this article.

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[1] Culley et al. v. Marshall et al. , No. 22-585, slip. op. (U.S. May 9, 2024), accessible at https://www.supremecourt.gov/opinions/23pdf/22-585_k5fm.pdf.

[2] Id. at 1-2 (majority opinion).

[3] Id. at 1.

[4] Id. at 2-3.

[5] Id.

[6] Id. at 2 (citing Ala. Code. § 20-2-93(h), § 28-4-287 (2013) and Wallace v. State , 229 So. 3d. 1108, 1110 (Ala. Civ. App. 2017)).

[7] Id. at 2-3.

[8] Id. at 2.

[9] Id.

[10] Id. at 2-3.

[11] Id. at 3.

[12] Id.

[13] Id.

[14] Id. at 3-4.

[15] Id. at 4.

[16] See 598 U. S. ___ (2023). Compare App. to Pet. for Cert. 6a-8a, with Ingram v. Wayne County , 81 F. 4th 603, 620 (CA6 2023); Krimstock v. Kelly , 306 F. 3d 40, 44 (CA2 2002).

[17] Id. at 5 (citing United States v. $8,850 , 461 U.S. 555, 562-65 (1983) and United States v. Von Neumann , 474 U.S. 242, 247-50 (1986)).

[18] Id. at 7 (quoting $8,850, 461 U.S. at 564-65); Id. at 7-8 (citing Von Neumann, 474 U.S. at 249-51).

[19] Id. at 11-13.

[20] Id. at 14.

[21] Id. at 4 n. 1 (citing Ala. Code. § 15-5-63(3), § 20-1-93(l); Ala. Act. 2021-497 (effective Jan. 1, 2022)).

[22] Id. at 14.

[23] Id. at 1 (Gorsuch, J., concurring).

[24] Id. at 5.

[25] Id. at. 5 (quoting Hurtado v. California , 110 U. S. 516, 528 (1884)).

[26] Id. at 6.

[27] Id. at. 7 (citing R. Waples, Proceedings in Rem § 19, p. 22 (1882)).

[28] Id. at 7 (quoting Harmony v. United States , 2 How. 210, 233 (1844)).

[29] Id. at 7.

[30] Id. at 7.

[31] Id. at 7-8.

[32] Id. at 1, 7 (Sotomayor, J., dissenting)

[33] Id. at 6-7.

[34] Id. at 7.

[35] Id.

[36] Id. at 2.

[37] Id. (citing Br. for Buckeye Institute as Amicus Curiae 14).

[38] Id. at 3.

[39] Id. (citing Br. for Institute for Justice et al. as Amici Curiae 4).

[40] Id. at 6 (Sotomayor, J., dissenting).

[41] Id.

[42] Id. at 3 (Gorsuch, J., concurring).

[43] Tr. at 68, Culley et al. v. Marshall et al. , No. 22-585 (U.S. Oct. 30, 2023), accessible at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/22-585_7648.pdf.

[44] Id. at 3-4 (Gorsuch, J., concurring); Id. at 3-4 (Sotomayor, J., dissenting).

[45] Id. at 3-4 (Gorsuch, J., concurring); Id. at 3-4 (Sotomayor, J., dissenting).

[46] Id. at 7-8 (Gorsuch, J., concurring).

[47] Id.

[48] Id. at 7.

[49] Leonard v. Texas , 580 U.S. 1178, 1181-82 (2017) (Thomas, J., concurring).

[50] Id. at 1182 (Thomas, J., concurring).