

# Contesting the Seizure of Vehicles Under Civil Forfeiture: What Process Is Due?

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In September 2015, United States Customs and Border Protection (CBP) agents [seized](#) Gerardo Serrano’s F-250 pickup truck at the U.S.-Mexico border for allegedly attempting to smuggle “munitions of war.” CBP held the vehicle for almost two years while Serrano contested its forfeiture. Serrano sued the agency, arguing that the Due Process Clause requires the government to provide a prompt, post-seizure judicial hearing before confiscating property under federal civil forfeiture laws. Conducting the balancing test required under prevailing Supreme Court precedent, the United States Court of Appeals for the Fifth Circuit ultimately held in [Serrano v. Customs and Border Patrol](#) that the existing legal process provided under the federal civil forfeiture laws was sufficient to satisfy due process. This decision is in some tension with a ruling from the United States Court of Appeals for the Second Circuit, which invalidated a New York City civil forfeiture law for failing to provide independent judicial review of the validity of the city’s confiscation of vehicles. This Sidebar will provide an overview of the Fifth Circuit’s opinion in *Serrano v. CBP*, an analysis of Serrano’s petition for review before the Supreme Court, and a discussion of potential implications this case could have on congressional regulation of federal forfeiture laws.

## Overview of *Serrano*

On September 21, 2015, CBP agents stopped Serrano when he was seen taking photographs at a border station at the U.S.-Mexico border. The agents ordered Serrano out of his truck and searched the vehicle, finding a .380 caliber magazine and five .380 bullets. After being detained and questioned for about three hours, Serrano was released, but CBP retained possession of the truck and ammunition. A few days later, Serrano received notice of the seizure in the mail, informing him that his truck, magazine, and bullets were subject to forfeiture because there was probable cause to believe that Serrano had attempted to export “munitions of war” from the United States. The notice advised Serrano that the following options were available to him concerning the seizure: (1) file a remission petition; (2) submit an “offer in compromise” with a check for the proposed settlement amount; (3) abandon any interest in the property; (4) request court action and have his case referred to the U.S. Attorney for judicial forfeiture proceedings; (5) do nothing; or (6) offer to substitute assets to release the seized property. Serrano responded with a written demand for his truck’s return or a court hearing. In the letter, Serrano include a check to cover the cost bond required under the statute to institute judicial forfeiture proceedings.

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On four separate occasions, Serrano called the primary point of contact that CBP had indicated on the notice of seizure. During one of these calls, Serrano was told that his case had been delayed because the forfeiture attorneys were “[very busy](#).” After 23 months of waiting, on September 6, 2017, Serrano filed a complaint in the federal district court seeking return of his property based upon violations of the Fourth and Fifth Amendments. Several weeks later, CBP returned his truck, cost bond, and ammunition. Although the district court found that the case was not mooted by the return of his property, it rejected Serrano’s argument that due process requires a prompt post-seizure, pre-forfeiture hearing at which a property owner can challenge the legality of the seizure and the retention of his vehicle pending forfeiture proceedings. Serrano appealed this ruling to the Fifth Circuit Court of Appeals. Before addressing the Fifth Circuit’s ruling, this Legal Sidebar surveys relevant aspects of federal forfeiture law and the Due Process Clause.

## Civil Forfeiture Overview

“Asset forfeiture” is the process of confiscating either property or money from a person because it is illegal to possess (contraband), constitutes the proceeds of a crime, or was used to facilitate a crime. Asset forfeiture comes in two forms, civil and criminal, each with its own set of intricate rules. In civil asset forfeiture, the government proceeds against the offending property, not the property owner, in what is known as an *in rem* proceeding. In civil forfeiture cases, the guilt of the property owner is not in question. Rather, these cases turn on whether the property was sufficiently connected to a federal crime. Under [federal customs laws](#), which applied in Serrano’s case, when the government seizes property valued below \$500,000, the seizure can be processed through administrative forfeiture—the nonjudicial process for confiscating offending property. The seizing agency initiates the administrative forfeiture process by sending [notice](#) to the property owner, including a set of options available to the owner. One of the options, which Serrano chose, is to contest the confiscation of his vehicle in federal court. Upon choosing this route, the seizing agency refers the case to the U.S. Attorney to institute judicial forfeiture proceedings. Because civil forfeiture fundamentally entails the deprivation of private property, it necessarily implicates the Due Process Clause.

## Procedural Due Process Framework

The [Fifth Amendment](#), which applies to federal government actions, and the [Fourteenth Amendment](#), which applies to states, require that “[n]o person shall ... be deprived of life, liberty, or property, without due process of law[.]” The Due Process Clause contains two components: procedural and substantive. The substantive component of due process concerns the government’s ability to regulate certain fundamental rights—for example, [abortion](#) or [marriage](#). The procedural aspect, which is the focus of the analysis here, assesses the *legal process* required by the Constitution when the government seeks to deprive people of life, liberty, or property. The Supreme Court addressed the modern framework for procedural due process in [Mathews v. Eldridge](#). There, the Court noted that in identifying the “specific dictates of due process,” the following three factors must be considered: (1) “the private interest that will be affected by the official action;” (2) “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 (3) “the Government’s interest, including the function involved and the fiscal and the administrative burdens that the additional or substitute procedural requirement would entail.”

## Fifth Circuit Ruling in Serrano

Before the Fifth Circuit Court of Appeals, Serrano argued that both existing federal case law—including a prominent ruling from the United States Court of Appeals for the Second Circuit—and an independent application of the *Mathews* balancing test, entitle him to an intermediate judicial hearing while he awaits

a final forfeiture trial. Instead, the Fifth Circuit distinguished these cases and sided with the government in its *Mathews* analysis.

In *Krimstock v. Kelly*, the decision upon which Serrano's argument heavily relies, the Second Circuit Court of Appeals applied the *Mathews* balancing test in a constitutional challenge to a New York law permitting police to seize vehicles following drunk driving arrests. Under New York City's civil administrative code, the government was authorized to seize a vehicle following an arrest for the state-law charge of driving while intoxicated or any other crime for which the vehicle could serve as an instrumentality. This provision did not provide a right to a post-arrest hearing to determine whether probable cause existed for seizing the vehicle. The *Krimstock* court put significant weight on the first factor of the *Mathews* test—the owner's interest in the property—by noting that the deprivation of personal property involves substantial due process interests and that motor vehicles were of "particular importance" as a "means to earn a livelihood." Although the court noted the risk that erroneous deprivation posed to innocent owners is substantial, the court found that "on balance" the second *Mathews* factor weighed in favor of the government "because a trained police officer's assessment of the owner-driver's state of intoxication can typically be expected to be accurate." Finally, as to the third factor—the government's interest—the Second Circuit sided with the vehicle owners, noting that "the need to prevent forfeitable property from being sold or destroyed during the pendency of proceedings does not necessarily justify continued retention of all vehicles when other means of accomplishing those goals are available," such as requiring a cost bond. Ultimately, the Second Circuit held that "[p]romptly after their vehicles are seized ... as alleged instrumentalities of crime, plaintiffs must be given an opportunity to test the probable validity of the City's deprivation of the vehicles *pendente lite*, including probable cause for the initial warrantless seizure."

Noting that "due process is flexible and calls for such procedural protections as the particular situation demands," the Fifth Circuit panel distinguished *Krimstock* on the grounds that its holding is limited to the specific New York City statute at issue, "which is materially distinguishable from the forfeiture scheme Serrano challenges" because the federal regime "affords multiple alternative remedial processes." Instead, the court engaged in an independent application of the *Mathews* test to hold that the federal forfeiture statute in question is constitutionally sound. As to the first factor, the Fifth Circuit agreed with *Krimstock* about the importance of private interest involved in seizing one's vehicle, noting that "the main points of contention are with respect to the balancing of the second and third *Mathews* factors." The court found that the risk of erroneous deprivation of property—the second factor—was minimal due to the various remedial processes available to a property owner, including filing a petition for remission, filing an offer in compromise, or requesting the commencement of judicial forfeiture proceedings. Finally, the court found that the third factor favored the government, as "its interest in preventing the unlawful exportation of munitions, drugs, and other contraband is significant." On balance, the Fifth Circuit concluded that, when the government seizes property under federal customs laws, due process does not mandate a prompt, post-seizure hearing before a final forfeiture trial is held.

### Petition for Review by Supreme Court

On December 4, 2020, Serrano [filed](#) for review by the Supreme Court. This is not the first time the High Court has been asked to address due process concerns raised by the seizure of vehicles pursuant to civil forfeiture. In 2009, the Court granted certiorari in *Smith v. City of Chicago* (restyled *Alvarez v. Smith*) to assess the constitutionality of an Illinois statute permitting the seizure of vehicles connected to various drug crimes. Generally agreeing with the Second Circuit's constitutional analysis in *Krimstock*, the Seventh Circuit held that the statute violated the Due Process Clause and that "some sort of mechanism to test the validity of the retention of the property is required." Ultimately, the Court was unable to resolve these issues in *Alvarez* because the case was mooted when the government returned the property at issue.

One of the primary arguments put forth by Serrano in his review petition is that the Fifth Circuit opinion below conflated two discrete due process inquiries. In the second step of its *Mathews* analysis, the Fifth Circuit asserted that claimants can always contest the reasonableness of the government's delay in instituting a forfeiture proceeding under the Supreme Court case *United States v. Eight Thousand Eight Hundred and Fifty Dollars* (\$8,850). In that case, the Court held that the appropriate test for assessing due process violations for delay in the initiation of a forfeiture trial was the same speedy-trial test set out in *Barker v. Wingo*, which weighs the following four factors: length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. In his petition for review, Serrano argues that he was not contesting the delay of his final forfeiture trial, as was the issue in \$8,850, but was instead requesting that he be given an "intermediate" hearing to contest the retention of his vehicle while he awaits his forfeiture trial. The Seventh Circuit acknowledged this distinction in *Alvarez* when it noted that "\$8,850 concerns the speed with which the civil forfeiture proceeding itself is begun—a different question from whether there should be some mechanism to promptly test the validity of the seizure." Similarly, in *Krimstock*, the Second Circuit noted that the issue was not the speed with which civil forfeiture proceedings themselves are instituted, but rather whether a property owner is entitled to a prompt post-seizure hearing to challenge the legitimacy of the government's retention of his vehicle while those proceedings are conducted. This split in approach could prompt the Supreme Court to grant review.

## Considerations for Congress

Although the Due Process Clause creates a constitutional floor, requiring a certain level of process before the government can confiscate personal property, courts have accorded Congress great deference when shaping federal forfeiture laws. This means Congress can create, if it saw fit, more stringent procedural requirements than are constitutionally mandated. For instance, as pertains to Serrano's case, Congress could place tighter time constraints on how promptly the government must institute judicial proceedings following a seizure.

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