

2015

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Recommended Citation

De Almeida, Dennis (2015) "Government Seizures of Cash Property: Does the Federal Government Have to Pay Interest When It Is Required to Return Money?," Seton Hall Law Review: Vol. 45 : Iss. 4 , Article 4.

Government Seizures of Cash Property: Does the Federal Government Have to Pay Interest When it is Required to Return Money?

Dennis De Almeida*

I. Introduction

Imagine that on a dry day in early August, you and your family attempted to cross the Mexican-American border to return home from a vacation in Puerto Vallarta, Mexico. Unbeknownst to you, there were drugs attached to the undercarriage of your vehicle while your car was parked at a luxurious resort, where your family stayed. Once you arrived at the American border, an inspection by the border patrol found the drugs and confiscated them, along with your car and all of your family's belongings, which included \$3,000 in U.S. currency that you had in your suitcase, in case of an emergency.

These circumstances are not unheard of, and forfeiture of private property happens frequently in the United States against people and property suspected to be involved in criminal activity.¹ In 2012 alone, \$5.9 billion in assets were held by the United States federal government² ("Government"), which were seized or already forfeited.³ In the situation above, you would most likely be criminally charged and then cleared if you were found to be innocent. Your property, however, might not be as lucky. While going through the process of fighting your criminal prosecution, the Government can seize and hold onto your property until the

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¹ See generally Stefan D. Cassella, *Criminal Forfeiture Procedure: An Analysis of Developments in the Law Regarding the Inclusion of A Forfeiture Judgment in the Sentence Imposed in A Criminal Case*, 32 AM. J. CRIM. L. 55, 57 (2004) ("[F]ederal prosecutors have begun to make criminal forfeiture a routine part of criminal law enforcement in federal cases.").

² This Comment will only discuss asset forfeitures by the United States federal government.

³ U.S. DEP'T OF JUSTICE, ASSETS FORFEITURE FUND AND SEIZED ASSET DEPOSIT FUND ANNUAL FINANCIAL STATEMENTS FISCAL YEAR 2013, AUDIT REP. NO. 13-07, at 6 (Jan. 2013), available at <http://www.justice.gov/oig/reports/2013/a1307.pdf>.

resolution of your case.⁴ In some instances, this can last for years, due to a lengthy trial and the possibility of multiple appeals. Meanwhile, you are unable to use and benefit from your property, the \$3,000 in cash. What happens to your money while it is being seized? Does it earn interest? Who gets to keep that interest if you are acquitted and the Government is found to have wrongfully seized your property?

Due to a circuit split, the answers to these questions depend on whether you are facing a civil or criminal forfeiture action.⁵ If this is a civil forfeiture action and you substantially prevail in the suit, you will receive the property and interest on the money that was seized in all federal jurisdictions. If this is a criminal forfeiture and you prevail, the majority of federal appeals courts hold that only the property must be returned and that interest should not be paid, while the minority holds that the property and interest must be returned.

This Comment will discuss whether the Government in a criminal forfeiture proceeding should return interest that is earned while it seizes cash property that is later required to be returned. There is a multi-circuit split regarding this issue.⁶ Most recently in 2012, the United States Court of Appeals for the Third Circuit addressed the circuit split in *United States v. Craig* and held that interest earned on seized property does not have to be returned.⁷ The Supreme Court of the United States denied *certiorari* on October 7, 2013,⁸ which leaves this circuit split unresolved since 1998.⁹

There are various issues surrounding the circuit split regarding whether the Government should pay interest on wrongfully seized property including sovereign immunity and the

⁴ 21 U.S.C. § 853(f) (2012).

⁵ *United States v. Craig*, 694 F.3d 509, 513 (3d Cir. 2012), *cert. denied*, 134 S. Ct. 55 (2013).

⁶ *Id.*

⁷ *Id.*

⁸ *Craig v. United States*, 134 S. Ct. 55 (2013).

⁹ *Craig*, 694 F.3d at 513.

interpretation of criminal and civil forfeiture laws. The threshold inquiry is whether the Government waives its sovereign immunity regarding returning seized property and, in particular, providing interest on that returned property. The return of property in a criminal forfeiture proceeding is governed by Rule 41(g) of the Federal Rules of Criminal Procedure (“Rule 41(g)”) ¹⁰ and 28 U.S.C. § 2465(a).¹¹ Civil forfeiture proceedings are governed by the Civil Asset Forfeiture Reform Act (“CAFRA”).¹² This Comment focuses primarily on the circuit split as it applies to criminal forfeitures.

Part II of this Comment provides relevant background and history of sovereign immunity and the no-interest rule, and explains the difference between criminal and civil forfeiture proceedings. Next, Part III discusses and analyzes the various decisions that comprise the circuit split on this issue. Part IV argues that the Government should be required to disgorge the actual interest that accrued on seized cash property upon its return. Unlike the minority position of the circuit courts, however, this Comment argues that the Government should not be required to return the constructive interest that could have accrued from the seized property. Part V concludes the Comment.

II. Background of the Main Issues Identified by the Circuit Courts

A. Sovereign Immunity

The first hurdle in a suit against the Government is overcoming its sovereign immunity.¹³ The Government is immune from all suits unless Congress expressly waives that immunity

¹⁰ FED. R. CRIM. P. 41(g).

¹¹ 28 U.S.C. § 2465(a) (2012).

¹² Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202 (2000).

¹³ *Craig*, 694 F.3d at 511.

through a statute.¹⁴ Even when sovereign immunity is waived, “the Government’s consent to be sued must be construed strictly in favor of the sovereign and not enlarge[d] . . . beyond what the language requires.”¹⁵

Congress has given an express waiver of sovereign immunity with regard to “returning property” in both civil and criminal asset forfeitures.¹⁶ For civil forfeitures, CAFRA applies and also allows claimants who “substantially prevail” in a civil forfeiture proceeding¹⁷ to obtain the seized cash property¹⁸ along with prejudgment interest,¹⁹ post-judgment interest,²⁰ litigation costs and attorney fees.²¹ For criminal forfeitures, the applicable rules to recover seized property are Rule 41(g) and 28 U.S.C. § 2465(a).²² The criminal forfeiture rules do not address whether a suspect found to be not guilty may recover the interest gained while the Government held the seized property.²³

The majority of circuit courts rely on *Library of Congress v. Shaw*²⁴ to hold that interest should not be paid or disgorged on property wrongfully held by the Government.²⁵ In *Shaw*, the Supreme Court held that “[i]n the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit, the United States is immune from an interest award.”²⁶ This holding has been coined the “no-interest rule.”²⁷

¹⁴ *Id.*

¹⁵ *United States v. Nordic Vill. Inc.*, 503 U.S. 30, 34 (1992) (internal quotations and citations omitted).

¹⁶ 28 U.S.C. § 2465(a)(1) (2012); FED. R. CRIM. P. 41(g).

¹⁷ 28 U.S.C. § 2465(b)(1) (2012).

¹⁸ *Id.* at § 2465(a)(1).

¹⁹ *Id.* at § 2465(b)(1)(C).

²⁰ *Id.* at § 2465(b)(1)(B).

²¹ *Id.* at § 2465(b)(1)(A).

²² FED. R. CRIM. P. 41(g); 28 U.S.C. § 2465(a). For third-parties with interests in a property 21 U.S.C. § 853(n)(6) is the applicable rule.

²³ *See* FED. R. CRIM. P. 41(g); 28 U.S.C. § 2465(a), (b)(2)(B).

²⁴ 478 U.S. 310 (1986).

²⁵ *United States v. Craig*, 694 F.3d 509, 513 (3d Cir. 2012), *cert. denied*, 134 S. Ct. 55 (2013).

²⁶ *Shaw*, 478 U.S. at 314.

²⁷ *Id.* at 312.

The Court additionally noted that “the force of the no-interest rule cannot be avoided simply by devising a new name for an old institution.”²⁸ As an example, the Court stated that characterizing the interest as “compensation for delay” instead of interest will not allow a court to circumvent the no-interest rule because both share the same function of compensating a party for the delayed receipt of money.²⁹

Shaw concerned a dispute over prejudgment interest on attorney fees against the Government, arising from a claim under Title VII of the Civil Rights Act of 1991.³⁰ The question in *Shaw* was whether Title VII’s general waiver of sovereign immunity stating “the United States shall be liable for costs the same as a private person” included a waiver of the Government’s sovereign immunity from an interest award on top of any monetary judgment.³¹ The Court ruled that this waiver did not include such a waiver because the text of the statute did not expressly mention interest awards.³²

The dissent in *Shaw* noted how the Court’s ruling frustrated the “clear intention of Congress.”³³ In response to the holding in *Shaw*, Congress amended Title VII to explicitly provide for prejudgment interest as a remedy and superseded the Court’s ruling.³⁴

The question that has divided circuit courts is whether the no-interest rule applies to interest that is gained on cash property while the Government wrongfully seizes the property. As will be discussed in depth in Parts III and IV of this Comment, the majority of the circuits hold that the no-interest rule bars the courts from requiring payment of this type of interest.³⁵ The

²⁸ *Id.* at 321.

²⁹ *Id.* at 322.

³⁰ *Id.* at 311.

³¹ *Id.* at 313, 317–19.

³² *Shaw*, 478 U.S. at 310–11, 318–19.

³³ *Id.* at 324 (Brennan, J., dissenting).

³⁴ Civil Rights Act of 1991, Pub. L. No. 102–166, § 114, 105 Stat. 1071.

³⁵ *United States v. Craig*, 694 F.3d 509, 512–13 (3d Cir. 2012), *cert. denied*, 134 S. Ct. 55 (2013).

minority of the circuits hold that this interest is not damages at all, but part of the property and must be returned.³⁶

B. Criminal and Civil Forfeitures

There are three different types of asset forfeiture proceedings: (1) criminal; (2) civil; and (3) administrative.³⁷ This comment will primarily focus on criminal judicial forfeitures.

A criminal judicial forfeiture is an action brought against a defendant as part of a criminal prosecution.³⁸ “It is an *in personam* (against the person) action and requires that the Government indict (charge) the property used or derived from the crime along with the defendant.”³⁹ The defendant must be convicted on one of the predicate forfeiture charges before the property is subject to forfeiture.⁴⁰ Then, if the jury finds that the property is forfeitable, the court may issue an order of forfeiture and take ownership of the property.⁴¹

In contrast, a civil judicial forfeiture is an “*in rem* (against the property) action brought in court against the property. The property is the defendant and no criminal charges against the owner are necessary.”⁴² In a civil forfeiture, the Government must only prove a connection between the property and the crime.⁴³ The property owner's guilt is irrelevant in deciding

³⁶ *Id.*

³⁷ An administrative forfeiture “is an *in rem* action that permits a federal agency to forfeit seized property without judicial involvement. The authority for a seizing agency to start an administrative forfeiture action is found in the Tariff Act of 1930, 19 U.S.C. § 1607. Property that can be administratively forfeited is: merchandise the importation of which is prohibited; a conveyance used to import, transport, or store a controlled substance; a monetary instrument; or other property that does not exceed \$500,000 in value.” *Types of Federal Forfeiture*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/jmd/afp/07federalforfeiture/> (last updated Jan. 2013).

³⁸ *Types of Federal Forfeiture*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/jmd/afp/07federalforfeiture/> (last updated Jan. 2013).

³⁹ *Id.*

⁴⁰ Cassella, *supra* note 1, at 57.

⁴¹ *Types of Federal Forfeiture*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/jmd/afp/07federalforfeiture/> (last updated Jan. 2013).

⁴² *Id.*

⁴³ *Id.*

whether property should be forfeited, unless the property owner proves the innocent owner defense under CAFRA.⁴⁴

Although crime triggers all forfeitures, the Government may choose if it wants to proceed under criminal or civil forfeiture procedure. There are important differences between criminal and civil forfeitures. If the Government proceeds under civil forfeiture procedure, then CAFRA will apply and a claimant can recover the interest on the seized property if the claimant “substantially prevails” in the forfeiture action.⁴⁵ If the Government proceeds under criminal forfeiture procedure, then Rule 41(g) and the common law will apply to the return of interest on wrongfully seized property. Due to the circuit split, however, the jurisdiction where the claim is brought will dictate whether a claimant will be successful in recovering interest on the wrongfully seized property.⁴⁶

The Government’s burden of proof for both civil and criminal forfeitures is by a preponderance of the evidence standard.⁴⁷ For a criminal forfeiture though, the Government must first convict the defendant of a crime, under the beyond a reasonable doubt standard, that will then allow for a criminal forfeiture during sentencing.⁴⁸ This extra step of proving the defendant’s guilt beyond a reasonable doubt can make criminal forfeitures more challenging for

⁴⁴ Heather J. Garretson, *Federal Criminal Forfeiture: A Royal Pain in the Assets*, 18 S. CAL. REV. L. & SOC. JUST. 45 (2008) (citing *United States v. Cherry*, 330 F.3d 658, 669 n.16 (4th Cir. 2003)). The innocent owner defense under CAFRA protects a claimant’s property from civil forfeiture if the claimant proves the required factors. 18 U.S.C. § 983(d) (2012).

⁴⁵ 28 U.S.C. § 2465; *see Craig*, 694 F.3d at 512 (stating that if a claimant does not substantially prevail in a civil forfeiture action then the Government is not liable for interest under CAFRA).

⁴⁶ FED. R. CRIM. P. 41(g); *United States v. Craig*, 694 F.3d 509, 512–13 (3d Cir. 2012), *cert. denied*, 134 S. Ct. 55 (2013).

⁴⁷ 18 U.S.C. § 983(c) (2012); Annette Gurney, *Beginner's Guide to Federal Forfeiture*, 70-MAR J. KAN. B.A. 18, 22 (2001) (citing *United States v. Tanner*, 61 F.3d 231, 234–35 (4th Cir. 1995), *cert. denied*, 516 U.S. 1119 (1996); *United States v. Bornfield*, 145 F.3d 1123, 1133 (10th Cir. 1998)).

⁴⁸ Cassella, *supra* note 1, at 57.

prosecutors than civil forfeitures. Additionally, if a defendant is acquitted of an underlying crime, the Government may still pursue a civil forfeiture proceeding against the property.⁴⁹

In both criminal and civil forfeiture procedures, pursuant to regulations⁵⁰ and guidelines,⁵¹ the Government can seize cash property that is suspected to be involved in a crime⁵² and shall promptly deposit it with the Seized Asset Deposit Fund (“SADF”), except when the seized cash is to be used as evidence.⁵³ The SADF holds seized cash and the proceeds of pre-forfeiture sales of seized property until the resolution of the forfeiture proceeding.⁵⁴ Most of the funds held in the SADF are not owned by the Government and therefore the money in the SADF cannot be expended by the Government.⁵⁵ The seized cash and monetary instruments are invested in Government securities.⁵⁶ If the Government prevails in its forfeiture action, then the money is transferred into the Asset Forfeiture Fund, which contains property that was forfeited and is now owned by the Government.⁵⁷

⁴⁹ United States v. Ford, 64 F. App'x 976, 984 (6th Cir. 2003); *see also* David Pimentel, *Forfeitures Revisited: Bringing Principle to Practice in Federal Court*, 13 NEV. L. J. 1, 5 (2012).

⁵⁰ 28 C.F.R. § 8.5 (2012).

⁵¹ U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEY'S MANUAL 9-118.790 (2010), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/.

⁵² 21 U.S.C. § 853(e) (2012); 18 U.S.C. § 981(b)(1) (2012).

⁵³ U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEY'S MANUAL 9-111.600 (2010), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/.

⁵⁴ U.S. DEP'T OF JUSTICE, ASSETS FORFEITURE FUND AND SEIZED ASSET DEPOSIT FUND ANNUAL FINANCIAL STATEMENTS FISCAL YEAR 2013, AUDIT REP. NO. 13-07, at 4 (Jan. 2013), *available at* <http://www.justice.gov/oig/reports/2013/a1307.pdf>.

⁵⁵ *Id.*

⁵⁶ *Id.* at 7.

⁵⁷ *Id.* at 3–4.

III. Analyzing the Circuit Split

The primary issue causing the circuit split is whether the Government must pay the interest earned on seized property when it is required to return property to a claimant.⁵⁸ This issue is unsettled in criminal forfeitures cases.⁵⁹

The majority of the circuits hold that a winning party in a forfeiture action is not entitled to interest that actually or constructively accrued on the seized cash property.⁶⁰ The majority relies on the “no-interest” rule from *Shaw* and reasons that the Government never pays interest unless Congress has expressly granted a waiver of sovereign immunity to allow for interest awards.⁶¹

The minority of the circuits hold that a winning party in a forfeiture action is entitled to the interest that actually or constructively accrued on the seized cash property.⁶² The minority’s main argument is that the interest earned while the Government improperly seized the property is part of the actual property.⁶³ Therefore, since the Government has waived sovereign immunity regarding the return of property, it should be required to return or “disgorge” the whole property, which includes the interest.⁶⁴ This Comment refers to this theory as the “disgorgement theory.”

⁵⁸ *United States v. Craig*, 694 F.3d 509, 512–13 (3d Cir. 2012), *cert. denied*, 134 S. Ct. 55 (2013); *see also* *United States v. \$30,006.25 in U.S. Currency*, 236 F.3d 610, 613 (10th Cir. 2000).

⁵⁹ *Craig*, 694 F.3d at 512–13. The circuit split also applies to a situation in civil forfeiture proceedings in which the Government voluntarily returns property before a judgment. *Id.* In this situation, the claimant does not satisfy the “substantially prevailing” element, which CAFRA requires to award interest on seized property. *Id.* This Comment will not address this situation.

⁶⁰ *Craig*, 694 F.3d at 512–13; *Larson v. United States*, 274 F.3d 643, 647–48 (1st Cir. 2001); *United States v. \$30,006.25 in U.S. Currency*, 236 F.3d 610, 615 (10th Cir. 2000); *Ikeliowu v. United States*, 150 F.3d 233, 239 (2d Cir. 1998); *United States v. \$7,990.00 in U.S. Currency*, 170 F.3d 843, 845–46 (8th Cir. 1999).

⁶¹ *Craig*, 694 F.3d at 512–13.

⁶² *Carvajal v. United States*, 521 F.3d 1242, 1245–49 (9th Cir. 2008); *United States v. 1461 W. 42nd St.*, 251 F.3d 1329, 1338 (11th Cir. 2001); *United States v. \$515,060.42 in U.S. Currency*, 152 F.3d 491, 504 (6th Cir. 1998); *United States v. \$277,000 U.S. Currency*, 69 F.3d 1491 (9th Cir. 1995).

⁶³ *Carvajal*, 521 F.3d at 1245.

⁶⁴ *Id.* at 1245–49.

A. Minority approach: Circuits that require the Government to return interest earned on wrongfully seized and returned money

1. Ninth Circuit - *United States v. \$277,000 U.S. Currency*

The first federal appellate court to address this issue was the Ninth Circuit in 1995 in a case entitled *United States v. \$277,000 U.S. Currency*.⁶⁵ Here, the court held that “the Government is not generally liable for damages or interest prior to judgment, because of sovereign immunity” but to the extent that the Government profited from seizing the property, it is required to disgorge any interest actually or constructively earned on the seized property.⁶⁶

In *\$277,000 U.S. Currency*, the defendant was driving his truck when he was pulled over by a police officer.⁶⁷ Upon searching the truck, the police officer discovered \$277,000 and seized the money to investigate its possible involvement in drug related crimes.⁶⁸ The district court judge ordered that the seized money be deposited in an interest-bearing account.⁶⁹ But the Government deposited the money into a treasury account that did not accrue interest.⁷⁰

Evidence supporting the Government’s claim against the defendant was suppressed and the court ruled that the money should be returned to the defendant.⁷¹ The Government then moved for relief from paying prejudgment interest for the time that the Government seized the defendant’s money.⁷² The district court denied the Government’s motion.⁷³

On appeal, the Ninth Circuit upheld the district court’s ruling. The court discussed *Library of Congress v. Shaw* and the “no-interest” rule, but explained why the “no-interest” rule

⁶⁵ 69 F.3d 1491 (9th Cir. 1995).

⁶⁶ *Id.* at 1492.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *\$277,000*, 69 F.3d at 1492.

⁷² *Id.*

⁷³ *Id.*

did not apply to this type of situation.⁷⁴ The court noted that “not every payment of money by the Government related to something it has seized can be characterized as a forbidden award of pre-judgment interest.”⁷⁵

The court held that in this case, the Government is not actually being required to pay interest, but only to disgorge some of its share of the proceeds of the seized property.⁷⁶ The Government must pay interest when it has “constructively” earned interest on the money.⁷⁷ This is because when the Government deposits seized money into one of its funds, that money is considered part of the Government’s financial assets and it no longer has to borrow equivalent funds.⁷⁸ This savings from borrowing money is equivalent to the earning of interest for the Government.⁷⁹ The funds deposited in non-interest-bearing accounts should be considered to have earned interest at the Government’s alternative borrowing rate.⁸⁰ “[T]he act of placing . . . money in any ‘Treasury account’ represent[s] an equivalent sum that the Government [is] not required to borrow. This will always be the case, at least during any time there is Government debt.”⁸¹

The court referenced common sense when it noted that interest earned on money that is in an interest-bearing account is a part of the *res* and must be returned with the property.⁸² The court provided an example of the Government seizing a pregnant cow that has a calf while in the

⁷⁴ *Id.* at 1493.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ \$277,000, 69 F.3d at 1493.

⁷⁸ *Id.*

⁷⁹ *Id.* at 1495.

⁸⁰ *Id.* at 1496.

⁸¹ *Id.* at 1495.

⁸² *Id.*

Government's possession and states that the Government would not be able to keep the calf if the cow had to be returned.⁸³ The Ninth Circuit summarized its position very well when it stated:

We believe the law is reasonably clear: the Government is not liable to suit for inchoate interest, as an item of damages in a forfeiture action. However, as a matter of practice, assets amenable to such treatment should be put to use, with their increase accruing ultimately to whatever party is found to have the right to the property. Where such a course has been followed, actually or constructively, as in this case, the Government will not be allowed to retain the fruits, once the tree has been ordered returned to its owner.⁸⁴

2. Sixth Circuit - United States v. \$515,060.42

Three years later, the Sixth Circuit addressed this issue in *United States v. \$515,060.42* and agreed with the Ninth Circuit's holding.⁸⁵ This case involved a forfeiture action against currency seized as part of an investigation into a bingo game operation.⁸⁶ The claim was barred by the statute of limitations and the funds were ordered to be returned.⁸⁷ The court held that the defendants were entitled to the interest gained by the Government because sovereign immunity did not bar an award of interest to the defendants.⁸⁸

The court adopted the disgorgement theory.⁸⁹ In its reasoning, the court said "we do not view the award of interest in this case as the typical award of prejudgment interest which cannot be recovered absent an express waiver of sovereign immunity."⁹⁰ Rather, the court viewed this award of interest as part of the seized property to which the Government was not entitled, because it did not succeed in its forfeiture action.⁹¹

⁸³ \$277,000, 69 F.3d at 1495.

⁸⁴ *Id.* at 1497.

⁸⁵ *United States v. \$515,060.42 in U.S. Currency*, 152 F.3d 491 (6th Cir. 1998).

⁸⁶ *Id.* at 495.

⁸⁷ *Id.* at 497.

⁸⁸ *Id.* at 504–05.

⁸⁹ *Id.* at 505–06.

⁹⁰ *Id.* at 504.

⁹¹ *\$515,060.42*, 152 F.3d at 504.

The court discussed sovereign immunity and the no-interest rule but held that “to the extent that the Government has actually or constructively earned interest on seized funds, it must disgorge those earnings along with the property itself when the time arrives for a return of the seized [property] to its owner.”⁹² The court reasoned that “there is no issue of sovereign immunity because the Government is not being asked to pay interest, but to disgorge property that was not forfeited.”⁹³ The Government is also not an owner of the seized property until the time forfeiture is decreed, and therefore it is not being asked to pay interest, but rather to disgorge the benefits received from the property in which it never held a proprietary interest.⁹⁴

3. Sixth Circuit - United States v. Ford

In *United States v. Ford*, an unpublished decision from the Sixth Circuit in 2003, the court expanded on *\$515,060.42* by making important distinctions between criminal and civil forfeiture proceedings.⁹⁵ This case involved a criminal case in which the defendant was convicted but prevailed on the criminal forfeiture portion of the case.⁹⁶

The court noted the importance that this case was not a civil forfeiture action like *\$515,060.42*, but that it was a criminal forfeiture proceeding.⁹⁷ The difference is that an “[a]cquittal in an *in personam* criminal forfeiture proceeding does not conclusively determine whether the particular property will ultimately be forfeited.”⁹⁸ This is because an acquittal of the underlying criminal action, which requires proof beyond a reasonable doubt, does not prevent a

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 504–05.

⁹⁵ *United States v. Ford*, 64 F. App’x 976 (6th Cir. 2003); *see also* *United States v. 1461 W. 42nd St.*, 251 F.3d 1329, 1338 (11th Cir. 2001) (adopting the Sixth Circuit’s disgorgement of interest theory after CAFRA was enacted).

⁹⁶ *Id.* at 977.

⁹⁷ *Id.* at 984.

⁹⁸ *Id.* (quoting *United States v. Corrado*, 286 F.3d 934, 939 (6th Cir. 2002)).

subsequent civil forfeiture proceeding against the property.⁹⁹ Therefore, the court determined that the award of interest was premature because the Government could still file a civil forfeiture and successfully take ownership of the defendant's property.¹⁰⁰

B. Majority approach: Circuits that do not require the Government to return interest on lawfully seized and returned property

1. Second Circuit - *Ikelionwu v. United States*

In 1998, the Second Circuit in *Ikelionwu v. United States* created the circuit split on this issue.¹⁰¹ The court held that the *pro se* plaintiff¹⁰² was not entitled to “prejudgment interest” on the wrongfully seized currency because there was no statutory basis for awarding the interest in 28 U.S.C. § 2465, and thus the no-interest rule barred recovery of prejudgment interest.¹⁰³ Although it ruled contrary to the Ninth and Sixth Circuits previous holdings, it did not address the rulings from those circuits.¹⁰⁴

2. Eighth Circuit - *United States v. \$7,990.00 in U.S. Currency*

The following year, the Eighth Circuit in *United States v. \$7,990.00 in U.S. Currency* also held that there was no statutory basis for the Government to pay interest earned on property that was seized by the Government, which had to be returned.¹⁰⁵ The court noted that the language governing the return of seized property in 28 U.S.C. § 2465 made no mention of

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 985.

¹⁰¹ *Ikelionwu v. United States*, 150 F.3d 233 (2d Cir. 1998).

¹⁰² *Id.* at 234.

¹⁰³ *Id.* at 238–39 (citing *Library of Cong. v. Shaw*, 478 U.S. 310, 314 (1986)).

¹⁰⁴ *Id.*

¹⁰⁵ *United States v. \$7,990.00 in U.S. Currency*, 170 F.3d 843, 844–45 (8th Cir.), *cert. denied sub nom. Fiorentino v. United States*, 528 U.S. 1041 (1999); *see also United States v. 30,006.25 in U.S. Currency*, 236 F.3d 610 (10th Cir. 2000) (following the same reasoning).

prejudgment interest, and therefore, without an express waiver the no-interest rule, prohibited the payment of prejudgment interest.¹⁰⁶

The Eighth Circuit followed the Second Circuit's position in the circuit split.¹⁰⁷ In its rationale, the court stated that sovereign immunity does not depend on whether the Government benefitted from its conduct and quoted *Shaw* saying "the force of the no-interest rule cannot be avoided simply by devising a new name for an old institution."¹⁰⁸ From this reasoning, the Eighth Circuit seems to have understood the minority's position to be that sovereign immunity can be waived because the Government was improperly benefiting from keeping the accrued interest. Although the minority position does mention the fundamental unfairness of the Government benefiting from improperly seized property, it explains that the interest earned on the property *is part of the property* and therefore sovereign immunity is not implicated. This is because the Government has waived its sovereign immunity on the *return of property* that it wrongfully seized through statute.¹⁰⁹

3. First Circuit - *Larson v. United States*

The First Circuit joined the majority position in *Larson v. United States*.¹¹⁰ The court analyzed the circuit split and decided that without an express waiver of sovereign immunity, the no-interest rule prevents recovery of prejudgment interest.¹¹¹

The court addressed the Ninth Circuit's rationale that considers accrued interest on seized property as "profit from wrongly seized property" that is being disgorged, instead of an award of

¹⁰⁶ \$7,990.00, 170 F.3d at 844–45.

¹⁰⁷ *Id.* at 845.

¹⁰⁸ *Id.* (quoting *Library of Cong. v. Shaw*, 478 U.S. 310, 321 (1986)).

¹⁰⁹ *United States v. \$277,000 U.S. Currency*, 69 F.3d 1491, 1493 (9th Cir. 1995).

¹¹⁰ *Larson v. United States*, 274 F.3d 643 (1st Cir. 2001).

¹¹¹ *Id.* at 647–48.

prejudgment interest.¹¹² The court noted that fairness considerations cannot waive sovereign immunity and quoted *Shaw*, saying “[c]ourts lack the power to award interest against the United States on the basis of what they think is or is not sound policy.”¹¹³ The court also quoted *Shaw* for the proposition that “the force of the no-interest rule cannot be avoided simply by devising a new name for an old institution”¹¹⁴ and argued that the court just characterizes prejudgment interest as disgorging “profit from wrongly seized property,” which is not allowed by the holding of *Shaw*.¹¹⁵ In short, the court believed that the Ninth Circuit based its decision on public policy and was simply renaming prejudgment interest in an effort to promote fairness.

4. Third Circuit - United States v. Craig

The Third Circuit was the most recent court to address the circuit split in *United States v. Craig*.¹¹⁶ In this case, Ryan James Craig was convicted and ordered to pay restitution, but there was additional seized money left over after Craig paid the restitution.¹¹⁷ The Government tried to apply the leftover money to a judgment in a different jurisdiction.¹¹⁸ Craig then filed a motion under Federal Rules of Criminal Procedure 41(g) to have the remaining money returned and prevailed, but the Government refused to pay the interest that accrued on the seized money.¹¹⁹ Craig then filed a motion seeking interest under various theories, including CAFRA.¹²⁰

¹¹² *Id.* at 647 (quoting *United States v. \$277,000 U.S. Currency*, 69 F.3d 1493 (9th Cir. 1995)).

¹¹³ *Id.* (quoting *Library of Cong. v. Shaw*, 478 U.S. 310, 321 (1986)).

¹¹⁴ *Id.* (quoting *Shaw*, 478 U.S. at 321).

¹¹⁵ *Id.*

¹¹⁶ *United States v. Craig*, 694 F.3d 509 (3d Cir. 2012), *cert. denied*, 134 S. Ct. 55 (2013).

¹¹⁷ *Id.* at 511.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

The issue before the court was whether CAFRA entitles a convicted criminal to interest on an award of excess funds returned to him after he satisfied a restitution order.¹²¹ The court ruled that it did not and held that CAFRA only applies to civil proceedings to forfeit property and does not apply to criminal seizures or forfeitures or motions under Rule 41(g).¹²² Furthermore, even if CAFRA did apply, Craig did not “substantially prevail” against the Government as is required by CAFRA’s provision providing for prejudgment interest.¹²³ The court reasoned that Craig did not substantially prevail because he did not obtain a judgment on the merits nor any relief specific to the forfeiture action; he just prevented the Government from diverting his funds to satisfy a judgment in another jurisdiction.¹²⁴

The court also addressed the circuit split regarding the “return of property” and held in accordance with the majority that the no-interest rule applied and that, absent an express waiver, sovereign immunity prevents recovery of interest.¹²⁵ The court stated that Rule 41(g) provides only for the “return [of] property” and does not make an explicit mention of interest.¹²⁶ It further rejected the minority’s position that interest is a part of the seized property that is required to be returned by stating this is just devising a new name in an attempt to avoid the no-interest rule.¹²⁷ Craig petitioned the Supreme Court for *certiorari* but the Court denied his petition on October 7, 2013.¹²⁸

¹²¹ *Id.*

¹²² *Craig*, 694 F.3d at 512–13.

¹²³ *Id.* at 512.

¹²⁴ *Id.*

¹²⁵ *Id.* at 513.

¹²⁶ *Id.*

¹²⁷ *Id.* (quoting *Library of Cong. v. Shaw*, 478 U.S. 310, 321 (1986)).

¹²⁸ *Craig v. United States*, 134 S. Ct. 55 (2013).

IV. Why the Supreme Court Should Adopt the Position that the Government Should Pay the Actual Interest Accrued on Cash Property that was Seized and Returned but not Constructive Interest

The Supreme Court should have granted *certiorari* in *Craig v. United States*¹²⁹ because there is a clear and longstanding circuit split between eight circuit courts of appeal.¹³⁰ In the context of criminal forfeitures and 28 U.S.C. § 2465(a), the First, Second, Third, Eighth, and Tenth Circuits have held that no interest should be paid when seized cash property is returned, while the Sixth, Ninth, and Eleventh have held that interest should be paid.¹³¹ This circuit split covers thirty-nine states, with sixteen states providing for the return of interest and twenty-three states denying interest.¹³² It is intrinsically unfair for an innocent plaintiff to be penalized because the majority of circuit courts have incorrectly applied the law while an identical plaintiff in a minority jurisdiction is not penalized. This circuit split needs to be resolved and the Supreme Court should rule that actual interest that accrued on seized property should be returned when the seized property is returned.

Although the Court of Appeals for the Federal Circuit opined that this circuit split is of diminished importance since the enactment of CAFRA,¹³³ the circuit split has not been resolved and is, in fact, still significant. CAFRA's section regarding the return of currency and interest does not apply to criminal forfeiture proceedings,¹³⁴ which account for approximately 50 percent

¹²⁹ *Id.*

¹³⁰ *United States v. Craig*, 694 F.3d 509, 513 (3d Cir. 2012), *cert. denied*, 134 S. Ct. 55 (2013). The Solicitor General argued in his brief that the circuit split was of minor importance and that it was not implicated in this case because the record did not “establish that the government actually or constructively earned interest on the seized money” and therefore, the Court should not review the case. Brief for United States in Opposition at 7–8, *Craig v. United States*, 134 S. Ct. 55 (2013) (No. 12-1046).

¹³¹ *Craig*, 694 F.3d at 513.

¹³² *Geographic Boundaries of United States Courts of Appeals*, UNITED STATES COURTS, <http://www.uscourts.gov/uscourts/images/CircuitMap.pdf> (last visited Jan. 4, 2014).

¹³³ *Smith v. Principi*, 281 F.3d 1384, 1388 n.2 (Fed. Cir. 2002); *see also* *United States v. Ford*, 64 F. App'x 976, 986 n.4 (6th Cir. 2003).

¹³⁴ U.S.C. § 2465(b)(1) (2012).

of all contested forfeiture proceedings.¹³⁵ In criminal forfeitures, therefore, the circuit split still exists.¹³⁶

This circuit split is an issue that has a substantial legal and practical impact. According to the U.S. Department of Justice, in 2012 the total amount of seized cash and monetary instruments in the Seized Asset Deposit Fund (SADF) was approximately \$1.5 billion, and in 2011 there was about \$4 billion.¹³⁷ Of this seized property, 80 percent of forfeitures go uncontested and the seized property is forfeited to the Government.¹³⁸ Even so, in 2012, more than \$46.5 million in cash assets were returned after being seized involving more than 850 incidents.¹³⁹ In 2011, more than \$73.6 million in cash assets were returned involving more than 900 incidents.¹⁴⁰ This is significant because there is a lot of money at stake and many innocent victims are penalized if the interest they rightfully own is not returned.

Pursuant to 28 U.S.C. § 524(c), the Asset Forfeiture Fund and SADF invest cash balances in Government securities.¹⁴¹ The investment interest earned in 2012 totaled \$3.3 million and in 2011 totaled \$4.5 million.¹⁴² This is a significant amount of interest that was earned on seized and forfeited property in just one year and this amount would substantially increase if interest rates go up, because the interest rates and Government securities are currently at near-historic

¹³⁵ Cassella, *supra* note 1, at 56.

¹³⁶ *Id.*

¹³⁷ U.S. DEP'T OF JUSTICE, ASSETS FORFEITURE FUND AND SEIZED ASSET DEPOSIT FUND ANNUAL FINANCIAL STATEMENTS FISCAL YEAR 2013, AUDIT REP. NO. 13-07, at 47 (Jan. 2013), *available at* <http://www.justice.gov/oig/reports/2013/a1307.pdf>.

¹³⁸ Stefan D. Cassella, *The Case for Civil Forfeiture: Why in Rem Proceedings Are an Essential Tool for Recovering the Proceeds of Crime*, 11 J. MONEY LAUNDERING CONTROL 8, 11 (2008), *available at* http://works.bepress.com/stefan_cassella/20.

¹³⁹ U.S. DEP'T OF JUSTICE, ASSETS FORFEITURE FUND AND SEIZED ASSET DEPOSIT FUND ANNUAL FINANCIAL STATEMENTS FISCAL YEAR 2013, AUDIT REP. NO. 13-07, at 45 (Jan. 2013), *available at* <http://www.justice.gov/oig/reports/2013/a1307.pdf>. These incidents include criminal and civil actions.

¹⁴⁰ *Id.* at 45.

¹⁴¹ *Id.* at 7.

¹⁴² *Id.*

laws.¹⁴³ This interest is a part of the property and should be given to the party that prevails in the forfeiture proceeding.

A. Congress’s legislative intent in enacting CAFRA was to provide interest to claimants who prevail against the Government in civil forfeiture actions but this intent applies broadly to all forfeitures

When CAFRA was enacted, it seemingly adopted the minority’s disgorgement theory and now allows a claimant who substantially prevails in a civil forfeiture action to recover the interest that was actually or constructively earned while cash property was wrongfully seized by the Government.¹⁴⁴ In 2003, the Sixth Circuit stated that CAFRA “ratified the outcome, if not the rationale” of the disgorgement theory.¹⁴⁵ In 2008, the Ninth Circuit also noted how CAFRA’s legislative history implicitly adopted the minority’s position.¹⁴⁶

At a hearing before the Committee of the whole House of Representatives, Congressman John Conyers discussed CAFRA and its purpose.¹⁴⁷ He emphasized to the members of Congress that:

the Government [should] pay [a] successful claimant post-judgment interest as well as prejudgment interest on currency. [CAFRA] prevents the Government from gaining a windfall on improperly seized property and puts the property owner in the position he or she would have been if the property had not been seized in the first instance.¹⁴⁸

¹⁴³ Min Zeng, *Treasury Yields at Record Low Again*, WALL ST. J. (July 24, 2012), <http://online.wsj.com/news/articles/SB10000872396390443437504577546760997508398>.

¹⁴⁴ 28 U.S.C. § 2465(b)(1)(C) (2012). The statute uses the phrase imputed amount of interest instead of constructive interest.

¹⁴⁵ *United States v. Ford*, 64 F. App’x 976, 981 n.5 (6th Cir. 2003) (citing H.R. REP. NO. 106-192, at 19 (1999)).

¹⁴⁶ *Carvajal v. United States*, 521 F.3d 1242, 1248–49 (9th Cir. 2008) (citing H.R. REP. NO. 106-192, at 19 (1999)).

¹⁴⁷ 145 CONG. REC. H4854-02.

¹⁴⁸ *Id.*

Although this statement was made in the context of civil forfeiture proceedings, the rationale and reasoning for providing interest on wrongfully seized property is exactly the same in criminal forfeiture proceedings.

Furthermore, in the Committee on the Judiciary, the Committee noted the circuit split and stated that where money or other negotiable instruments were seized and then returned, it would be “manifestly unfair” to deny interest to a property owner who prevailed in a forfeiture action.¹⁴⁹ The problems that CAFRA was enacted to remedy also apply to criminal forfeiture proceedings. The legislative intent behind CAFRA should influence the courts’ decisions when deciding on cases that fall within the circuit split to prevent unjust rulings.¹⁵⁰

B. Interest actually earned on cash property is part of the “property” that has to be returned

As the minority of circuit courts have held, interest that was *actually* earned on seized property is part of the property.¹⁵¹ When the Government seizes property, it does not own that property unless and until it successfully wins a forfeiture proceeding. Therefore, the Government should not be able to retain any proceeds or benefits from the time it wrongfully seizes an individual’s property.

For example, as the Ninth Circuit explained, if the Government seized a pregnant cow and later, after the cow had given birth, the seizure was found to be wrongful, the Government could not give back the cow and keep the calf.¹⁵² Additionally, if the Government wrongfully seized coupon bonds, the Government would not be able to keep the coupon payments that were

¹⁴⁹ H.R.Rep. No. 106–192, at 19 n.79.

¹⁵⁰ See *Carvajal*, 521 F.3d at 1248–49; *Ford*, 64 F. App’x at 981 n.5.

¹⁵¹ *Carvajal*, 521 F.3d at 1245.

¹⁵² *United States v. \$277,000 U.S. Currency*, 69 F.3d 1491, 1496 (9th Cir. 1995).

made and only return the bonds;¹⁵³ the same goes for corporate stocks and dividend payments.¹⁵⁴ If the Government wrongfully seizes real estate that generates rental income, the Government must return the profits or rents accrued during the wrongful seizure.¹⁵⁵ Likewise, the Government needs to return interest that actually accrues on cash property during an improper seizure.

The possible examples are endless, but the principle is simple: when property creates a tangible benefit it is part of that original property. The general rule that “interest follows principal” applies here.¹⁵⁶ As the Supreme Court stated, “any interest that does accrue [while in the possession of a custodian] attaches as a property right incident to the ownership of the underlying principal.”¹⁵⁷ Investment of the principal does not entitle the Government to assume ownership of the interest.¹⁵⁸

The Department of Justice even adopted the view that interest on the seized property should be returned to the claimant if the property is returned in its Asset Forfeiture Audit Report in 2002.¹⁵⁹ The report provides that interest earned on SADF accounts is either “returned to the owner with the underlying principal or become[s] the property of the Government upon forfeiture of the principal.”¹⁶⁰ So if the Government seizes property and has to return it, it should return the whole property including the tangible benefits, such as accrued interest.

¹⁵³ See *Webb's Fabulous Pharm., Inc. v. Beckwith*, 449 U.S. 155, 163 n.6 (1980).

¹⁵⁴ See *Standard Oil Co., N.J., v. Markham*, 64 F.Supp. 656, 664 (S.D.N.Y. 1945) (citing *Henkels v. Sutherland*, 271 U.S. 298, 299 (1926)).

¹⁵⁵ *U.S. v. All Assets & Equip. of West Side Bldg. Corp.*, 188 F.3d 440, 445 (7th Cir. 1999).

¹⁵⁶ See *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 165 (1998) (citing *Beckford v. Tobin*, 27 Eng. Rep. 1049, 1051 (Ch. 1749)).

¹⁵⁷ *Id.*; see *Webb's Fabulous Pharm., Inc. v. Beckwith*, 449 U.S. 155, 162 (1980).

¹⁵⁸ *Webb's Fabulous Pharm.*, 449 U.S. at 162.

¹⁵⁹ UNITED STATES DEP'T OF JUSTICE, ASSETS FORFEITURE FUND AND SEIZED ASSET DEPOSIT FUND ANNUAL FINANCIAL STATEMENTS FISCAL YEAR 2001, AUDIT REP. NO. 02-22 (June 2002), available at <http://www.justice.gov/jmd/afp/01programaudit/auditreport72002.htm>.

¹⁶⁰ *Id.*

C. Sovereign immunity is waived when disgorging actual interest earned on wrongfully seized property

Sovereign immunity is waived when the Government is disgorged of the interest that was *actually* earned while it was improperly seized. The Government expressly waives sovereign immunity for the “return of property.”¹⁶¹ As argued above, interest actually earned on property is part of that property. Therefore, sovereign immunity is waived because the Government consents to returning wrongfully seized property.

Just because the property earned “interest” does not mean that the “no-interest” rule applies. The no-interest rule from *Shaw* does not apply to disgorged interest that was earned on seized property, it applies to *separate damage awards* for interest.¹⁶² The Court in *Shaw* even stated that “interest is an element of damages separate from damages on the substantive claim.”¹⁶³ The disgorgement of interest is part of the damages on the substantive claim and is not a separate element of damages as it was in *Shaw*. *Shaw* involved a damage award of prejudgment interest on top of the *attorney’s fees* that the plaintiff won.¹⁶⁴ The plaintiff was looking for additional damages in the form of prejudgment interest for the time he spent pursuing the claim.¹⁶⁵ This is fundamentally different from when interest is part of the property itself.

The seized property and accrued interest is not owned by the Government. Whoever wins the forfeiture proceeding is entitled to get the whole property, which includes its proceeds: the interest earned or in the case of a pregnant cow, the calf that was born.¹⁶⁶ “[T]he payment of

¹⁶¹ 28 U.S.C. § 2465(a) (2012); FED. R. CRIM. P. 41(g).

¹⁶² See *Library of Cong. v. Shaw*, 478 U.S. 310, 314–15 (1986).

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 319.

¹⁶⁵ *Id.*

¹⁶⁶ “The government is responsible to those it deprives of real property without due process for the profits or rents accrued during the period of illegal seizure.” *United States v. All Assets & Equip. of W. Side Bldg. Corp.*, 188 F.3d 440, 445 (7th Cir. 1999), see also *United States v. All Assets & Equip. of W. Side Bldg. Corp.*, 58 F.3d 1181, 1193 (7th

interest on wrongfully seized money is not a payment of damages.”¹⁶⁷ The Government is not getting punished or forced to pay damages, but merely to return what does not belong to it.

D. Sovereign immunity is implicated when constructively accrued interest on seized property is returned

Paying constructive interest on seized property in a criminal forfeiture proceeding violates the no-interest rule.¹⁶⁸ This is because the interest paid was not *actually* earned on the seized money and a claimant would be in essence seeking separate interest damages from the Government.

The Government would need to waive its sovereign immunity to provide for constructive interest as the Legislature did in CAFRA.¹⁶⁹ Forcing the Government to pay constructive interest for interest that should have accrued, but did not actually accrue, is a type of compensatory damage. It is also a way of providing for prejudgment interest and just calling it another name, which is expressly prohibited by *Shaw*: “the force of the no-interest rule cannot be avoided simply by devising a new name for an old institution.”¹⁷⁰

When actual interest is disgorged from the Government, no harm or damages are assessed against the Government. In contrast, when constructive interest is charged against the Government, the Government is being penalized and has to come up with additional funds to pay the award.

Cir. 1995); *United States v. Marsh*, 105 F.3d 927, 931 (4th Cir. 1997); *United States v. 51 Pieces of Real Prop. Roswell*, 17 F.3d 1306, 1316 (10th Cir. 1994).

¹⁶⁷ *Carvajal v. United States*, 521 F.3d 1242, 1245 (9th Cir. 2008) (citing *United States v. \$277,000 U.S. Currency*, 69 F.3d 1491, 1498 (9th Cir. 1995)).

¹⁶⁸ *See United States v. Craig*, 694 F.3d 509, 513 (3d Cir. 2012), *cert. denied*, 134 S. Ct. 55 (2013).

¹⁶⁹ 28 U.S.C. § 2465(b)(1) (2012).

¹⁷⁰ *Id.* at 321.

The minority position in the circuit split argues that the Government does gain a benefit from having seized money in a non-interest bearing account and therefore it should be disgorged of the benefit which is calculated at the Government's alternative borrowing rate.¹⁷¹ Although this makes sense in light of fairness and equity, these arguments fail due to the no-interest rule and the strict application of sovereign immunity.¹⁷²

The minority's position on constructive interest is a slippery slope, because if this was the general rule, what would be the limit on constructive interest? The Government could seemingly benefit in some way from everything that it seizes. The Government should not be required to account for every benefit that it receives while holding onto an asset. The Government seizes a lot of assets that it does not use and just sit in a warehouse pending a legitimate forfeiture proceeding.¹⁷³ In the case of cash, sometimes the Government seizes cash to use as physical evidence and does not derive any tangible benefit from it. CAFRA and the common law have noted that cash that is used as evidence for the Government in a case does not accrue interest.¹⁷⁴

Since there are rules and guidelines¹⁷⁵ that require the Government to put seized funds into an interest bearing account in the SADF,¹⁷⁶ the situation of constructive interest should be rather uncommon.

E. Equity, fairness, and public policy considerations demand that actually accrued interest is returned to its rightful owner

¹⁷¹ *United States v. \$277,000 U.S. Currency*, 69 F.3d 1491, 1495–96 (9th Cir. 1995).

¹⁷² *Library of Cong. v. Shaw*, 478 U.S. 310, 321 (1986).

¹⁷³ U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEY'S MANUAL 9-118.400 (2010), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/.

¹⁷⁴ 28 U.S.C. § 2465(b)(1)(C)(ii) (2012); *United States v. \$277,000 U.S. Currency*, 69 F.3d 1491, 1493 (9th Cir. 1995).

¹⁷⁵ 28 C.F.R. § 8.5 (2012); U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEY'S MANUAL 9-118.790 (2010), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/.

¹⁷⁶ Other than when the government uses the property for tangible evidentiary purposes. 28 C.F.R. § 8.5(c).

The Supreme Court in *Shaw* held that equity and fairness do not waive sovereign immunity.¹⁷⁷ But, as argued above, sovereign immunity is waived and, therefore, does not apply when the government returns the actual interest accrued on property while wrongfully seized. Thus, equity and fairness arguments should be taken into consideration.

The Government should not have the economic benefit of gaining interest that accumulates on wrongfully seized assets. This runs contrary to common sense and violates general principles of fairness and equity. The Courts should not treat identical individuals differently based on the jurisdiction they are prosecuted.

The Ninth Circuit said it well when it stated “[w]here a disputed [property] is capable of being put to use for someone, it makes no sense whatsoever that a pile of dollar bills should be left doing no good for anyone.”¹⁷⁸ It is only fair that the Government should put money in an interest bearing account when it seizes it, unless it needs to use it as evidence. And, in fact, pursuant to the United States Attorney’s Manual, the Government is required to put seized cash into the SADF, which is an interest bearing account.¹⁷⁹ While seized, the money will accrue interest that should be given to the party that prevails in the forfeiture action. If a claimant prevails in a forfeiture action, it is bad enough that their property was wrongfully seized, but to also lose the interest that accrued while it was seized is an additional unjust punishment.

There is significant harm to innocent individuals who lose out on the interest that was actually accrued on their wrongfully seized property. Criminal trials and forfeiture proceedings can take years to be completed, and during this time the plaintiffs completely lose the use and benefit of their property. For example, in *United States v. \$277,000*, it took almost four years to

¹⁷⁷ *Shaw*, 478 U.S. at 321 (1986).

¹⁷⁸ *\$277,000 U.S. Currency*, 69 F.3d at 1494.

¹⁷⁹ U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEY’S MANUAL 9-111.600 (2010), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/.

return the plaintiff's money and eight years to completely resolve the case.¹⁸⁰ If the \$277,000 that was seized was invested at a 4% interest rate compounding yearly, more than \$45,000 in interest would have accrued on the property.¹⁸¹ Of course, interest rates can be much higher or much lower and the amount of interest that would accrue changes accordingly.

It is against public policy to allow the Government to be unjustly enriched at the expense of its citizens. Allowing this unjust enrichment may incentivize criminal asset seizures if the Government may seize property with impunity and without worrying about paying interest for the time it wrongfully held the property. Public policy, equity, and fairness demand that this issue be resolved so that claimants can receive the interest that actually accrued on their property while it was seized by the Government.

V. Conclusion

In criminal forfeitures, actual interest earned on seized property during the time that the Government seized it should be disgorged to its rightful owner, if the property has to be returned. The Government should not be allowed to profit from wrongfully seizing property. If the seized property did not generate any interest to be disgorged, then just the original property should be returned. The minority in this circuit split has stretched the disgorgement theory too far when it ruled that constructive interest should also be paid by the Government. It is plausible to calculate the constructive interest that the Government gained but this would create a slippery slope. The courts should not have to determine every last type of interest or benefit that the Government could have received while in possession of seized property.

¹⁸⁰ *Id.* at 1491–92.

¹⁸¹ In August of 2006, the 30-day Treasury Rates were above a 5% interest rate. *Daily Treasury Bill Rates Data*, U.S. DEP'T OF TREASURY, <http://www.treasury.gov/resource-center/data-chart-center/interest-rates/Pages/TextView.aspx?data=billratesAll> (last visited Jan. 4, 2014).

The Supreme Court of the United States should have granted *certiorari* in *United States v. Craig*, and ruled that actual interest earned on cash property that was seized by the Government is part of the seized property and is not considered prejudgment interest. With this determination, the Court would clear up the circuit split and remedy the injustice caused to innocent property owners who are deprived of the interest earned on their property.

Alternatively, the United States Congress should pass legislation that will reform the criminal forfeiture statutes to provide for the return of actual interest earned on seized property to claimants who prevail in a criminal forfeiture action.