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OPINION SUPPLEMENTAL INFORMATION  
January 4, 1991  
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COMPLETE NAME  
OF CASE:

Richmond Tenants Organization, Inc., et al  
v.  
Jack Kemp, Secretary of Housing and Urban  
Development, et al

DOCKET NO.:

3:90CV00346

COURT:

United States District Court  
Eastern District of Virginia  
Richmond Division

DATE OPINION  
FILED:

December 19, 1990

JUDGE:

Hon. Richard L. Williams

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RICHMOND TENANTS ORGANIZATION V. HUD

THE HONORABLE RICHARD L. WILLIAMS (2214)

Filed : 06/15/90 NOS : 443 Origin : 1 Jury Demand: Demand : 0  
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Remarks:

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Mark Batten, DOJ

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CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET NO. <u>3:90CV00346</u>
RICHMOND TENANTS ORGANIZATION, ET AL	HOUSING AND URBAN DEVELOPMENT	PAGE ___ OF ___ PAGES

DATE	NR.	PROCEEDINGS
		<p>For Pltfs:</p> <p>Florence Wagman Roisman, #87718 National Housing Law Project 122 C Street, N.W., Suite 220 Washington, D.C. 20001-2019 (202) 783-5140</p> <p>David B. Bryson, Catherine M. Bishop and James R. Grow, Esq. National Housing Law Project 1950 Addison Street, Suite 200 Berkeley, California 94704 (415) 548-9400</p> <p>Charles H. Dorsey, Jr., Esquire Stuart Cohen, Esquire Barbara Samuels, Esquire Legal Aid Bureau, Inc. Candler Buidling, 7th Floor 714 E. Pratt Street Baltimore, MD 21202-3105</p> <p><u>FOR DEPT HUD:</u> Thornburgh &amp; Dept of Justice Arthur R. Goldberg, Esquire Mark W. Batten, Esquire U. S. Department of Justice PO Box 883, Room 3716 Washington, DC 20044 (202) 514-1285</p>

Closed 12-19-90

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF RICHMOND TENANTS ORGANIZATION, INC. et al.	DEFENDANT JACK KEMP, SECRETARY OF HOUSING & URBAN DEVELOPMENT, et al.	3:90CV00346 DOCKET NO. _____ PAGE 1 OF _____ PAGES
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DATE	NR.	PROCEEDINGS
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**FLING FEES PAD**

Date	Receipt Number	F.F.
6-15-90	# 22330	F.F. 120.00

FF

DATE RECD:	1-9-91	9:30
ON RECD:		
DATE	10-11-90	8:30
STATUS		
DOCKET		
RECEIVED		

DATE	NR.	PROCEEDINGS
1990		
Jun. 15	1	Pltfs' Application for Temporary Restraining Order, filed. phb
Jun. 15	2	Pltfs' Declaration of Patricia M. Hanrahan in Support of Motion for TRO, filed. phb
Jun. 15	3	Pltfs' Motion for Preliminary Injunction, filed. phb
Jun. 15	4	Pltfs' Memorandum in Support of Motion for TRO & for Prelim. Injunc., filed. phb
Jun. 15	5	Pltfs' Affidavit of Mamie Robison, filed. phb
Jun. 15	6	Pltfs' Affidavit of Shirley M. Washington, filed. phb
Jun. 15	7	Pltfs' Affidavit of Annie Whitlock, filed. phb
Jun. 15	8	Pltfs' Affidavit of Cornelius Claxton, filed. phb
Jun. 15	9	Pltfs' Affidavit of Teresa W. Hopson, filed. phb
Jun. 15	10	Pltfs' Affidavit of Alma Marie Barlow, filed. phb
Jun. 15	11	Pltfs' Declaration of Robert F. Gillett, filed. phb
Jun. 15	12	Pltfs' Complaint, filed. No jury. phb
Jun. 15	13	Pltfs' Motion to Receive Exhibit Under Seal, filed. phb
June 15	--	IN OPEN COURT: Williams, J., R. Belsvik, OCR. Parties by counsel. U.S. Atty. Matter came on for hearing on Pltfs' motion for TRO. Arguments had. Rebuttal arguments had. Matter taken under advisement by the Court.(1:00) jtj
June 18	14	ORDER that Court GRANTS IN PART pltfs' motion for a prel. inj.; the defts are ENJOINED from evicting, without prior notice & an opportunity to be heard household members of public housing units whose leaseholds have been seized by the govt.; Court ENJOINS the U.S. Atty from having a tenant executed the Hold Harmless Agreement, attached with papers submitted by the government as a condition to avoid eviction without a formal hearing; this Order to have effect throught the Richmond Division of East. Dist. of Va.; Court CONSTRUES representation of pltfs as a motion for class certification & PROVISIONALLY DENIES ptlfs' prayer for class certification; Court finds in favor of ptlfs; pltfs' motion for a prel. inj., as modified by the Court, is GRANTED; ptlfs ORDERED to execute a bond in the amount of \$1.00, ent. 6-18-90, RLW, filed. Copies mailed. Jmp
June 18	15	ORDER that Exhibit 3 to Declaration of Patricia M. Hanrahan is SEALED, ent. 6-18-90, RLW, filed. Copies mailed. jmp
June 18	--	Exhibit 3 to Patricia M. Hanrahan's Declaration SEALED & placed in sealed cabinet jmp
June 19	--	Summonses issued & picked up by atty. jmp

(CONT)

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF		DEFENDANT	DOCKET NO. 3:90CV00346
RICHMOND TENANTS ORGANIZATION		HUD	PAGE 3 OF _____ PAGES

DATE	NR.	PROCEEDINGS	
<u>1990</u>			
July 16	30	Deft Richmond Redevelopment's Answer, filed. No jury	jmp
July 25	31	<b>SCHEDULING ORDER, ENT 07-25-90, RLW, filed. Cps. mailed.</b>	jtj
Aug. 1	32	Notice of Appearance of Arthur R. Goldberg & Mark Batten for deft HUD	jmp
Aug. 20	33	Ptlf's Motion to Unseal Records, filed	jmp
Aug. 21	34	Federal Defts' Answer to Pltfs' Amended Complaint, filed. No jury.	
Aug. 27	35	ORDER that Exhibit 3 to the Declaration of Patricia M. Hanrahan filed 6-15-90, previously filed under seal, is UNSEALED, ent. 8-27-90, RLW, filed. Copies mailed. (filed as attachment to Pleading #2)	jmp
Sept. 5	36	Pltf's Motion for Order to Show Cause why Deft Dept. of Justice Should Not be Held in Contempt, filed	jmp
Sept. 5	37	Pltf's Memo. in Supprot of Motion for Order to Show Cause Why the Dept. of Justice Should Not Be Held in Contempt, filed	jmp
Sept. 5	38	Pltf's Motion to File Deposition of Charles E. Cox, Jr., filed with memo. in support included. (Deposition in notebook in brown expandable)	jmp
Sept. 14	39	Pltfs' Notice of Deposition Upon Oral Examination of Richmond Redevelopment Housing Authority on 9-18-90, filed	jmp
Sept. 17	40	Memorandum of the Dept. of Justice in opposition to Pltfs' Motion for Order to Show Cause, filed.	afd
Sept. 24	41	Pltf's Reply in Support of Motion for Order to Show Cause Why Dept of Justice Should Not Be Held in Contempt, filed	jmp
Sept. 25	42	ORDER that deposition of Charles E. Cox, Jr. is filed, ent. 9-25-90, RLW, filed. Copies mailed.	jmp
Sept. 25	--	Deposition of Charles E. Cox, Jr. taken 7-26-90 on behalf of pltfs, filed	jmp
Oct. 11	43	Federal Defts' Motion For Summary Judgment, filed.	len
Oct. 11	44	Federal Defts' Memorandum In Support of Motion For Summary Judgment, filed.	len
Oct. 11	--	<b>IN OPEN COURT: Spencer, J., Kull, OCR. Appearances: Parties by counsel. Matter came on for hearing on pltf's motion for order to show cause why DOJ should not be held in contempt. Counsel heard. Taken under advisement by the Court. (:40)</b>	lkm
Oct. 11	45	PTO, NONJURY CASE, ent'd 10/11/90, RLW, filed. Copies mailed.	lkm
Oct. 12	46	Memorandum Opinion, entered by RLW on 10/12/90 & filed.	afd
Oct. 12	47	ORDER that pltf's motion for an order to show cause why the Department of Justice should not be held in contempt is Denied, entered by RLW on 10/12/90 & filed. Copies mailed.	afd
Oct. 19	48	RRHA's Motion for Sum. Judg., filed	jmp
Oct. 19	49	RRHA's Memo. in Support of Motion for Sum. Judg., filed	jmp
Oct. 22	50	Pltf's Notice to take Deposition of U.S. Dept. of Justice on November 6, 1990, at 9:30 a.m., filed.	jtj
Oct. 22	51	Pltf's Notice to take Deposition of HUD on November 1, 1990, at 10:00 a.m., filed.	jtj
Oct. 22	52	Pltf's Notice to take Deposition of Clarence H. Albright, Jr. on November 1, 1990, at 10:00 a.m., filed.	jtj
Oct. 22	53	<b>PRETRIAL ORDER, ENT 10-22-90, RLW, filed. Cps. mailed.</b>	jtj
Oct. 22	--	Transcript of proceedings before RLW on June 15, 1990, filed.	jtj
Nov. 2	--	Transcript of proceedings before RLW on November 2, 1990, filed.	jtj
Nov. 9	54	Pltf's Notice to Take Depositions of Thomas Edwards on 11-16-90, filed	jmp
Nov. 9	55	Pltf's Notice to Take Depositions of Richard C. Gentry on 11-15-90, filed	jmp
Nov. 13	56	ORDER setting out briefing schedule for certain pending & anticipated motions, ent. 11-13-90, RLW, filed. Copies mailed.	jmp

(CONT)



P  
SARAH  
WILSON

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

RICHMOND TENANTS ORGANIZATION, INC., )  
ET AL., )

Plaintiffs, )

v. )

C.A. No. 3:90CV00346

JACK KEMP, SECRETARY OF HOUSING AND )  
URBAN DEVELOPMENT, ET AL., )

Defendants. )

MEMORANDUM OPINION

This matter is before the Court on cross-motions for summary judgment, pursuant to Fed. R. Civ. Proc. 56. On the basis of the pleadings, supporting briefs, and arguments made at the December 14, 1990 hearing, the Court hereby GRANTS the plaintiffs' motion for summary judgment, DENIES its renewed motion for class certification, and DENIES the defendant's motion for summary judgment,

Factual and Procedural History

On June 15, 1990, plaintiffs instituted a constitutional and statutory challenge of the "National Public Housing Asset Forfeiture Project" on their own behalf and on behalf of the nationwide class of public housing residents. The Forfeiture Project, jointly developed by the Department of Housing and Urban Development ("HUD") and the Department of Justice ("DOJ"), authorizes the government to seize the homes of public housing tenants without prior notice and an opportunity to be heard if any leasehold resident is suspected of drug-related activity. The

plaintiffs requested declaratory and preliminary and permanent injunctive relief and applied for a temporary restraining order to prevent government officials from implementing the Project.

Three days later, this Court preliminarily enjoined the government from evicting, without prior notice and an opportunity to be heard, household members of public housing units whose leaseholds had been seized by the government. The government was permitted to continue executing warrants of arrest in rem, seizure warrants, and writs of entry. The Court provisionally denied the plaintiffs' motion for class certification but on June 22, 1990, extended its June 18, 1990 order to the prospective class of nationwide public housing tenants. The Court specified that its order did not affect the authority of officers of the Department of Justice to seek the immediate eviction of household members in exigent circumstances.

Government seizure of public housing leaseholds is authorized by Title 21 U.S.C. §881(a)(7), which subjects to forfeiture "[a]ll real property...(including any leasehold interest)...which is used, or intended to be used...to commit, or facilitate the commission of, a violation of this title punishable by more than one years' imprisonment." The statutory provision prohibits forfeiture if the criminal act or omission occurred without the knowledge or consent of that owner. There are no procedural rules specifically designed for use in §881 civil forfeiture actions. Under §881(b), the government may seize property under three summary procedures, utilizing rules of more general application. The government has relied on the third procedure outlined in §881(b) to seize public

leaseholds in which drug activity has allegedly occurred; requesting the issuance of a seizure warrant in accordance with Fed. R. Crim. Proc. 41, which requires an ex parte probable cause determination by a judicial officer.

#### Analysis

The small but growing body of case law on forfeiture of public leaseholds under §881(a)(7) establishes that no-notice removal of tenants without a predeprivation hearing violates the constitutional right of due process. United States v. Premises and Real Property Located at 4492 S. Livonia Rd., 889 F.2d 1258, 1264 (2d Cir. 1989); reh den. 897 F.2d 659 (2d Cir. 1990); Application of Kingsley, 802 F.2d 571 (1st Cir. 1986); United States v. A Leasehold Interest...at 850 S. Maple, Ann Arbor, Mich., 743 F.Supp. 505 (E.D. Mich. 1990); United States v. Parcel I Beginning at a Stake, 731 F. Supp. 1348 (S.D. Ill. 1990). The U.S. Supreme Court established in Fuentes v. Shevin that procedural due process requires notice and an opportunity to be heard before the State authorizes its agents to seize property, except in "extraordinary situations." Such extraordinary situations must meet three criteria: 1) the seizure must be directly necessary to secure an important governmental or general public interest; 2) there must be a special need for very prompt action; and 3) the person initiating the seizure must be a government official responsible for determining, under the standards of a narrowly drawn statute, that seizure is necessary and justified in the particular instance. 407 U.S. 67, 91 (1972). In the context of

civil in rem forfeiture proceedings, the Supreme Court has further refined the second Fuentes requirement. To make the required showing that there be a need for very prompt action the government must show either that: 1) the pre-hearing seizure is required to prevent further unlawful activity related to the property, or 2) the pre-hearing seizure is required to prevent dissipation or concealment of the property. United States v. Parcel I, 731 F.Supp. 1352, citing Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 679 (1974).

The government's no-notice removal of tenants in public housing in order to prevent suspected drug-related activity does not satisfy any of these criteria. The federal defendants claim that no-notice seizures serve the important public interest of preventing further drug sales on the property while the forfeiture action is pending and protecting the law enforcement officers who seize the property. The defendants further contend that this risk of continued drug activity constitutes a special need for prompt action.

However, numerous courts have determined that homes are distinctly different legal entities in the property forfeiture context. Unlike cars, yachts, and airplanes, more typical examples of property confiscated in order to prevent continued drug activity, a home is immobile, and thus not likely to be hidden or moved after notice. Livonia, 889 F.2d at 1265. Consequently, "exigent circumstances could virtually never exist which required the seizure of a home prior to notice and a hearing." U.S. v. Property at 850 S. Maple, Ann Arbor, Mich., 743 F.Supp. at 510.

More importantly, "an individual's expectation of privacy and freedom from governmental intrusion in the home merits special constitutional protection." Livonia, 889 F.2d at 1264, citing United States v. Karo, 468 U.S. 705, 714 (1984). Courts have traditionally distinguished between personal property and a home, affording the latter far greater protection under the law. U.S. v. Property at 850 S. Maple, 743 F.Supp. at 510.

The federal defendant argues that the magistrate's ex parte probable cause determination, together with the post-deprivation adversarial hearing to which a tenant is entitled, satisfies the Constitution's due process requirement. The constitutional adequacy of the pre-seizure ex parte procedure afforded tenants turns on a balancing of three considerations: 1) the significance of the property interest at stake; 2) the risk of an erroneous deprivation through the procedures used and the probable value of additional procedural safeguards; and 3) the government's interest in pre-notice seizure, including the avoidance of burdensome additional procedures. Mathews v. Eldridge, 424 U. S. 319, 334-335 (1976).

As noted above, ex parte probable cause hearings administered prior to seizure of public leaseholds do not provide sufficient constitutional protection of tenants' expectations of freedom and privacy in their homes. Moreover, "although an ex parte probable cause determination before a judicial officer reduces the possibility of an erroneous deprivation, pre-seizure notice and an opportunity to be heard would certainly further minimize that risk." Livonia, 889 F.2d at 1265. The plaintiffs contend that the

risk of erroneous deprivation is high and support their contention with evidence of erroneous seizures based on insufficient or stale evidence and mistaken identification of the leaseholder. See Plaintiffs' Memorandum in Support of Summary Judgment, p.15-19; Stipulations 75, 77, 80, 81, 84. Without an adversarial hearing at which the accused can confront and cross-examine his accusers, the accused has no means of ferreting out mistaken or deliberately false testimony. The seizure warrant issued under the current ex parte procedure is based on information provided in written affidavits and is often not the personal knowledge of the sworn affiant.

Again, the government claims that prenotice seizures serve the important purposes of preventing further use of the property as an instrumentality of crime and protecting law enforcement officers from possible violence. However, as the Court explained in Livonia, "the government's interest in this context is the narrow one of obtaining pre-notice seizure of a fixed item like a home, not the broad interest of enforcing the drug laws, since the latter will also be served by forfeiture after an adversary proceeding". 889 F.2d at 1264. Moreover, the broad interest in deterring drug dealing will be established whether or not the seizure occurs before or after an adversarial proceeding. United States v. Parcel I, 713 F.Supp. at 1353.

The eviction of an entire household prior to a formal judicial finding that forfeiture is justified constitutes a harm of major proportions. To be rendered homeless for several months or more while a civil forfeiture action is pending may be traumatic and

permanently damaging. Under the civil forfeiture statute, the Government can not act in a manner which irrevocably alters a claimant's right to their property before winning a hearing on the merits. United States v. A Leasehold Interest In Property Located at 850 S. Maple, 743 F.Supp at 510, n.7.

The Court has ordered permanent injunctive relief and corrective action in the form of a supplemental letter to all public housing authority leaseholders informing them that forfeiture of public housing leaseholds without prior notice and a hearing is unlawful. Because this relief affects the defendant's conduct regardless of whether the class is certified, the plaintiffs' renewed motion for class certification is DENIED.

It is so ORDERED.

Let the Clerk send a copy of this opinion to all counsel of record.

\_\_\_\_\_  
DATE

\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE