SUPREME COURT OF THE UNITED STATES

No. 00–6567

LARRY DEAN DUSENBERY, PETITIONER *v.*
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[January 8, 2002]

JUSTICE GINSBURG, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE BREYER join, dissenting.

"'The fundamental requisite of due process of law is the opportunity to be heard.' *Grannis* v. *Ordean,* 234 U. S. 385, 394 [1914]. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U. S. 306, 314 (1950). Today's decision diminishes the safeguard of notice, affording an opportunity to be heard, before one is deprived of property. As adequate to notify prisoners that the Government seeks forfeiture of their property, the Court condones a procedure too lax to reliably ensure that a prisoner will receive a legal notice sent to him. The Court does so despite the Government's total control of a prison inmate's location, and the evident feasibility of tightening the notice procedure "as [would] one desirous of actually informing [the prisoner]." *Id.,* at 315. Because the Court, without warrant in fact or law, approves a procedure "less likely to bring home notice" than a feasible alternative, *ibid.*, I dissent.

I

The Court correctly identifies the foundational case on reasonable notice as a due process requirement, *Mullane*

v. *Central Hanover Bank & Trust Co.*, and the core instruction: "[D]eprivation of . . . property by adjudication [must] be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Id.,* at 313. Further, the Court recognizes that petitioner Dusenbery's complaint does not rest on the Government's use of the postal service to dispatch, from the Federal Bureau of Investigation (FBI) to the Federal Correctional Institution (FCI) in Milan, Michigan, notice of an impending forfeiture. *Ante*, at 7–8. Were this case about the adequacy of the transmission of information from the FBI to the FCI, swift summary judgment for the Government, I agree, would be in order. But the case we confront is not about notice to the prison, the warden, or the prison mailroom personnel. It is about the adequacy of notice to an individual held in the Government's custody, a prisoner whose location the Government at all times knows and tightly controls.

What process did the Government provide for getting the FBI's forfeiture notice from the FCI's mailroom to prisoner Dusenbery's cell? On that key transmission the record is bare. It contains no statement by FCI Milan's warden concerning any set of safeguards routinely employed. The Government presented only the affidavit and telephone deposition of James Curtis Lawson, an "Inmate Systems Officer" assigned to FCI Milan's mailroom. App. 36–37, 46–53. On the mailroom to prisoner transmission, Lawson said simply this: "The [Housing] Unit Team member or a correctional staff member will [after signing the mailroom logbook] distribute the mail to the inmates during the institution's mail call." App. 37. Lawson did not know whether notice was in fact delivered to Dusenbery. Nor would he have such knowledge or information regarding any other prisoner. As Lawson clarified on deposition, he was not acquainted with particular practices or systems governing mail once it left the mailroom,

because that was not "pertinent to [his] department." App. 52. According to Lawson, "[t]hat would be case workers' responsibility," *ibid.;* but no caseworker filled in the evidentiary gap.

Was the prison to prisoner mode of transmission described by Officer Lawson "substantially less likely to bring home notice" than a feasible substitute that would place no "impractical obstacles" in the Government's way? *Mullane*, 339 U. S., at 314–315. The answer, in my judgment, is certainly yes. Before detailing why that is my view, I will examine what the Court does not elaborate: In full scope, what does *Mullane*, the foundational case, teach about the nexus to the forum and notice to interested persons necessary to make an adjudication fair and workable, and thus compatible with due process?[1]

II

Mullane was a proceeding in which the trustee of a common trust fund sought from a New York Surrogate Court an order settling all questions concerning the management of the common fund during a statutorily specified accounting period.[2] Many of the beneficiaries resided outside New York. Could a New York court adjudicate such a case despite the large numbers of nonresidents

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[1] In briefing this case, the Government questioned whether it is "permissible for courts to approach the due process issue here as a matter of what is 'fair' or workable." Brief for United States 31. Any doubt on that score should be dispelled. *Mullane* carefully explained that the due process requirement at stake not only permits, it *demands* that both fairness and practicality be taken into account. See 339 U. S., at 313–320.

[2] The decree sought by the *Mullane* trustee would terminate "every right which beneficiaries would otherwise have against the trust company, either as trustee of the common fund or as trustee of any individual trust, for improper management of the common trust fund during the period covered by the accounting." *Id.,* at 311.

affected? And if a New York court could entertain the case, would notice by publication, for which the New York statute provided, suffice to inform beneficiaries of the proceeding? The Court recognized that these were separate questions calling for discrete inquiries.

New York had jurisdiction to adjudicate despite the dispersion of trust beneficiaries among several States, the Court explained, because the trust "exist[ed] by the grace of [New York's] laws and [was] administered under the supervision of its courts." *Id.,* at 313. If New York could not take hold of the case, no other State would be better situated to do so. Without a forum for periodic settlement of the trustee's accounts, the common fund device would be unworkable. Under the circumstances, New York's interest "in providing means [periodically] to close trusts [of the kind involved in *Mullane* was] . . . so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants." *Ibid.*

Having thus settled the question of the nexus between the forum and the controversy necessary to establish jurisdiction to adjudicate, the Court turned to the means by which potentially affected persons must be apprised of the proceeding: "Quite different from the question of a state's power to discharge trustees," the Court began, "is that of the [full] opportunity it must give beneficiaries to contest." *Ibid.*

"Personal service of written notice," the Court acknowledged, "is the classic form of notice always adequate in any type of proceeding." *Ibid.* But that classic form, the Court next developed, "has not in all circumstances been regarded as indispensable to the process due residents, and it has more often been held unnecessary as to nonresidents." *Id.*, at 314. For beneficiaries whose interests or addresses were unknown to the trustee, notice by publication would do, *faute de mieux. Id.,* at 318. But "[a]s to

known present beneficiaries of known place of residence," *Mullane* instructed, notice by publication would not do. *Ibid.* Personal service on "the large number of known resident or nonresident beneficiaries," however, would "seriously interfere with the proper administration of the fund." *Id.,* at 318–319 (delay as well as expense rendered such service impractical). For that group, the Court indicated, "ordinary mail to the record addresses," which might be sent with periodic income remittances, was the minimal due process requirement. *Id.,* at 318. The risk that notice would not reach even all known beneficiaries, the Court reasoned, was justifiable, for the common trust

> "presupposes a large number of small interests. The individual interest does not stand alone but is identical with that of a class. The rights of each in the integrity of the fund and the fidelity of the trustee are shared by many other beneficiaries. Therefore notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all, since any objection sustained would inure to the benefit of all." *Id.*, at 319.

In a series of cases following *Mullane*, the Court similarly condemned notice by publication or posting as not reasonably calculated to inform persons with known interests in a proceeding. See *Tulsa Professional Collection Services, Inc.* v. *Pope*, 485 U. S. 478 (1988) (notice by publication inadequate as to estate creditors whose identities were known or ascertainable by reasonably diligent efforts); *Mennonite Bd. of Missions* v. *Adams*, 462 U. S. 791 (1983) (notice by publication and posting inadequate to inform real property mortgagee of a proceeding to sell the mortgaged property for nonpayment of taxes); *Greene* v. *Lindsey*, 456 U. S. 444 (1982) (posting summons on door of a tenant's apartment provided inadequate notice of eviction proceedings); *Schroeder* v. *City of New York*, 371

U. S. 208 (1962) (publication plus signs posted on trees inadequate to notify property owners of condemnation proceedings); *Walker* v. *City of Hutchinson*, 352 U. S. 112 (1956) (publication as sole notice to property owners inadequate to inform them of condemnation proceedings). In these cases, the Court identified mail service as a satisfactory supplement to statutory provisions for publication or posting. But the decisions, it bears note, do not bless mail notice as an adequate-in-all-circumstances substitute for personal service. They home in on the particular proceedings at issue and do not imply that in the mine run civil action, a plaintiff may dispense with the straightforward, effective steps required to secure proof of service or waiver of formal service. See Fed. Rules Civ. Proc. 4(d), 4(*l*).

III

Returning to the instance case and the question *Mullane* identified as pivotal: Was the mail delivery procedure at FCI Milan "substantially less likely to bring home notice [to prison inmates]" than a "feasible . . . substitut[e]"? 339 U. S., at 315; cf. *Mennonite Bd.*, 462 U. S., at 803 (O'CONNOR, J., dissenting) (ability of "members of a particular class . . . to safeguard their interests . . . must be taken into account when we consider the 'totality of the circumstances,' as required by *Mullane*"). Prisoner Dusenbery's situation differs dramatically from that of persons for whom we suggested ordinary mail service, without more, would suffice. Those differences, I am persuaded, are dispositive.

A beneficiary not in receipt of actual notice in *Mullane* would nevertheless be protected, in significant measure, by beneficiaries who did receive notice and might have advanced objections shared by the large class of similarly situated persons. Moreover, the Surrogate's Court was obliged to review the trustee's accounting before approving

it. In contrast, Dusenbery's alleged ownership interest stands alone. No others are similarly situated. Dusenbery claims that the money the FBI seized at his home was not traceable to an unlawful exchange for a controlled substance. See 21 U. S. C. §881(a)(6) (1988 ed.). Absent notice of the forfeiture proceeding, Dusenbery had no opportunity to present that claim before an impartial forum. See 19 U. S. C. §1609 (1988 ed.) (if no claim is filed within the prescribed time, the Government shall declare the property forfeited).

Nor can any undue hardship justify a less than careful endeavor actually to inform Dusenbery that his property is the subject of an impending forfeiture. The agency responsible for giving notice of the forfeiture, here, the FBI, is part of the same Government as the prisoner's custodian, the Bureau of Prisons (BOP). As the Second Circuit observed, "[w]hen [a federal] investigating agency [seeks] a prisoner's cooperation in testifying against some important wrongdoer, it has no difficulty delivering the message in a manner that insures receipt." *Weng* v. *United States*, 137 F. 3d 709, 715 (1998). Similarly, the federal forfeiting agency should encounter no difficulty in "secur[ing] the [BOP's] cooperation in assuring that the notice will be delivered to the [prisoner] and that a reliable record of the delivery will be created." *Ibid.*

A further factor counsels care to inform a prisoner that his Government is proceeding against him or his property. A prisoner receives his mail only through the combined good offices of *two* bureaucracies which he can neither monitor nor control: The postal service must move the mail from the sender to the prison, and the prison must then move the mail from the prison gates to the prisoner's hands. That the first system can be relied upon does not imply that the second is acceptable. See *United States* v. *One Toshiba Color Television*, 213 F. 3d 147, 154 (CA3 2000); accord, *Weng*, 137 F. 3d, at 715; cf. *Houston* v. *Lack,*

487 U. S. 266, 271 (1988) (Court recognized that "the *pro se* prisoner has no choice but to entrust the forwarding of [mail] to prison authorities whom he cannot control or supervise and who may have every incentive to delay"; Court therefore held that *pro se* prisoner's notice of appeal must be regarded as "filed" when delivered to prison authorities for mailing). In the cases in which we indicated that mail notice would be sufficient, by contrast, receipt hinged only upon the dependability of the postal service, "upon which prudent men will ordinarily rely in the conduct of important affairs." *Greene,* 456 U. S., at 455; see also *Mullane*, 339 U. S., at 319 ("[T]he mails today are recognized as an efficient and inexpensive means of communication."); United States Postal Service, 2000 Comprehensive Statement on Postal Operations 91 (Table 5.1) (on-time delivery rate of first class mail between 87% and 94%).

The majority asserts that "[t]he Government here carried its burden of showing the . . . procedures . . . used to give notice." *Ante*, at 7. As to the prison to prisoner transmission, that assertion is groundless, for the Government carried no burden whatever. It introduced nothing to show the reasonableness or reliability of the mailroom to cell delivery at FCI Milan at the time of the forfeiture in question. See *supra*, at 2–3.

Beyond doubt, the Government can try harder, without undue inconvenience or expense. Indeed, it now does so: As the Government informed the Court on brief, prison employees currently "must not only record the receipt of the certified mail and its distribution, but the prisoner himself must sign a log book acknowledging delivery." Brief for United States 24 (citing BOP Program Statement 5800.10.409, 5800.10.409A (Nov. 3, 1995)). If a prisoner refuses to sign, a prison officer must document that refusal. BOP Operations Memorandum 035–99 (5800), p. 2 (July 19, 1999). The Government noted additionally that

administrative forfeiture notices, along with "appropriately marked congressional, judicial, law enforcement, and attorney correspondence," are now marked "special mail," to be "opened only in the inmate's presence." Brief for United States 29, n. 19 (citing 28 CFR 540.12(c) (2001) and BOP Program Statement 5800.10.35).

The Government, of course, should not be "penalized" for upgrading its policies. See *ante*, at 11. It would be improper to brand the BOP's 1988 procedures deficient simply because those procedures have since been improved. Nevertheless, the new rules show that substantial improvements in reliability could have been had, in 1988 and years before, at minimal expense and inconvenience. Nor will it do to label these efforts a matter of executive grace. They undeniably provide a "feasible" means "substantially [more] likely to bring home notice" than FCI Milan's prior uncertain mailroom to prison cell practice. See *Mullane*, 339 U. S., at 315.[3]

The Government would assign to Dusenbery the burden of showing that the mail delivery system inside the prison was unreliable at the relevant time. Brief for United States 23–24. The Court shies away from explicit agreement, for that is not what *Mullane* instructs. Rather, the

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[3]The majority suggests that it is necessary to "explain" how "requiring the *end recipient* to sign for a piece of mail substantially improves the reliability of the delivery procedures *leading up to* that person's receipt." *Ante*, at 10. The signature procedure now in place offers the FBI the same security that motivates any other postal customer to pay a surcharge for certified mail, return receipt requested: a sender who knows whether delivery to the addressee was accomplished can try again if the first effort fails. Moreover, if forfeiture cannot be had absent a logbook signature or documentation that the addressee refused to sign, the BOP will have every incentive to make sure its internal procedures guarantee reliable delivery. The BOP's incentive fades if all that is required is a general statement by a mailroom employee that it is prison policy to deliver inmate mail. See *supra*, at 2.

party obliged to give notice—here, the Government—must adopt a method "reasonably calculated" to reach the intended recipient. See 339 U. S., at 318; *One Toshiba Color Television*, 213 F. 3d, at 155 (If the Government "chooses to rely on less than actual notice, it bears the burden of demonstrating the existence of procedures that are reasonably calculated to ensure that [actual] notice will be given."). The Government, staying "within the limits of practicability," *Mullane*, 339 U. S., at 318, now conforms to the foundational precedent; its prior practice fell short of the requirement that "[t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it," *id.,* at 315.[4]

The majority is surely correct that the Due Process Clause does not require "heroic efforts" to ensure actual notice. *Ante*, at 9. But the BOP's recently installed proof of delivery procedures require no convoys of armored vehicles to "escor[t]" prisoners to the post office. *Ibid.* There is little danger that Hollywood will confuse the rescuers of Private Ryan, see *ibid.*, with a BOP Unit Team member, putatively delivering certified mail to inmates in his charge at least since 1988, instructed a decade later to linger for the additional moments required to secure for each delivery a signature in a logbook.[5] The Due Process

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[4]The majority's concern that a more demanding proof of notice requirement would undermine finality, *ante*, at 10, is baffling: Disputes over whether notice was sent or received would be diminished, not encouraged, by requiring proof of notice by signature. Under the regime the majority tolerates, notice may be delivered or not depending on the diligence or carelessness of the prison administration and the reliability or neglect of its Unit Teams. "The title to property should not depend on such vagaries." *Ibid.*

[5]The majority worries that a firmer rule on delivery might "also apply, for example, to members of the Armed Forces both in this country and overseas." *Ante*, at 9. Of course, many active-duty military personnel, both on and off military bases, maintain personal mailboxes

Clause requires nothing of the Government in cases of this genre beyond the practicable, efficient, and inexpensive reform the BOP has already adopted.

Notice consistent with due process "will vary with circumstances and conditions." *Mennonite Bd.,* 462 U. S., at 802 (O'CONNOR, J., dissenting) (emphasis deleted) (internal quotation marks omitted). Given the circumstances and conditions of imprisonment, the Government must have cause to be confident that legal notices to prisoners will be delivered inside the prison with the care "one desirous of actually informing the [addressee] might reasonably adopt to accomplish it." *Mullane*, 339 U. S., at 315. The uncertain mailroom to cell delivery system formerly in place at FCI Milan fell short of that mark. Greater reliability could be achieved with modest effort. Because the Court finds that small but significant effort undue, I dissent.

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and interact with local postal authorities as does any other resident. The majority is right that other members of the Armed Forces—soldiers in combat, for example—are in respects material to this case similarly situated to Dusenbery: Government authority determines their whereabouts and restricts their movements, and that same authority receives their mail at a central delivery location and must make arrangements to distribute it further. It is at least doubtful, however, that a soldier, oblivious to a pending action, would return home to find her property irrevocably forfeited to her Government because she had the misfortune to be in a combat zone too long.