

# CIVIL ASSET FORFEITURE REFORM ACT

## HEARING BEFORE THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTH CONGRESS

SECOND SESSION

ON

**H.R. 1916**

CIVIL ASSET FORFEITURE REFORM ACT

—————  
JULY 22, 1996  
—————

**Serial No. 94**

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# CIVIL ASSET FORFEITURE REFORM ACT

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MONDAY, JULY 22, 1996

HOUSE OF REPRESENTATIVES,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The committee met, pursuant to notice, at 9:40 a.m., in room 2141, Rayburn House Office Building, Hon. Henry J. Hyde (chairman of the committee) presiding.

Present: Representatives Henry J. Hyde, George W. Gekas, Carlos J. Moorhead, Bob Barr, and Barney Frank.

Also present: Alan F. Coffey, Jr., general counsel/staff director; Diana Schacht, deputy general counsel; Kenneth Prater, clerk; Stephanie Peters, minority counsel; and Melanie Sloan, minority counsel.

## OPENING STATEMENT OF CHAIRMAN HYDE

Mr. HYDE. The committee will come to order.

Under our rules, it is permissible for purposes of hearings to proceed with less than a full complement, and while today is Monday morning and the House doesn't go into session until sometime later and votes later this afternoon, it is understandable that a lot of Members aren't present. But frankly, this subject is an important one, and because of the press of other calendar matters, we haven't gotten to it this year until this morning. And I am loath to forgo the opportunity to advance this legislation. So we are going to proceed with it, but I apologize for the paucity of Members, and I congratulate my friend George Gekas for his being here.

Mr. GEKAS. Thank you, Mr. Chairman.

Mr. HYDE. The gentleman from Pennsylvania.

Mr. GEKAS. Yes. I am eager to listen to the witnesses and to perhaps engage in a colloquy with one or more of them on this, like you say, important subject.

I just wanted to lay a little background on the basis that this committee in the early 1980's, in furtherance of then President Reagan and then President Bush, and even more recently under President Clinton, we were considering this subject matter in one form or another. As a matter of fact, all the comprehensive crime plans which we have either contemplated or adopted in one way or another touched upon this subject, and I must say that you cannot have a comprehensive crime program unless you include forfeiture as one of the matters which you must consider thoroughly.

I am eager to see where we have failed, where we can improve, what it really means to law enforcement, and, therefore, I join with

the chairman in moving ahead to make a record on this very important subject.

Thank you, Mr. Chairman.

Mr. HYDE. I thank the gentleman. Those people in the room who are in the Navy will recognize the phrase, "now hear this."

Well, now hear this: Federal and State officials have the power to seize your home, your car, your business and your bank account, all without indictment, hearing or trial. Regardless of sex, age, race or economic status, we are all potential victims of civil asset forfeiture procedures.

Just ask Willie Jones, owner of a Nashville landscaping business. In 1991, he made the mistake of paying for an airplane ticket in cash—behavior that was deemed to fit a drug courier profile. Mr. Jones was detained. His luggage was searched. No drugs were found, but his wallet contained \$9,600 in cash. The money was seized, but Mr. Jones was not charged with any crime. After 2 years of legal wrangling, his money was finally returned.

In 1989, during a fruitless 7-hour search for drugs aboard Craig Kline's \$24,000 new sailboat, Federal agents wielding axes, power drills and crowbars nearly destroyed the boat. No evidence of contraband was found. The boat was sold for scrap, and only after Congress intervened did Mr. Kline receive a reimbursement of \$9,100, a third of the boat's value.

Over the course of several years, Florida police routinely confiscated cash, an estimated \$8 million total, from hundreds of motorists who supposedly fit profiles of drug couriers. Criminal charges were rarely filed in these cases, and only in three instances did the individuals successfully have funds returned.

According to one estimate, in more than 80 percent of civil asset forfeiture cases, the property owner is not charged with a crime. Nevertheless, Government officials usually keep the seized property. Furthermore, to justify its seizure, the Government need only present evidence of what its agents see as "probable cause." That is the same standard required to obtain a search warrant, but in that situation, police are permitted to seek evidence of a crime, not to permanently take somebody's property. Even worse, under present law, the burden of proof is on the property owner, who must establish by a preponderance of the evidence that his or her property has not been used in a criminal act or not otherwise forfeitable. The uncharged victim must prove the negative.

The basic presumption in American law, you are innocent until proven guilty, has been turned on its head. Property owners who lease their apartments, cars or boats risk losing their property because of renters' conduct, conduct over which the actual owner has no control.

To contest Government forfeiture, owners are allowed only a few days within which to file a claim and post a 10-percent cash bond based on the value of the property. Even if the owner is successful in getting the property returned, the government is not liable for any damage to the property which occurs while in the Government's possession.

In 1992, former New York City Police Commissioner Patrick Murphy observed that the large monetary value of forfeitures has

created a great temptation for State and local police departments to target assets rather than criminal activity.

Now, let me stress, I view criminal asset forfeiture following a criminal conviction as an appropriate punishment. There, the guilty party has been accorded due process of law. But civil asset forfeiture all too often punishes innocent persons. These procedures may have made sense in the 18th century, when ships containing contraband or smuggled goods were seized, but in today's modern world, the targets of noncriminal forfeiture are residences, businesses and bank accounts. We need to reform these procedures so as to ensure fundamental fairness and due process rights.

For these reasons, I have introduced the Civil Asset Forfeiture Reform Act, H.R. 1916. First and foremost, this legislation revives the notion that property, like individuals charged with crimes, is innocent until proven guilty. It allows property owners to recover for the damage done to property while in the custody of law enforcement agencies and protects innocent property owners, such as landlords, who are unaware of illegal activity. Further, the bill would eliminate the regressive cash bond now required of property owners who file an appeal in a seizure case and would extend the period of time for appeal of a seizure from the current 10 or 20 days to a more reasonable 30 days.

The fifth amendment to our Constitution reads: "No person shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Today this committee embarks on a path of reform that hopefully will comport Federal civil asset forfeiture law with the true spirit of the fifth amendment.

[The bill, H.R. 1916, follows;]

104TH CONGRESS  
1ST SESSION

# H. R. 1916

To reform certain statutes regarding civil asset forfeiture.

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## IN THE HOUSE OF REPRESENTATIVES

JUNE 22, 1995

Mr. HYDE introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committee on Ways and Means, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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## A BILL

To reform certain statutes regarding civil asset forfeiture.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Civil Asset Forfeiture  
5 Reform Act”.

6 **SEC. 2. LIMITATION OF CUSTOMS AND TAX EXEMPTION**

7 **UNDER THE TORT CLAIMS PROCEDURES.**

8 Section 2680(c) of title 28, United States Code, is  
9 amended—

1 (1) by striking “law-enforcement” and inserting  
2 “law enforcement”; and

3 (2) by inserting before the period the following:  
4 “, except that the provisions of this chapter and sec-  
5 tion 1346(b) of this title shall apply to any claim  
6 based on the negligent destruction, injury, or loss of  
7 goods or merchandise (including real property) while  
8 in the possession of any officer of customs or excise  
9 or any other law enforcement officer”.

10 **SEC. 3. LONGER PERIOD FOR FILING CLAIMS IN CERTAIN**  
11 **IN REM PROCEEDINGS.**

12 Paragraph (6) of Rule C of the Supplemental Rules  
13 for Certain Admiralty and Maritime Claims to the Federal  
14 Rules of Civil Procedure (28 U.S.C. Appendix) is amended  
15 by striking “10 days” and inserting “30 days”.

16 **SEC. 4. BURDEN OF PROOF IN FORFEITURE PROCEEDINGS.**

17 Section 615 of the Tariff Act of 1930 (19 U.S.C.  
18 1615) is amended to read as follows:

19 **“SEC. 615. BURDEN OF PROOF IN FORFEITURE PROCEED-**  
20 **INGS.**

21 “In—

22 “(1) all suits or actions (other than those aris-  
23 ing under section 592) brought for the forfeiture of  
24 any vessel, vehicle, aircraft, merchandise, or baggage

1 seized under the provisions of any law relating to the  
2 collection of duties on imports or tonnage; and

3 “(2) in all suits or actions brought for the re-  
4 covery of the value of any vessel, vehicle, aircraft,  
5 merchandise, or baggage, because of violation of any  
6 such law;

7 the burden of proof is on the United States Government  
8 to establish, by clear and convincing evidence, that the  
9 property was subject to forfeiture.”.

10 **SEC. 5. CLAIM AFTER SEIZURE.**

11 Section 608 of the Tariff Act of 1930 (19 U.S.C.  
12 1608) is amended to read as follows:

13 **“SEC. 608. SEIZURE; CLAIMS; REPRESENTATION.**

14 “(a) IN GENERAL.—Any person claiming such vessel,  
15 vehicle, aircraft, merchandise, or baggage may at any time  
16 within 30 days from the date of the first publication of  
17 the notice of seizure file with the appropriate customs offi-  
18 cer a claim stating his interest therein. Upon the filing  
19 of such claim, the customs officer shall transmit such  
20 claim, with a duplicate list and description of the articles  
21 seized, to the United States attorney for the district in  
22 which seizure was made, who shall proceed to a condemna-  
23 tion of the merchandise or other property in the manner  
24 prescribed by law.

1       “(b) **COURT-APPOINTED REPRESENTATION.**—If the  
2 person filing a claim under subsection (a), or a claim re-  
3 garding seized property under any other provision of law  
4 that incorporates by reference the seizure, forfeiture, and  
5 condemnation procedures of the customs laws, is finan-  
6 cially unable to obtain representation of counsel, the court  
7 may appoint appropriate counsel to represent that person  
8 with respect to the claim. The court shall set the com-  
9 pensation for that representation, which shall—

10           “(1) be equivalent to that provided for court-ap-  
11 pointed representation under section 3006A of title  
12 18, United States Code, and

13           “(2) be paid from the Justice Assets Forfeiture  
14 Fund established under section 524 of title 28, Unit-  
15 ed States Code.”.

16 **SEC. 6. RELEASE OF SEIZED PROPERTY FOR SUBSTANTIAL**  
17 **HARDSHIP.**

18       Section 614 of the Tariff Act of 1930 (19 U.S.C.  
19 1614) is amended—

20           (1) by inserting before the first word in the sec-  
21 tion the following: “(a) **RELEASE UPON PAY-**  
22 **MENT.**—”; and

23           (2) by adding at the end the following:

24       “(b) **RELEASE OF SEIZED PROPERTY FOR SUBSTAN-**  
25 **TIAL HARDSHIP.**—

1           “(1) REQUEST FOR RELEASE.—A claimant is  
2           entitled to immediate release of seized property if  
3           continued possession by the United States Govern-  
4           ment would cause the claimant substantial hardship,  
5           such as preventing the functioning of a business,  
6           preventing an individual from working, or leaving an  
7           individual homeless. A claimant seeking release of  
8           property under this subsection must request posses-  
9           sion of the property from the appropriate customs  
10          officer, and the request must set forth the basis  
11          therefor. If within 10 days after the date of the re-  
12          quest the property has not been released, the claim-  
13          ant may file a complaint in any district court that  
14          would have jurisdiction of forfeiture proceedings re-  
15          lating to the property setting forth—

16                 “(A) the nature of the claim to the seized  
17                 property;

18                 “(B) the reason why the continued posses-  
19                 sion by the United States Government pending  
20                 the final disposition of forfeiture proceedings  
21                 will cause substantial hardship to the claimant;  
22                 and

23                 “(C) the steps the claimant has taken to  
24                 secure release of the property from the appro-  
25                 priate customs officer.



1           “(2) RETURN OF PROPERTY.—If a complaint is  
2 filed under paragraph (1), the district court shall  
3 order that the property be returned to the claimant,  
4 pending completion of proceedings by the United  
5 States Government to obtain forfeiture of the prop-  
6 erty, if the claimant shows that—

7           “(A) the claimant is likely to demonstrate  
8 a possessory interest in the seized property; and

9           “(B) continued possession by the United  
10 States Government of the seized property is  
11 likely to cause substantial hardship to the  
12 claimant.

13           The court may place such conditions on release of  
14 the property as it finds are appropriate to preserve  
15 the availability of the property or its equivalent for  
16 forfeiture.

17           “(3) TIME FOR DECISION.—The district court  
18 shall render a decision on a complaint filed under  
19 paragraph (2) no later than 30 days after the date  
20 of the filing, unless such 30-day limitation is ex-  
21 tended by consent of the parties or by the court for  
22 good cause shown.”.

23 **SEC. 7. JUSTICE ASSETS FORFEITURE FUND.**

24           Section 524(e) of title 28, United States Code, is  
25 amended—

1 (1) by striking out “law enforcement pur-  
2 poses—” in the matter preceding subparagraph (A)  
3 in paragraph (1) and inserting “purposes—”;

4 (2) by redesignating the final 3 subparagraphs  
5 in paragraph (1) as subparagraphs (I), (J), and (K),  
6 respectively;

7 (3) by inserting after subparagraph (G) of  
8 paragraph (1) the following new subparagraph:

9 “(H) payment of court-awarded compensation  
10 for representation of claimants pursuant to section  
11 608(b) of the Tariff Act of 1930;” and

12 (4) by striking out “(H)” in subparagraph (A)  
13 of paragraph (9) and inserting “(I)”.

14 **SEC. 8. CLARIFICATION REGARDING FORFEITURES UNDER**  
15 **THE CONTROLLED SUBSTANCES ACT.**

16 (a) **IN GENERAL.**—Section 511(a) of the Controlled  
17 Substances Act (21 U.S.C. 881(a)) is amended—

18 (1) in paragraph (4)(C), by striking “without  
19 the knowledge, consent, or willful blindness of the  
20 owner.” and inserting “either without the knowledge  
21 of that owner or without the consent of that owner.”

22 (2) in each of paragraphs (6) and (7), by strik-  
23 ing “without the knowledge or consent of that  
24 owner.” and inserting “either without the knowledge

1 of that owner or without the consent of that  
2 owner.”.

3 (b) SPECIAL RULE.—

4 (1) GENERALLY.—Section 511 of the Con-  
5 trolled Substances Act (21 U.S.C. 881) is amended  
6 by adding at the end the following:

7 “(l) For the purposes of this section, property shall  
8 not be considered to have been used for a proscribed use  
9 without the knowledge or without the consent of the owner  
10 of an interest in that property, if that owner was wilfully  
11 blind to, or has failed to take reasonable steps to prevent,  
12 the proscribed use.”.

13 (2) CONFORMING TECHNICAL AMENDMENT.—

14 The subsection (l) of section 511 that relates to an  
15 agreement between the Attorney General and the  
16 Postal Service is redesignated as subsection (k).

17 **SEC. 9. APPLICABILITY.**

18 The amendments made by this Act apply with respect  
19 to claims, suits, and actions filed on or after the date of  
20 the enactment of this Act.

○

Mr. HYDE. This morning, we will begin with testimony about personal experiences with civil asset forfeiture. First, Mr. Willie Jones, a landscaper from Nashville, TN, will talk about his several-year struggle to get the Drug Enforcement Administration to return money they had seized from him simply because he met a drug courier profile.

Second, we will hear from Mr. King Cutkomp of Rock Island, IL, who will tell the story of his mother's experience of civil asset forfeiture.

And finally, on the first panel, Stephen Komie, secretary of the Illinois State Bar Association, is here to describe the cases of several of his clients who have been caught up in civil asset forfeiture.

Would Mr. Komie, Mr. Cutkomp and Mr. Jones come to the table.

Good morning, Mr. Jones. If you don't mind, I would like to start out with you. If you would tell us your story about your encounter with this issue, we would appreciate it.

Mr. JONES. Good morning.

Mr. HYDE. Would you help with the microphone. If you just push that little lever and pull that close to you. Very well. Thank you, Mr. Jones.

Would you please state your name and where you live.

Mr. JONES. My name is Willie Jones. I live in Nashville, Tennessee.

Mr. HYDE. Very well, sir. Would you tell us your story involving asset forfeiture.

#### STATEMENT OF WILLIE JONES

Mr. JONES. Yes. On February 27, 1991, I went to the Metro Airport to board a plane for Houston, TX, to buy nursery stock. I was stopped in the airport after paying cash for my ticket.

Mr. HYDE. What business are you engaged in or were you engaged in?

Mr. JONES. I am engaged in landscaping.

Mr. HYDE. Landscaping. You were on your way to buy some nursery stock?

Mr. JONES. That's correct.

Mr. HYDE. All right, sir. So you arrived at the airport. Then what happened?

Mr. JONES. I paid cash for a round-trip ticket to Houston, TX, and I was detained at the ticket agent. The lady said no one ever paid cash for a ticket. And as I went to the gate, which was gate 6, to board the plane, at that time three officers came up to me and called me by my name, and asked if they could have a word with me, and told me that they had reason to believe that I was carrying currency, had a large amount of currency, drugs. So at that time—

Mr. HYDE. Proceeds of a drug transaction; you had money that was drug money then, that's what they charged you with?

Mr. JONES. Yes, sir.

Mr. HYDE. Were you carrying a large amount of cash?

Mr. JONES. Yes, sir. I had \$9,000.

Mr. HYDE. \$9,000 in cash. Why was that, sir? Was your business a cash business?

Mr. JONES. Well, it was going to be if I had found the shrubbery that I liked, by me being—going out of town, and the nursery business is kind of like the cattle business. You can always do better with cash money.

Mr. HYDE. They would rather be paid in cash than a check, especially since you are from out of town?

Mr. JONES. That is correct.

Mr. HYDE. All right. So you had \$9,000 in cash, and these three officers have gotten you off to the side, and they had suggested that this money was drug money; is that right?

Mr. JONES. That is correct.

Mr. HYDE. Then what happened?

Mr. JONES. Well, at that time, they took the money and they asked me to go with them, and I questioned them about going where. And they said—they told me not to worry about that, just come on, let's go.

Mr. HYDE. Did you tell them what you were about, where you were going and for what purpose?

Mr. JONES. I did. I also presented them with a business card. At that time, I was carrying a checkbook with my name and my business name.

Mr. HYDE. What police were these; do you remember? With what force were they associated?

Mr. JONES. It was DEA.

Mr. HYDE. Drug Enforcement Administration people?

Mr. JONES. Yes, sir.

Mr. HYDE. OK. Then what happened?

Mr. JONES. So we proceeded to go out of the airport, which they had a little building out across the terminal. We went there. And at that time, I was questioned about had I ever been involved in any drug-related activity, and I told them, no, I had not.

So they told me I might as well tell the truth because they was going to find out anyway. So they ran it through on the computer after I presented my driver's license to them, which everything was—I had—it was all in my name. And he ran it through the computer, and one officer told the other one, saying, he is clean. But instead, they said that the dogs hit on the money. So they told me at that time they was going to confiscate the money.

Mr. HYDE. They determined from the dog's activities that there were traces of drugs on the money?

Mr. JONES. That is what they said.

Mr. HYDE. That is what they claimed?

Mr. JONES. Yes, sir.

Mr. HYDE. Therefore, they kept the money?

Mr. JONES. They did keep the money.

Mr. HYDE. Did they let you go?

Mr. JONES. They did let me go.

Mr. HYDE. Were you charged with anything?

Mr. JONES. No. I asked them to, if they would, if they would count the money and give me a receipt for it. They refused to count the money, and they took the money and told me that I was free to go, that I could still go on to Texas if I wanted to; that the plane had not left.

Mr. HYDE. Of course, your money was gone. You had no point in going to Texas if you can't buy shrubs.

Mr. JONES. No.

Mr. HYDE. So did you ever get your money back?

Mr. JONES. I finally got my money back 2½ years—some 2½ years later.

Mr. HYDE. How did that happen?

Mr. JONES. But at the same time, I left the—after they told me I was free to go, I left the airport, and I rode down the interstate for a while, and I got to thinking about what had happened, and I turned and went back to the airport because it just didn't sound right and didn't feel right.

I went back to the airport, and at this time they told me that I was one of the few to—that they had taken as much as \$100,000 off of people and had let them go, and that they—that was the last place that they wanted to come back to. And I told them, I said, well, I don't really have anything to hide or anything to cover up, so I went back, and they told me at that time, again, I was definitely not going to get my money back, and they was not going to arrest me.

Mr. HYDE. So how did you get your money back?

Mr. JONES. Well, at that time I contacted my attorney, which is here, Mr. Edwards, and we started working on the case, because we had to actually sue the Government to—

Mr. HYDE. Return your money?

Mr. JONES [continuing]. Get my money returned.

Mr. HYDE. So you filed a lawsuit; is that correct?

Mr. JONES. That is correct.

Mr. HYDE. And after 2 years, you got your money back?

Mr. JONES. Yes.

Mr. HYDE. Was that by court order?

Mr. JONES. That was by court order.

Mr. HYDE. Did you get any interest on the money?

Mr. JONES. No.

Mr. HYDE. So you lost 2 years of interest, plus the use of the funds, plus you had to hire an attorney and file a lawsuit.

Mr. JONES. That is correct.

Mr. HYDE. Is there anything that you wish to add to this, other than what you have told us?

Mr. JONES. Not really, I guess other than how easy it is an innocent person can get caught up into something like this. I was not aware at that particular time that we was going to have to go through all the different things we had to go through to just get the money back.

Mr. HYDE. Would you identify your attorney, or would you identify yourself, sir? Do you have anything to add, counsel? Congratulations on getting Mr. Jones' money back.

#### STATEMENT OF E.E. (BO) EDWARDS III, ESQ.

Mr. EDWARDS. Thank you, Mr. Chairman. I am E.E. Edwards, better known as Bo Edwards. I am from Nashville and over the last several years have represented numerous people who have had the misfortune of having property seized. Mr. Jones, I would say,

is probably by far the most famous, perhaps because his case is sort of a potpourri of the abuses and the injustices of forfeiture.

The reason, Mr. Chairman, that Mr. Jones had to sue the Government to get his money back was because when he came to see me 2 days after the money was taken, I explained to him that in order to get into court he was going to have to post a bond, and the bond would be \$9,000, 10 percent of what they took from him. And he said well, they took all my money. I don't have \$9,000.

Mr. HYDE. You mean \$900?

Mr. EDWARDS. I am sorry. \$900, that's right. He said he didn't have \$900 left. They took all his money. Essentially, they took all his working capital.

We filed affidavits. In fact, asked the Asset Forfeiture Office on two or three occasions to waive the bond requirement, and they consistently refused. So finally, he was faced with a choice of either giving up or doing what we did. And perhaps because Mr. Jones is a good man and a nice man and his lawyer was a little stubborn, we decided to sue the Government. But, in fact, the Government probably spent over \$300,000 trying to avoid admitting that they were wrong in taking Willie Jones' \$9,000.

Mr. HYDE. Well, tell me about your litigation. What kind of a suit did you file?

Mr. EDWARDS. We filed a civil rights action under section 1983 against the three officers who seized his money. And incidentally, although they were operating under the leadership direction of the DEA, they were actually local officers. The DEA in Nashville, as occurs all over the country, had formed a joint task force by contract. We actually obtained a copy of the contract and put it into evidence in his trial, whereby the Metropolitan Police Force of Nashville provided a certain number of officers. The Air Force—I am sorry. The airport police department provided a certain number of officers, and the DEA provided one agent to supervise. And that is how this interdiction unit at the Nashville airport was composed.

The three officers we sued consisted of one Metro Nashville Police sergeant, who was on leave from the drug squad to this interdiction unit, and two airport officers. And we sued the three of them. We could not ask for damages—or at least we made the decision not to, because of the doctrine of qualified immunity. Had we asked for damages against the officers for taking—for stopping Mr. Jones and taking his money, the lawsuit instead of taking 2 years probably would have taken 3 or 4, and we would have run the risk that the case would have been dismissed on the basis of immunity. But because we asked only for his money back, they could not use qualified immunity as a defense.

The first—there were actually two trials, Mr. Chairman. The first trial was in response to the government's position that a U.S. district court could not review the decision of the Asset Forfeiture Office of the Justice Department in refusing to waive Mr. Jones' bond. In other words, they wouldn't let him into court, and their position was a district—a U.S. district judge couldn't pass judgment on their decision.

Mr. HYDE. And because your client didn't have the \$900 to post a bond, you couldn't proceed under the asset forfeiture process? You had to file a civil rights suit?

Mr. EDWARDS. That's exactly right. We couldn't afford to pay our way into court, so we couldn't get a day in court for Willie Jones without suing the Government because they wouldn't waive the bond requirement.

Mr. HYDE. The U.S. Attorney's Office defended this lawsuit?

Mr. EDWARDS. Yes, sir.

Mr. HYDE. And they persisted in withholding Mr. Jones' money?

Mr. EDWARDS. Well, that is a very interesting question, Mr. Chairman. A few weeks after we filed the lawsuit under section 1983 as a civil rights case on behalf of Mr. Jones, I had a conference with an assistant U.S. attorney in Nashville, and we talked about the case, and I explained just how clean Mr. Jones was and just how egregious the seizure of his money was, and the AUSA thought that it would make a lot of sense, if we were willing, to rethink refusing to waive his bond. And I told him that we would agree to drop the civil rights case if the Government would agree to waive the bond and let us go back into the normal forfeiture process and get a trial under the court's jurisdiction to hear forfeiture cases.

So we had a private agreement to do that, but he had to talk to main Justice before we could solidify that understanding, and he came back to me a few days later and said, main Justice wouldn't go along with that.

Mr. HYDE. What year was this?

Mr. EDWARDS. This was in 1991. The lawsuit was filed, I believe, 1 or 2 days before the Fourth of July of that year. The seizure, of course, was on February 27, earlier in that year.

Mr. HYDE. Did you deal with the Department of Justice other than the U.S. attorney there?

Mr. EDWARDS. No, sir. I did not deal directly with anyone in Main Justice.

Mr. HYDE. You don't know who was responsible for making that decision?

Mr. EDWARDS. No, I am afraid I don't.

Mr. HYDE. What enlightened member of the Justice Department?

Mr. EDWARDS. Yes, sir.

Mr. HYDE. All right. So you proceed with the civil rights lawsuit. Did you go to trial?

Mr. EDWARDS. The first trial resulted in the district judge, Thomas Wiseman, holding that the Asset Forfeiture Office had acted in bad faith in refusing to waive the bond, and he ordered the bond waived and ordered an immediate trial with respect to the seizure.

The Government asked for more time and after some argument was granted additional time, and we finally had a trial, as I recall, in late 1992. During that trial, the Government was flying DEA agents from Nashville to Houston and Houston agents from Houston to Nashville. I mean, it may very well be a modest conservative estimate when I say the Government spent over \$300,000 trying to defend this seizure. But at any rate, I think it is certainly fair to say that the Government did everything that they could think of to try to prove that Willie Jones was a drug dealer. But they were facing an insurmountable problem: The truth, because he wasn't and never has been.



So ultimately, the judge held that the stop of Mr. Jones in the airport was in violation of his fourth amendment rights; that the money should never have been seized long before the dog sniff occurred.

He further found, based on documents that I was able to obtain showing that DEA lab technicians had long—had much earlier advised against using dog sniffs to establish proof with respect to currency, because the American money supply is so tainted with trace cocaine, he decided that and held that there was no basis for the seizure; there was no basis for a forfeiture, and he ordered the Government to return Mr. Jones' money.

Mr. HYDE. Why didn't he get interest back?

Mr. EDWARDS. Because of the same problem. We were concerned about giving the Government an opportunity to raise the issue of qualified immunity.

Mr. HYDE. To escape altogether, yes.

Mr. EDWARDS. There have been some decisions in Federal court since Mr. Jones' case has ended that suggested—or that suggest that perhaps he would have been entitled to obtain interest on his money had we pressed that issue.

Mr. HYDE. How about your attorney's fees, did they get allowed, or did Mr. Jones have to pay those?

Mr. EDWARDS. Well, that is very interesting. Had the Government waived the \$900 bond requirement and let Mr. Jones have his day in court, I would have not been entitled to attorney's fees, and Mr. Jones would have had to pay whatever fee I got paid out of the money he got back. But because they refused to do that and were acting in bad faith in refusing, that left us with the only alternative of suing under the civil rights statute. By virtue of prevailing as a plaintiff in a civil rights case, I was entitled to an award of attorney's fees. So I was ultimately paid in the neighborhood of \$80 to \$85,000—I don't remember the exact amount—for the work I did over 2½ years representing Mr. Jones.

Had the Government waived the bond, I would have been paid nothing, and Mr. Jones would have been stuck with the fee, which is another reason that forfeiture can be so unjust. A reasonable attorney's fee, even in a modest, simple forfeiture case in Federal court, is going to cost \$20,000, \$25,000, \$30,000 in legal fees just because of the time and attorney effort required. So when the amount seized is a relatively modest sum, the property owner is going to lose anyway, no matter what he does.

Mr. HYDE. Wouldn't you think somebody along the chain of command from the U.S. Attorney's Office in Nashville up to the Justice Department would have the common sense to look at this and to cut their losses and do a little justice for Mr. Jones? Does it boggle your mind, as it does mine, that the bureaucracy refuses to give an inch on something like this that is so blatant and egregious?

Mr. EDWARDS. Mr. Chairman, it makes me sad that my Government acts that way. I didn't grow up believing in the kind of Government that I have seen exemplified in Mr. Jones' case or many other cases. And money—the desire to get this property is what causes it, I believe.

Mr. HYDE. I think that there is a whole field of inquiry of the Federal Government suing people on suits that are baseless that someday needs a real inquiry, but this is surely one.

Well, I congratulate you, sir. You are what a lawyer should be, persistent and tough, and Mr. Jones is a smart man in picking you for a lawyer.

Now, I notice you are on the panel, the third panel. Do you have more to say then?

Mr. EDWARDS. Well, Mr. Chairman, I think my position on the third panel is more with respect to the broader picture.

Mr. HYDE. Very well.

Mr. EDWARDS. And to the provisions in your bill itself because I have been very active over the last several years in promoting your cause, the cause of forfeiture reform.

Mr. HYDE. Thank you.

Mr. EDWARDS. But let me say thank you so much for your kind words. But without the very courageous and bold position, public position you have taken, I fear that many more Americans would be subjected to the same kind of injustices, and America should be very proud and very thankful for the work that you have done in calling the country's attention to these injustices.

Mr. HYDE. You are very kind, and I accept that for lots of people who are interested; Mr. Frank, and the ACLU, and Cato Institute and many others. So this is a remedy whose time hopefully has come, and you have made a great contribution and we will hear from you again on panel three then.

Mr. HYDE. Very well. Mr. Cutkomp.

Mr. CUTKOMP. Yes, sir.

Mr. HYDE. If you would fix your microphone. That's right, and talk into the microphone.

Mr. CUTKOMP. OK.

Mr. HYDE. What is your name?

Mr. CUTKOMP. My name is King Cutkomp from Rock Island, IL.

Mr. HYDE. What is your business or profession?

Mr. CUTKOMP. I am in the wholesale food business, wholesale food distributor.

Mr. HYDE. Very good. And would you tell us your story as it involves asset forfeiture.

#### STATEMENT OF KING CUTKOMP

Mr. CUTKOMP. OK. Thank you very much.

I sincerely appreciate this opportunity to speak to you, a person, about my mother's experience with the abuse of our national civil forfeiture law, a law which ignores due process, encourages abuse by police and prosecutors, confiscates property from innocent, law-abiding citizens, and threatens our sacred honor with the tyranny of a police state.

My mother is an 85-pound, 75-year-old, hard-working, frugal lady, who chose to squirrel away any extra money she had rather than buy herself any of the things most people consider necessities. Although she has bought a few residential rental properties, she still tears Kleenexes in half to stretch her money and settles for eating half sandwiches rather than run up her grocery bill. She has

never taken a vacation or missed a day's work in the business, but neither has she ever been to a shopping mall.

She has always lived as though the next Great Depression would happen any day. By 70, she managed to save around \$70,000, which she kept in her house because her Depression experience taught her not to always trust banks.

In December 1989, the U.S. Government came to my mother's house and took her savings from a floor safe in the basement. Three months later, they seized her home and two rental properties she owned.

You need to know, my innocent mother was never charged with a crime, and the police acknowledged she was never part of my brother's marijuana ring conspiracy. Mom's biggest sin was allowing the adult son she loved to live next door to her.

After my brother was indicted, he fled town. The Government suspected she probably had allowed him to use her property illegally and probably had been given cash earned by him illegally. As you know, asset forfeiture laws only require probable cause to seize property. Once property has been seized, it is the owner's burden to prove innocence to the Government.

When this happened to Mom, I thought innocent until proven guilty would apply in her case, and she would immediately get her cash back. So trusting the Government, I didn't even hire an attorney for that matter. I soon learned later that under the Constitution a citizen isn't afforded an innocent until proven guilty in civil forfeiture cases. She wasn't considered innocent, and the Government didn't have to prove anything.

The \$70,000 they took from Mom was mostly old bills dated from the 1960's and 1970's and was covered with mold and mildew. The safe was rusted shut, and the safe handle broke off, and the whole safe had to be drilled open. Tragically, the FBI did not keep her cash in an evidence locker, but deposited her money into a bank, commingling it with other people's money and thus destroying her evidence and proof of innocence.

The morning Government agents banged on Mom's door telling her that they were there to seize her home, it included the local police, county sheriff's department, U.S. Marshal's Service, several FBI agents and IRS agents; about 20 all in total. All this force to take some property from one innocent, unarmed, law-abiding 70-year-old, 85-pound woman.

I immediately called our family attorney, and he met me at mom's house. He had previously been—it had previously been said to me by one of the agents, now they want to take everything your mother has and make her tell what she knows about your brother and be able to make him come back, too.

When I arrived at mom's house, she was in a daze. She said she asked the agents where she was supposed to live and was told, I don't care where you go, but you have got half an hour to pack up and get out.

Thankfully our attorney was able to reach an agreement that allowed mom to rent her own house from the Government until the case went to trial. The horror of the forfeiture squad invading her home still brings regular nightmares to mom 6 years later.

I did everything in my power to convince the Government agents that they were making a huge mistake and that mom was not a criminal. To them, that didn't matter. Since they could seize her property, they did. An agent said to me, when I first took this case to my boss, he said not even to mess around with it, that it was just another stupid marijuana case, until I showed him how many assets we could get.

I spent many, many cooperative and truthful hours trying to convince them that this was insane and finally realized it would cost me more going to trial than her properties were worth. I eventually made a settlement with them, and Mom got to keep a little of what she worked her whole life for. They took most of it, including her dignity and love for our Government.

I am here for a mother—for my mom and our country. It is too late to help her case, and I had the Government sign a paper that they can never bother her again. I want to make sure that they can never do this to another mother with a bad kid.

I have been on this crusade since I saw a Reader's Digest article in 1992 entitled "Is It Police Work or Plunder?" about nationwide forfeiture abuse and Congressman Hyde's effort to reform this law. I bought a computer, joined an on-line Internet service, and have been E-mailing thousands of unaware citizens to educate them about this barbaric civil forfeiture law. Nobody thinks it is right when they learn how it is used.

One prosecutor told me, citizens don't need a proof provision. Those in charge of a case are perfectly capable of determining who is guilty. That statement, I was told by a constitutional law professor, is a definition of tyranny.

I love the America I knew growing up in the 1940's and 1950's, and I am scared to death of the police state this country could become with more and more laws allowing forfeiture. It has to stop. Our Founding Fathers put their lives on the line against tyranny and cavalier attitudes. In my opinion, no real or personal property should be forfeited except in criminal cases. Eliminate this ridiculous, insane, corrupt law or rewrite it to include proof, fairness and compassion. It is ruining people's lives and is just another national disgrace.

Thank you.

[The prepared statement of Mr. Cutkomp follows:]

## PREPARED STATEMENT OF KING CUTKOMP

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In December of 1989, the U.S. Government came to my mother's home and took her savings from a floor safe in her basement. Three months later, they seized her home and two rental properties she owned. You need to know my innocent mother was never charged with a crime, and the police acknowledged she was never part of my brother's marijuana ring conspiracy. Mom's biggest sin was allowing the adult son she loved to live next door to her. After my brother was indicted, he fled town. The government suspected she PROBABLY had allowed him to use her property illegally, and PROBABLY been given cash earned by him illegally. As you know, asset forfeiture laws only require probable cause to seize property. Once property has been seized it is the owner's burden to prove innocence to the government.

When this happened to Mom, I thought "innocent until proven guilty" would apply in her case and she would immediately get her cash back. Trusting the government, I didn't even hire an attorney then for that matter. I soon learned later that under the Constitution a citizen isn't afforded innocent until proven guilty in civil forfeiture cases. She wasn't considered innocent and the government didn't have to prove anything.

The \$70,000 they took from mom was mostly old bills dated from the 60's and 70's and was covered with mold and mildew. The safe was rusted shut and had to be drilled open. Tragically, the FBI did not keep her cash in an evidence locker, but deposited her money into a bank, commingling it with other people's money and thus destroying her evidence and proof of innocence.

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When I arrived at Mom's home she was in a daze. She said she asked the agents where she was suppose to live and was told, *"I don't care where you go, but you have a half-hour to pack up and get out!"* Thankfully, our attorney was able to reach an agreement that allowed Mom to "rent" her own house from the government until the case went to trial. The horror of the forfeiture squad invading her home still brings regular nightmares to mom 6 years later.

I did everything in my power to convince the government agents that they were making a huge mistake and that mom was not a criminal. To them that didn't matter. Since they COULD seize her property, they did. An agent said to me, *"When I first took this case to my boss, he said not even to mess around with it, that it was just another stupid marijuana case, until I showed him how many assets we could get!"* I spent many, many cooperative and truthful hours trying to convince them that this was insane, and finally realized it would cost me more going to trial than her properties were worth. I eventually made a settlement with them and Mom got to keep a little of what she worked her whole life for. They took most of it, including her dignity and love for our government.

I am here for my mother and our Country. It is too late to help her case, and besides, I had the government sign a paper that they could never bother her again. I want to make sure they can never do this to another mother with a bad kid. I have been on this crusade since I saw a Readers Digest article in 1992, titled, *Is It Police Work or Plunder*, about nationwide forfeiture abuse and Congressman Hyde's effort to reform this law. I bought a computer, joined an Online Internet Service and have been emailing thousands of unaware citizens to educate them about this barbaric civil forfeiture law. Nobody thinks it is right when they learn how it is used, except prosecutors who do not want a proof provision in the law. One prosecutor told me, *"Citizens don't need a proof provision, those in charge of a case are perfectly capable of determining who is guilty!"* That statement, I was told by a Constitutional law professor, is the meaning of tyranny.

I love the America I knew growing up in the 40's and 50's, but am scared to death of the police

state this Country is turning into with more and more laws allowing forfeiture. IT HAS TO STOP. Our Founding Fathers put their lives on the line against tyranny and cavalier attitudes. In my opinion, no real or personal property should be forfeited except in criminal cases. Eliminate this ridiculous, insane, corrupting law, or re-write it to include proof, fairness and compassion. It is ruining people's lives and is just another national disgrace. Thank you.

Other material furnished to you:

The book I titled, U.S. v. Grandma, and the two flyers I email out all over America.



Book Review by Kathy Bergman  
 March 1996 F.E.A.R. Chronicles Forfeiture Endangers American Rights

***U.S. vs. GRANDMA***

In October of 1989, Mary Miller's youngest son was indicted by a midwestern grand jury for trafficking in marijuana. Over the next four years, Mary was forced to pay, literally, for her son's crimes.

Never charged with a crime herself, 75 year old Mary Miller had \$70,000 in cash, her home and several pieces of rental property seized by the federal government, because they believed she knew of her son's crimes. Her money, the government said, was not her life's savings as she claimed, but rather, the ill-gotten gains of Toby Miller's life of crime. Her real estate, the government went on to reason, was used to "facilitate" Toby's crimes when he lived as a tenant in Mary's duplex, and therefore should be forfeited also. In addition to that, she couldn't use the old dates on the cash in her defense because the FBI co-mingled her money by depositing it into a bank.

From October 1989 through August 1995, 122 newspaper headlines in a small midwestern city focused on Mary Miller's troubles. Her oldest son, Charles, and his family were subjected to local scrutiny and discussion also. In an attempt to regain his mother's property by producing an accurate chronologic record, Charles Miller set about detailing the facts surrounding Mary Miller's forfeitures, which eventually resulted in a book he titled *U.S. vs. Grandma*.

Because we were so impressed with Mr. Miller's first-hand account of his battle with the forfeiture squads on behalf of his innocent mother, F.E.A.R. has agreed to publish a soft-back version of *U.S. vs. Grandma*. Please purchase this book and use it to educate yourself to the realities of how our country's forfeiture laws are being used. Then, call or write your Congressman and Senators and demand they change the law. In fact, why not purchase a second book for your legislators, and request they read it! Congress names and addresses in Washington, D.C. can be had at 1-202-224-3121.

*U.S. vs. Grandma* is available for \$15 from F.E.A.R. Foundation, 20 Sunnyside, Suite A-204, Mill Valley, CA 94941. 1-415-388-8128 <http://www.fear.org>

***"Mary, we're here to seize your house. I don't care where you go but you have a half hour to pack up and get out!"***



**" You have a half hour to pack up and get out !"**

Civil property forfeiture laws - The landlord was not charged with anything and was free to go, but his rental property was seized. Unknown to him, pot was sold out of one of his rentals. The U.S. Supreme Court upheld the seizing of a wife's car because her husband used it to solicit a prostitute. In each case, the owner's innocence was irrelevant, because the charges were just against their property, not the owner.

Authorities ask airline ticket and travel counters to watch for people who pay cash for their tickets. While a black man was waiting for his plane, on mere suspicion, the law showed up and seized his cash and then his landscaping business. He was free to go, because the charge was just against his assets. A federal prosecutor was stopped for speeding. Knowing what police were doing in his district, he was nervous because he had \$300 cash on him.

The intent of civil forfeiture laws was to take the ill-gotten gains of real criminals, but it also tempts the imagination of many authorities because there is no provision in the law for proof. A prosecutor said, "Citizens don't need proof protection, those in charge of a case are perfectly capable of determining who (what) is guilty." A federal prosecutor in New Jersey was recently found guilty on 30 counts of forfeiture abuse and will be going to prison, after ruining many people's lives. F.E.A.R. brought many cases of abuse before Senate hearings. Congressman Conyers (D) said back then, "It wasn't suppose to work this way!" But it still is.

*"Mary, we're here to seize your house. I don't care where you go but you have a half hour to pack up and get out!"*



**HOW DO YOU THINK IT SHOULD WORK ?**

- If anything of yours is accused of wrongdoing, should it have to be PROVEN in a court of law ? Yes No
- PROOF BY (choose one):       clear & convincing,       beyond a reasonable doubt
- Should you have a hearing before real or personal property seizure, and absent owner protection ? Yes No
- Would you like the Supreme Court to rule whether property forfeiture is even Constitutional ? Yes No

Congressman Hyde (R-IL) is sponsoring forfeiture reform legislation, H.R. 1916. Other legislators need educated about the abuse and how you feel about it. Please speak up or this legal plunder will continue. Make blank copies of this convenient flyer for friends. Circle the answers and mail them to Congress (names and addresses in Washington, D.C., 1-202-224-3121). Lobby your State legislators and localities, too.

• Another idea, read the book *U.S. v. Grandma*. It will astound you! Mail your legislator (s) a copy of the book with this flyer folded in it. To order *U.S. v. Grandma*, print clearly on the order form, clip it out and mail it with \$15 ea. payable to F.E.A.R. Foundation (Forfeiture Endangers American Rights), 20 Sunnyside, Suite A204, Mill Valley, CA 94941. 1-415-388-8128 <http://www.fear.org> Thanks for your interest in due process.

Name \_\_\_\_\_, Address \_\_\_\_\_

City, State, Zip \_\_\_\_\_, Phn \_\_\_\_\_ E-mail \_\_\_\_\_

Mail \_\_\_\_\_ book (s) at \$15 each. Total encl. \$ \_\_\_\_\_, Signature \_\_\_\_\_ Date \_\_\_\_\_

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Mr. HYDE. Well, thank you, Mr. Cutkomp. And let me say this: I have a tremendous feeling of guilt, and I will tell you why. We let this happen. We let this happen. We keep the law in its status quo, and, as I hear these stories, I am chilled, I am appalled.

And the Government is an engine. It doesn't have any morals. It has the morals of the people who drive the engine. And some of them are decent, honorable people—most of them are decent, honorable people, but some of them are not. And for us to permit under the law this type of conduct to go on is our fault, and I feel very badly about it. And I think this is a bill that cries out—I am sure it can be improved, but let's get the best bill we can, and let's make this illegal. Let's make this terribly wrong. Legally, it is already morally terribly wrong.

Mr. CUTKOMP. Yes, it is.

Mr. HYDE. I thank you for your courage, and Mr. Jones, for coming forward. You are soldiers in a very important battle, a battle of more than just due process: Decency.

I thank you.

Mr. Komie, would you give us your name, please?

Mr. KOMIE. Stephen M. Komie.

Mr. HYDE. What is your business or profession?

Mr. KOMIE. I am an attorney and currently serving as secretary of the Illinois State Bar Association, which is proud to boast you as a member.

Mr. HYDE. Thank you. And I think you and I shared lunch Friday?

Mr. KOMIE. Yes, we did.

Mr. HYDE. Mr. Komie, would you tell us what you have come here to tell us, please?

#### **STATEMENT OF STEPHEN M. KOMIE, SECRETARY, ILLINOIS, STATE BAR ASSOCIATION**

Mr. KOMIE. I have come here to speak on behalf of the 34,000 members and a growing family of members—after every graduation of law school, we get another crowd—who support your efforts on behalf of the victims of the tyranny of asset forfeiture. This is one of the worst abuses of King George which has been incorporated into our law, and one need only visit your private office in this building to see the portrait of George Washington at Valley Forge to know that you are committed to eradicating the abuses of the Americans' rights anywhere they might be.

We are confronted in Illinois with a system which has run amuck, which tends to go to the law enforcement officials. Whenever anyone has cash on their person, the law enforcement officials grab the cash and make the person justify their ownership of the cash at a later time, a later date and a later location.

In my printed remarks, which I have sent forward to the committee, I have discussed a number of abuses of this system of what we in Illinois call "contingent fee law enforcement." This is no different than parking tickets and a quota system. I am sure that if you subpoenaed the Justice Department's memorandums between their offices, you will undoubtedly discover that quotas are given to individual offices, that production is expected, and they have to make so much each year, just as the people in Chicago who issue parking

tickets are expected to issue so many parking tickets and raise the city revenue.

Mr. HYDE. Are you suggesting, Mr. Komie, that the Justice Department imposes quotas on the various offices, Federal offices, around the country? Do they have to produce so much in asset forfeiture revenue?

Mr. KOMIE. Oh, yes. In fact, you might even see some of the materials that have been printed for this hearing. In one of those, there was a 1990 memorandum which indicated that there were budget quotas that had to be met and that they would be embarrassed if these quotas weren't met.

So it is in print, and it is circulating. I would suspect one of your subpoenas could flush out the exact details and how much each office is expected to produce.

Mr. HYDE. Who is the issuing office and who is the recipient of these directives?

Mr. KOMIE. My guess would be it would be downtown Washington, DC, right at the Justice Department, that whoever is in charge of that unit, the Assistant Attorney General or his designee.

Mr. HYDE. It goes to a U.S. Attorney's Office?

Mr. KOMIE. Yes.

Mr. HYDE. Out in the field?

Mr. KOMIE. Yes. Assistants have told me that they have to keep up. They can't just let these cases go or settle. They have to have so much money per year.

Mr. HYDE. That's fascinating. Please go ahead.

Mr. KOMIE. Now, with respect to some of the people that I have mentioned in my printed remarks, I think everybody in this room would agree that the American family farm is an institution which we have all endeavored to save one way or another, and we know that there are ownership problems in passing the farm down through the family.

Well, in Illinois, our legislature doesn't think that farms should be forfeited when people have marijuana growing on the farm. After all, Illinois was one of the states that the Federal Government planted marijuana in order to get hemp during World War II, for both the liberty ships and also for the Navy. So that marijuana grows wild in Illinois. It also is sometimes cultivated by some of the children of farm owners. Yet, the legislature doesn't think that this is an appropriate method to be used, forfeiting the farm because one of the family members may grow marijuana on it or it may grow wild on the farm.

The Stouts received from their father the family farm. They had a half interest in the farm. On the farm remained Mr. Stout's sister, Mrs. Accardi. She was married to Greg Accardi. Greg Accardi, unfortunately, was growing marijuana behind the shed, in the back. The police did a flyover with the helicopter, looked down, saw marijuana, kicked in the door at the family farm, came on in, seized the plants, of course, and then seized the farm.

When the case came on for trial, there was a small problem. They didn't have a consent to search. None of the records of the Illinois State Police indicated they had a consent to search. Yet the day of trial the police officer who searched the farm walked in with a consent form with purportedly Greg's signature on it. That was

sent to the State police laboratory and it discovered that the signature was a forgery; that Mr. Accardi had never signed for entry into the farm.

So what did they do? They called their friends downtown at 219 South Dearborn in the Federal building and said, seize the farm, and there they went. They seized the entire farm; never served notice on the Stouts in Michigan, where they lived. The only way it was published was through USA Today. There was no delivery even by a postal carrier of notice of the seizure of the farm.

The Stouts had only been on the farm at Christmastime or for pheasant hunting when marijuana doesn't grow. Yet they end up in Federal court, innocent owners, one-half interest in the farm, nothing to do with the growing of the dope one way or the other, yet they find themselves in court defending this over 3 years now. They can't have possession of the farm. The U.S. marshals seized the farm. They made an agreement for Greg and Holly Accardi to remain on the farm by renting, and then have left them in a situation where the only way out of the case short of trial is the Government wants them to pay the Government money as a settlement proposal.

Mr. HYDE. This is still pending?

Mr. KOMIE. Still pending in U.S. District Court for the Northern District of Illinois.

Mr. HYDE. Eastern Division?

Mr. KOMIE. Eastern Division, where you are a member.

In addition, I have had the opportunity to represent a grandmother, too. There is Mrs. Levine of Los Angeles, CA, had a grandson who was a gentleman who was in the drug business, big time, no doubt about it.

He was indicted, had all his assets seized. But Ms. Levine had an estate plan, which many Americans use, and that is they have a trust in the bank where they put the money in in their name and in the event they pass away some loved one ends up with the account.

When they sent out the forfeiture warrants they collected everything with name Hershman on it, which was her grandson's name. Ms. Levine had to live off her social security for 3 years, until some assistant in Chicago thought it was OK to return the money.

Despite repeated demands, the woman had nothing whatsoever to do with drugs, she was in a retirement home, but her money was seized by the Federal Government and she was forced to endure attorney's fees to get it back.

Then there was Mr. Tan. He was walking through Union Station in Chicago on his way between trains. Because he was Chinese, he stood out in our station because we don't have a lot of Chinese traveling through Union Station. They cornered him in the first class lounge. They made him open his suitcase. His entire capital for his business was in that suitcase. They took him half a mile to their office. In the office they took the money.

They then counted the money in a machine that had been contaminated by drugs, a money-counting machine, which had never been cleaned, and then subjected it to a dog search. Based on that they made him come all the way from Hong Kong back to the Unit-

ed States in order to get his money back, and it wasn't until he had a trial; there was no attempt at settlement.

Mr. HYDE. How much money?

Mr. KOMIE. We are talking about \$230,000.

Mr. HYDE. He was carrying it in cash?

Mr. KOMIE. Yes. Like Mr. Jones said, if you have cash you get a substantial discount when you buy a product. If you buy with cash, you don't have to pay the 3 percent the credit card companies charge, Americans want cash in their businesses and so they readily accept it.

But the Government has a different idea. They believe no American should carry cash, only a credit card. Once you have cash on yourself, you must justify it. Interestingly enough, there is no clerk of the circuit court in Illinois who will accept anything but cash; you can't get somebody out on bond without cash. So if someone is arrested on the way to the bond office to bail their child out and the money is attempted to be forfeited, that is the only way you can get them out of jail is with cash.

Mr. HYDE. We have heard testimony about testing of the money for suspicion of drugs and dogs sniffing it. Do you have any information on the prevalence of evidence that paper money, currency has been near drugs? I am told that almost all money has some—

Mr. KOMIE. I would refer you to the American Bar Association report that Ms. Reno's purse had been subjected to a dog sniff and it was discovered that the dog had an affinity for some of the money in her purse; so the prevalence of the contamination of the currency reaches as high as Ms. Reno's purse.

And from what I understand, based on the indications I have had, Mr. Angelos, a chemist with the Drug Enforcement Administration, has published a memorandum informing them that there is contamination on every one of the rollers in the Federal Reserve Banks of the United States, that as soon as the money is deposited in the Federal Reserve Bank or any member banks and goes through the roller system, the contamination is placed on other bills. So it is well known inside the Government, at any rate, that there is a contamination problem brought about by the bills running through the system themselves.

Mr. HYDE. So that is not a very efficacious way of determining whether their money has been involved in a drug transaction with this person?

Mr. KOMIE. Let me tell you, to law enforcement people it is a joke. They take the money to the bank and deposit it immediately. They don't even send it to the laboratory for testing.

As the gentleman to my left told you, his mother's money was evaporated into the banking system so a laboratory could never test the money. And that would be the key to proving innocence.

What happens if you have one bill in 300 that has some cocaine on it. Do you lose all other 299 bills because one bill is contaminated? That is the problem. Law enforcement agencies don't even take that seriously. I have never had a case they haven't deposited the money directly in the bank.

Mr. HYDE. Please proceed.

Mr. KOMIE. Lastly, there is Mr. Lombardo. Mr. Lombardo operated a pizza parlor in Chicago. He is an elderly gentleman. His life's work went into that pizza parlor. He was an immigrant. He didn't believe in banks.

A burglar by profession and drug addict claimed that stolen property was being sold on the back steps of the pizza parlor in the parking lot. The Chicago police got a warrant for the premises, found no stolen property, no drugs, but half a million dollars of Mr. Lombardo's lifetime savings sitting in a barrel in the back of the pizzeria in a boarded-up dumbwaiter, which was his bank.

They seized the money. Since they were Chicago police officers, it went straight to the Chicago Police Department, deposited immediately in a bank so that Mr. Lombardo had no opportunity to have the money tested.

They took the money off the premises to the police station where they claim a dog sniffed it. Other than that, they had no information at that time that this had anything to do with drugs whatsoever.

Mr. Lombardo filed in the Circuit Court of Cook County a motion to return his property. A judge heard that motion, but while the motion was pending, when the Chicago Police Department realized that they weren't going to be able to hold on to the money under the law, they petitioned the Drug Enforcement Administration and the IRS to come in and seize it. So a warrant was issued by a Federal magistrate under the forfeiture laws before the State court judge had finished his work on the case, ordering the seizure of the money.

There was a little problem the Government encountered, and that is, under the Federal law once a State court takes possession of the money, the Federal Government has to sit back and wait. They can come to court and litigate the ownership or they can bring their forfeiture petition in front of a State judge. Instead, they declined.

They waited until Mr. Lombardo had won his motion for return of property, and then obtained a court order from a Federal judge ordering Mr. Lombardo to bring the check—this is no longer the alleged offending money, this is the money from the clerk of the Circuit Court of Cook County, IL, which is coming out by check, to bring the check to the Federal building and voluntarily, via court order, hand it to the U.S. marshal for forfeiture.

The case proceeds, Mr. Lombardo never had a day in court. Not one witness has been heard from the witness stand. Not one witness set foot in the building. His half a million dollars was forfeited 2 weeks ago by a Federal judge granting summary judgment based on an affidavit of an IRS agent who heard vis-a-vis the informant who talked about the stolen property that turned out not to exist, that there was cocaine in a delivery truck out in back of the pizza parlor and that he stole the cocaine and used it and therefore he suspected drugs were being used at the pizza parlor.

Mr. HYDE. Was there proof that he knew of these transactions or that he consented to them?

Mr. KOMIE. Mr. Lombardo filed an affidavit in answer to the summary judgment saying that the money was never earned as a result of the narcotics business. But summary judgment was grant-

ed because the burden of proof shifted to Mr. Lombardo to prove he was innocent and the Government by appearing in front of a magistrate, *ex parte*, no lawyer there representing Mr. Lombardo, that was sufficient to force the burden of proof on Mr. Lombardo to forfeit his money. The only way he is going to correct this is by going to an appellate court.

Mr. HYDE. It makes a joke of due process, doesn't it?

Mr. KOMIE. It makes the "d" so small you need a pair of glasses or a magnifier to see it.

Mr. HYDE. Is that your testimony?

Mr. KOMIE. I would like to summarize, Mr. Chairman, by saying that we want to help you and the members of this committee in any way, shape or form to bring about reform in an area where the American public is unaware, except by your efforts, by your book and the publication of the Pittsburgh Press, in an area where the American public is largely uninformed about how insensitive our courts are, in an area where there is no oversight of the people making the decisions, in an area where there has never been a Justice Department official fired for making a mistake.

This is an area where there needs to be oversight, there needs to be an active change in the law. And in our printed statement we have made a couple of suggestions; require delivery directly to the person who is going to be forfeited.

In one case, Mr. Bryant, he was walking through the Detroit Airport—and, by the way, you should know that the Government has a program of paying off ticket agents who work for the airlines a certain percentage of the forfeiture.

Anyone who shows up at the counter and pays cash, they immediately call the DEA Task Force and say someone just paid cash, this is the description of that person, grab them at the gate, and the task force goes to the gate. These people have their property taken and don't even get the letter delivered to them.

It is either published in USA Today, and 21 days thereafter the money is considered forfeited, or the land is considered forfeited, or the other opportunity is that they don't have to sign for the notice. There is no requirement in the law that there be a registered letter or summons issued to the person who is being forfeited.

Mr. HYDE. So the clock starts running on their statute of limitations, their 10 days, and they don't know it?

Mr. KOMIE. Right. In Mr. Bryant's case, he was walking through the Detroit Airport and they delivered the letter to his neighbor. The neighbor thought she was doing him a favor by picking up the letter and he didn't get it until after the 21 days had elapsed. And so he had to go to Federal court, obtain an order from a Federal judge setting aside the forfeiture, despite numerous attempts to get the mitigation of the Justice Department, to mitigate the forfeiture that had already entered and he even supplied a cost bond.

He had a postmarked envelope and a cost bond that he sent in. They lost it and wouldn't even allow him to replace it. It is a terrible situation. So we need to require registered mail or a summons. We need to require the Federal judges to hear motions to suppress and prohibit summary judgment.

Summary judgment in the current state of the law allows the Government to have the magistrate make the whole decision and



the individual coming to court has no chance against that decision because the two of them were not in the courtroom at the same time the decision is being made. So summary judgment needs to be prohibited in these types of cases.

We need to eliminate "contingent fee law enforcement" by requiring that these monies either go to alternatives to sentencing, alternatives to incarceration and drug programs so these people don't come back into the court system, the people who are charged with crimes and convicted.

We need to leave to the States the question of the family farm. By allowing the local police when they get caught doing something wrong to call the Federal folks to bail them out is not good policy. The local circuit court judge should be in charge of what is going on in his own county and the marijuana-growing family farm should be left to the local State law and the issues raised by the ownership of the family farm by family members.

We think you should prohibit Federal courts from intervening once a State court has obtained jurisdiction of the property. The case books are replete with observations of sheriffs who once they realize that they are losing in State court immediately call up the Federal Government and have them come in and say, here, take the property to the Federal building, seize it and hand it over. And that is not limited to Illinois. It happens in other places.

Mr. HYDE. What happens to the proceeds that are seized? Why is law enforcement so zealous?

Mr. KOMIE. The answer to that is it turns out to be unappropriated expenditures for police departments. In other words, every government in the United States sits down every year and decides how much their budget is for what they do. So much of that goes to law enforcement. The chief of police has a budget that is accounted for. These moneys go back to whoever is responsible for bringing them to the attention of the Federal Government based on a formula. And when they get that money they don't have to answer to the city council, to the county board, or the State legislature.

Mr. HYDE. It is off budget?

Mr. KOMIE. It is off budget. That is why it is "contingent fee law enforcement." It is in addition to the budget. That tank that they wanted to buy last year to suppress civil disturbance, the county board said no, that is a waste of money, we have one civil disturbance once every 10 years; now they can buy the tank if that is what they want.

Mr. HYDE. Thank you very much.

[The prepared statement of Mr. Komie follows:]

PREPARED STATEMENT OF STEPHEN M. KOMIE, SECRETARY, ILLINOIS STATE BAR ASSOCIATION

Mr. Chairman and Members of the Judiciary Committee, the Illinois State Bar Association is a private, voluntary association with more than 34,000 members and growing with each law school graduation. The Association has provided professional services to attorneys, referral services to the public, and education to attorneys, the judiciary, and the citizens of Illinois since 1877. We are the oldest bar association of practicing attorneys in Illinois. One of the touch stones of the Illinois State Bar Association is to advise the General Assembly in Illinois and the members of Congress on issues of public importance which bear upon the rights and liberties of the citizens of our great country.

In that regard, the Illinois Bar Association wishes to salute Chairman Henry J. Hyde for his leadership in tackling the issue of civil asset forfeiture. His book on the subject, "Forfeiting Our Property Rights," may be used as a manifesto of the importance of constitutional liberties, rights, and the rule of law. Chairman Hyde has been in the forefront of the debate over reform of a system run amok. We are especially proud of the fact that Illinois lawyers are a part of providing a solution to the terrible injustices resulting from civil asset forfeiture. With Chairman Hyde's leadership and followed by Representative Michael Patrick Flanagan, we are confident this Congress will succeed in providing necessary reform for the protection of the innocent.

Incidentally, Chairman Hyde has been an ISBA member for more than 37 years and practiced law in the community which elected him to Congress. He is uniquely suited to bring forth H.R. 1916 because he knows firsthand the treatment innocent persons receive in the federal court. Today we stand in support of Chairman Hyde's efforts and urge continuing reforms which surpass those currently set forth in the Bill. For that reason we wish to bring to your attention the episodes of victims of the zeal of contingent fee law enforcement. As you know, the framers of the Constitution were very mistrustful of placing power in the hands of government and were especially fearful of placing power in the bureaucracy. Our forefathers would be shocked to learn that a person's home and property could be forfeited by the bureaucrats with the blessings of the federal judiciary without a jury ever seeing a witness or hearing any testimony. In 1789, George Washington and Thomas Jefferson would have told you such a thing was unconstitutional. In fact, every person to whom the United States Congress has built a monument and school children are taught to revere would protest this affront to our fundamental Constitutional tenants. However, since 1970, modern Americans have been confronted with draconian forfeiture proceedings. We at the Illinois Bar Association, while supporting law enforcement, stand fast against civil asset forfeiture which fails to provide adequate protections for the innocent and the guilty alike.

All Americans agree that the family farm has been an historic institution since the founding of the republic. As members of the Committee know, family farms have remained a part of the social fabric, contributed to the agricultural might of America, and have acted as a stable social institution for over 250 years. Many Americans have left their farms to their children resulting in the operation of the farm by one brother or sister on behalf of the non-resident family members. In Illinois, for good reason, the Illinois General Assembly has never authorized the forfeiture of the family farm for growing marijuana. Obviously, marijuana could be grown on a large farm without the knowledge of the absent family members or could be grown by a child without the knowledge of his parents. Certainly, the family farm as an institution should be protected from seizure under those circumstances. Yet 21 U.S.C. 881 authorizes the seizure of real property regardless of the drug involved or the quantity of the drug. So a family farm may be seized and forfeited for less than 5 marijuana plants. This is ironic because the Midwest the federal government had encouraged the planting of hemp for the production of rope for liberty ships and for use by our Navy in World War II. Hence, marijuana grows without cultivation in many parts of the Midwest. Therefore, there are many good reasons why the family farm should not be forfeitable.

#### SEIZURE WITHOUT NOTICE

Steven and Suzanne Stout are joint owners of a parcel of property commonly referred to as 47 West 644 Route 30, Maple Park, Illinois. In actuality, this parcel is a family farm of which Steve Stout acquired a half interest as a gift from his father Paul. His sister, Holly Accardi, has lived on the family farm with her husband Greg and their three small sons. Steve Stout and his wife Suzanne, and their children live in Grand Rapids, Michigan. They would only come to the Accardi farm over the Christmas vacation and occasionally on Thanksgiving. During these times, they would sometimes hunt pheasant.

On September 15, 1992, members of the Illinois State Police raided the Accardi farm. During the course of the raid, they entered the Accardis' farm without consent to search or a search warrant and began to search the farm before they contacted any of the owners. On the day of the hearing for the motion to suppress evidence, the police of fleer produced an alleged consent to search form purportedly signed by Gregory Accardi. This form was not in the file of the Illinois State Police. The form was sent to the Springfield laboratory of the State Police. There, Jeanne Brundige, a handwriting expert, employed by the Illinois State Police found Mr. Accardi's signature was a forgery. Mr. Accardi so testified as did a privately retained handwriting expert. Mr. Steven Kane. As the police were certain there would be difficul-

ties with their case in the state court, they turned the matter over to the Drug Enforcement Administration Forfeiture Unit. Since they could not seize and sell the farm by state law, they turned to the callous bureaucracy to take the family farm.

After this storm trooper raid on the Accardi farm, the Stouts never received actual notice that their interest in the farm would be forfeited. An *ex parte* order was entered in the Federal District Court for the Northern District of Illinois authorizing the seizing of the farm and other property on December 9, 1992. The Stouts received no actual notice of this *ex parte* proceeding. The Stouts did not receive actual service of the complaint of forfeiture of which was subsequently filed on December 14, 1992 under cause number 92 C 7906. The government instead chose to publish notification in the newspaper the U.S.A. Today. The Stouts do not read this newspaper.

People like the Stouts are deemed innocent owners under the statutes. They had no idea that any contraband was present on the farm as they were only present on the farm during the winter months when no marijuana was or could be grown. The parcel of property has been in Steve Stout's family and he wishes to have the opportunity to pass it on to his children. To do that he has been forced to retain the services of a Chicago lawyer and contest the *ex parte* seizure as well as the illegal entry by the police to preserve his and his wife's claim as innocent owners. This has cost him anticipated legal fees of up to \$10,000.00 which is a great deal of money for a young family. The property that the Stouts always viewed as a source of solace and relaxation has now become a source of anguish and unforeseen expense.

The lessons to be drawn from the Stout case are notice of the proceedings and the intended forfeiture should be delivered directly to the owner of a property and not published solely in U.S.A. Today. Secondly, the family farm should not be subject to seizure under these circumstances which place an ordinary citizen with little resources against the federal government. A federal judge must have discretion to appoint counsel to contest a forfeiture and Chairman Hyde's Bill provides for appointment of counsel. We support this provision. Finally, for the small amount of marijuana involved in this case, the Stouts have been subjected to several years of court proceedings and a demand from the federal government to pay the federal government money to get their farm back or face the risks of trial. We hope this Bill will be amended to prohibit seizure of family farms for marijuana and leave this matter to the states consistent with their public policy.

#### MAILING NOTICE TO THE WRONG PERSON

Mr. Milton Bryan was walking through the Detroit Metro Airport. He was approached by the Airport DEA Task Force. Mr. Bryan is a black American. He was forced to produce identification and escorted by DEA Task Force members larger than him to their office more of Chairman Hyde's and encourages its enactment.

#### GRANDMA'S BANK ACCOUNTS

Michael Hershman, a bona fide druggist without a license, was indicted for his drug business. Simultaneously, the government filed an asset forfeiture case against every asset in the name of Hershman. Michael Hershman's grandmother, Rachel Levine, had a savings account at Columbia Savings and Loan. The government seized the account in 1990. The account represented the lifetime savings of grandma. Fearing she would die, Grandma made Michael Hershman a beneficiary to her account in the event of death. The Drug Enforcement Administration was extremely insensitive to grandma's estate plan. It took grandma three years and attorneys' fees to get the government to release grandma's money forcing her to live on her social security only. Grandma had no remedy or a federal judge to petition in order to release the account before the trial of the forfeiture action. Once again, Chairman Hyde's Bill provides for a release of property. We, the Illinois State Bar Association, support giving federal judges discretion to release property to innocent owners before the trial. Further, we request Congress state in the legislative purpose of the act the need to protect innocent owners from draconian actions of the bureaucracy. Finally, the Bill should be amended to place mandatory time limits for hearing for innocent owners. In no case should the government avoid a hearing for temporary relief for more than ninety days.

#### LIFETIME EARNINGS SEIZED AND FORFEITED WITHOUT A TRIAL

Mr. Anthony Lombardo has owned a pizzeria which has supported him for several decades. Purportedly, an arrested burglar claimed he was selling stolen property on the back than a half-mile away from his boarding gate. There, they went through his carry-on luggage. They discovered \$32,000 in United States currency but found no drugs. The officers insisted on taking the money and giving Mr. Bryan a receipt for his money. He then caught his plane to St. Louis where he was met by officers

who demanded to search his checked baggage. They discovered no drugs and sent him on his way. One would think our kind federal government would send Mr. Bryan notice they intended to forfeit his money. They did send notice to Mr. Bryan without restriction of delivery to the addressee only. Another person living in the same housing complex signed for the letter and did not give it to Mr. Bryan until too late. Upon receiving the letter several days late, Mr. Bryan post marked a claim and posted a cost bond which was lost by the Asset Forfeiture Unit of the Drug Enforcement Administration. Mr. Bryan though counsel contacted this unit and attempted to replace the missing cost bond with a second cashiers check from his bank. The Asset Forfeiture Unit refused to accept the replacement cost bond or the good faith efforts of Mr. Bryan to contest the forfeiture of his money.

Mr. Bryan filed a motion under Federal Criminal Rules of Procedure 41(e) to return his property. A federal judge had to vacate a decree of forfeiture due to the absence of proper notice. According to the government it should not make any difference who they deliver the notice to if they live in the same neighborhood. The lesson to be learned here is Congress should require notice to be delivered to the owner of the property just like any other civil proceeding or require the post Office to deliver to the addressee (owner), only. Additionally, Congressman Hyde's Bill places the burden of proof on the federal government and not the claimant. Here Mr. Bryan is being forced to prove the innocent nature of his money in federal court with no burden to prove the money is derived from the drug business. The Illinois Bar Association supports this reform steps of the pizza parlor. The Chicago Police Department obtained a search warrant for the crime of receiving stolen property. The police searched the pizzeria and they find flour and pizza but no stolen property. However, Mr. Lombardo kept his savings in a barrel. The police seized \$506,000.00 in United States currency in small bills. The police took the money to the Police Station. Since they found no drugs at the pizza parlor, they called for a dog to sniff the drugs. They claim the dog alerted to the presence of drug on currency. They then deposited the money in a national bank. They paid no attention to the scientific research which demonstrates the money supply in the United States is contaminated by the rollers in the Federal Reserve Bank System. On this evidence alone, the Chicago Police justified the seizure of the money. Mr. Lombardo had no criminal record and no history of investigations for drug activities. So Mr. Lombardo comes to court in the Circuit Court of Cook County, Illinois. He filed a motion to return his property to him. The Chicago Police, well aware of the contingent fee law enforcement, authorized by 21 U.S.C. 881 called the Drug Enforcement Administration Asset Forfeiture Unit. The United States filed a case in federal court obtaining a warrant for the money although Mr. Lombardo was before a state court judge attempting to obtain his property.

A week later a state court judge ordered the return of the money to Mr. Lombardo. The government obtains an order from a federal judge requiring him to bring the check given to him by the state court to the federal building and handed over to the U.S. Marshall. This was only the beginning of Mr. Lombardo's travail to obtain his property. The federal judge assigned to Mr. Lombardo's case refused to give Mr. Lombardo a hearing on a motion to dismiss for lack of jurisdiction, on a motion to suppress evidence seized, or on a motion to suppress evidence on the grounds the application for the search warrant was a fraud, and granted summary judgment in favor of the government without Mr. Lombardo and the judge ever laying eyes on each other. Mr. Lombardo was never afforded a contested probable cause hearing as the court found the *ex parte* determination of a magistrate to issue a seizure warrant was sufficient to avoid the requirement of a trial. It is clear Mr. Lombardo got the least amount of due process our government could provide for him. As we said earlier, the founders of our country would be shocked and saddened to learn Mr. Lombardo's property could be seized and forfeited without a trial or a judge ever holding a hearing in open court. The lesson to be learned here is that a person can be stripped of their property without ever having a hearing a federal court. This case was decided solely on the paper filed and not the evidence heard by the court. Chairman Hyde's Bill takes a great step forward in shifting the burden back to the government to prove by clear and convincing evidence the criminality of the property. This will avoid the dire consequences suffered by Mr. Lombardo. The Bill should be attended to prohibit summary judgment and require hearings on motions to suppress evidence illegally seized. Cases like Mr. Lombardo's can only erode the confidence of the American people in the federal courts, their justice department and their police agencies. Therefore, Chairman Hyde, we call upon you to strengthen the procedures to protect the liberties and property ownership of our people.

The Illinois State Bar Association encourages and promotes the enactment of legislation which restores due process and protects the rights of the innocent and the

guilty alike. We stand ready to assist this Committee and its staff in the passage of H.R. 1916. We wish to thank you for the opportunity to appear here today and express our views. Please call upon us to assist you. We also ask that anyone interested in this issue and other legal issues contact us at our Internet address at <http://www.illinoisbar.org>. Thank you.

Mr. KOMIE. Thank you for having us. If we may be of any service to the committee, please call on us.

Mr. HYDE. Thank you, and I am sure you will be.

Mr. Frank.

Mr. FRANK. Mr. Chairman, I am delighted that you are taking the lead that you are taking, and as I have told you, I will work as closely as possible with you to get this corrected. This is an embarrassment.

I was pleased in reading the Justice Department's testimony to see acknowledgment from them that serious change is needed, but that is long overdue. I gather we got a bill from them last week, so the hearing may have already had some positive impact.

We have to legislate, and I would hope the administration would put aside the kind of bureaucratic impulses we sometimes get and join this. It is appalling what we hear.

I wanted to note and I was pleased to hear Mr. Edwards say that he was compensated on behalf of Mr. Jones through the provision of the Civil Rights Act that allows for attorneys' fees. I know not all of our colleagues have been as supportive of that reimbursement for attorneys bringing civil rights cases, and I am delighted to see that this is a case where it worked well. It is a maligned provision but a very important one.

A couple of questions because I am interested to hear from the administration.

To Mr. Jones, and to Mr. Edwards, when they were, let me use the technical term, harassing you, did they ever bring forward evidence to suggest that you had engaged in illegal activities other than the dogs sniffing the money?

Was there anything they brought forward of any sort, Mr. Edwards.

Mr. EDWARDS. No, sir. What they knew when they seized the money was that Willie Jones was an African-American who had bought with cash a round-trip ticket to Houston, that drug-source city in Texas, and was flying under his true name. That is how much they knew when they took his money.

Mr. FRANK. Flying under—

Mr. EDWARDS. His own name. Not an assumed name, but the same name that was on his driver's license.

Mr. FRANK. For that—that was all they had and all they ever had. At no point did they adduce anything that suggested that there was any wrongdoing of any sort?

Mr. EDWARDS. That is correct. I think that is an accurate and fair statement.

Mr. FRANK. When did this happen?

Mr. EDWARDS. The seizure occurred in late February 1991. The trial was in, as I recall, late 1992, and the court's decision ordering the return of the money was in 1993, roughly, almost 2½ years later.

Mr. FRANK. Did you ever get a letter of apology in any Federal official on this?

Mr. JONES. No. None.

Mr. FRANK. That doesn't surprise me, but disappoints me a bit.

Mr. Cutkomp, with your mother did they adduce any evidence that there was some complicity on her part at any point? I am not talking about whether she was or wasn't.

Did they have any evidence that suggested that she was?

Mr. CUTKOMP. She was never part of my brother's conspiracy.

Mr. FRANK. Did they claim she was?

Mr. CUTKOMP. No.

Mr. FRANK. Let me ask, particularly the attorneys here, others, is there any other area of American law that you can think of where this kind of reversal of roles takes place, where fitting a profile doesn't simply subject you to the closer investigation? We have cases where if you fit the profile, you get subjected to investigation, but where the burden of proof gets reversed?

Mr. Komie, can you think of any other area?

Mr. KOMIE. I can't think of any, or where people have the legal right to possess the property, which is the money, where they have to now prove that the source of the money is legitimate as opposed to the Government having the burdens.

Mr. EDWARDS. No. I think there is nothing like forfeiture, and that is probably because of the historical basis of forfeiture. In colonial America if we didn't seize the ship that the smuggled goods came in on, the tiny Federal Government would have had no recourse. But the Justice Department has taken those quite irrelevant traditions and spawned modern forfeiture.

Mr. FRANK. I guess it started with the precedent of having to secure the ship you sailed in on, and they have now applied the old saying, and the horse you rode in on.

The last question I had, as I read over the testimony in advance from the Treasury Department, they talked about the need to do this, where we were talking about goods which were themselves pirated, intellectual property abuse, for instance.

Mr. Komie, is this procedure widely used across the board, or is it primarily in people being accused of drug abuses?

Mr. KOMIE. This seems to go on throughout the United States, whether I am working in the Detroit area or any metropolitan area that has an airport or train station. In Florida, they have a interstate highway system and stop buses.

Mr. FRANK. What the Treasury Department said is we need this because we have to protect people who have counterfeited or pirated goods. Have you come across much use of it in that capacity?

Mr. KOMIE. No. I have seen one case in Chicago where we had pirated goods, where they swooped down on somebody who was producing unauthorized sweatshirts, T-shirts. But my experience is that law enforcement does not enforce patent trademark and unique copyright items. They spend most of their time running after the crime of the time, which is murder, rape; that is what they primarily occupy themselves with.

Mr. FRANK. Is forfeiture mostly for drug enforcement?

Mr. KOMIE. Yes, but in the case of Mr. Lombardo, it was the stolen property police who picked up the money and then once it got there they realized, here is a bonanza. We can split it up if we take it to the Federal building.

Mr. EDWARDS. I believe there is a second area that has experienced very recent boom that is perhaps not quite as evasive as drug forfeiture, but currency violation forfeiture. I represent a country doctor in Alabama who had put his entire life savings in a bank, amounting to about \$2.5 million, and had the interest off that account go to a school in his hometown, a private K through 12 school that was about to close because of financial problems.

About 2½ years after he set up this account and after he had benefited the school to the tune of about half a million dollars, he took the money that he had hoarded over a lifetime of practicing medicine, he was almost 70 at the time, he had over \$300,000 in the back of his closet and his wife finally persuaded him to take it out. So he put it in the bank to be added to this account he had set up for the school, and the bank president did not file a currency transaction report because the bank president, as he testified in deposition, knew the doctor was almost obsessive about not being known as a rich doc. He didn't want people to know he had that kind of money, this is sort of a throwback kind of doctor. He charges \$5 for a routine office visit and drives an 8-year-old car.

Mr. FRANK. How many office visits does he happen to get in in a day?

Mr. EDWARDS. A lot. He is a rare creature for 1996.

Anyway, the Government found out that this large amount of currency had been deposited to this account without a CTR being filed, so they seized the entire account, almost \$3 million at that time, under section 981, alleging that the entire amount was forfeitable under the currency forfeiture statutes.

A district court in Montgomery last year granted summary judgment in our favor. The doctor has now gotten back with interest all of the money, except the \$300,000 cash deposit, and we are now litigating what happens to that money in the eleventh circuit. So it is attraction of the money. Any time there is a forfeiture statute on the books, those law enforcement agencies that deal with whatever the law is are going to look for ways to take the money.

Mr. FRANK. Were they alleging any income tax violations in that case?

Mr. EDWARDS. No. They tried to find some, but couldn't. We ultimately showed that the doctor had overreported his cash income and the IRS had to send him back \$20,000-some.

Mr. FRANK. Thank you, Mr. Chairman.

I want to say that you are performing a great service here, Mr. Chairman, and I will do whatever I can to help you in its completion.

Mr. HYDE. Thank you very much.

Mr. Gekas.

Mr. GEKAS. Yes. I thank the Chair.

I wanted to ask Mr. Jones a couple of questions and/or his counsel.

At the point of contact that you had, the first contact in which they confiscated your sum of money, did they inform you that you had a right to reclaim it or that there was a process available for you to go to court to try to get it back, to contest their action; did they inform you of that?

Mr. JONES. They did somewhat inform me of that; right.

Mr. GEKAS. What did they say you had a right to do?

Mr. JONES. They told me if the money was clean that I would be able to get the money back.

Mr. GEKAS. Did they tell you that you would have had to post bond?

Mr. JONES. No.

Mr. GEKAS. You learned that later when you contacted your attorney?

Mr. JONES. That is correct.

Mr. GEKAS. Mr. Edwards, what was the predicate in the Civil Rights Act on which you founded the action?

Mr. EDWARDS. There were two constitutional bases, first, denial of due process, because the Asset Forfeiture Office had refused to waive the bond requirement and allow us to get into court; and secondarily, that the seizure of the money was without probable cause and violated Mr. Jones' rights under the fourth amendment against unreasonable search and seizure. We won ultimately on both points.

Mr. GEKAS. Is it to be assumed that when you finally did bring an action that, in effect, you had the burden of proof?

Mr. EDWARDS. Oh, yes.

Mr. GEKAS. In all those proceedings under the Civil Rights Act?

Mr. EDWARDS. That is correct.

Mr. GEKAS. So that even if this law were adopted you could still avail yourself of the Civil Rights Act if you found other bases, and you would still have the burden of proof there. If this bill had been in place and this were law, would you have resorted to the Civil Rights Act, do you think?

Mr. EDWARDS. No. Because I believe under the provisions of this bill we would not have had the problem of not having \$900 to pay the entrance fee to a Federal court and would have retained judicial review of the seizure without having to resort to becoming a plaintiff in a 1983 action.

Mr. GEKAS. Then the burden of proof under this new act would rest in the Government's corner, as it were?

Mr. EDWARDS. That is exactly right.

Mr. GEKAS. I have only one other question having to do with the gentleman whose mother was treated so undignifiably. Did they ever issue an apology to your mother?

Mr. CUTKOMP. No, sir.

Mr. GEKAS. I apologize for them?

Is your mother still living?

Mr. CUTKOMP. Yes.

Mr. GEKAS. Tell her that we have all felt her pain, and I am not quoting anybody on that.

I thank the Chair.

I relinquish the time remaining.

Mr. MOORHEAD [presiding]. All of us that have heard this testimony are appalled that such things can happen here in the United States where people's rights can be trampled so seriously, especially without due process. I think the forfeiture laws can be of benefit. I hope that you do, too.

In cases where there is a crack house being continuously used to sell narcotics, well-known to everybody, there is every reason in the



world that the property should be forfeited if that is what it is being used for. But in some cases, where automobiles are being used to transport illegals back and forth across the border, something has to be done to stop that kind of action. But certainly to reach summary judgment without any evidence in these cases, certainly goes far beyond what was ever intended, I am sure, by the legislators.

Mr. Cutkomp, do you have a comment?

Mr. CUTKOMP. Can't you put something in for absent owners and innocent owner provisions?

Mr. MOORHEAD. Where automobiles are involved, if there is a loan against the properties, normally in the cases I have heard of in California at least, the rights of the mortgage company or the lending company have been protected there, as they should be. But, obviously, if there is an unknowledgeable person that owns the property, that doesn't know anything about the crime being committed, there should be a way—

Mr. CUTKOMP. As long as there is a proof provision in it that keeps the table clear.

Mr. MOORHEAD. I agree that should be there.

Mr. Komie, do you think there is a place for asset forfeiture?

Mr. KOMIE. Absolutely, there can be asset forfeiture if the property itself is offending, but the cases we have been telling you about today, the property has been innocent.

Mr. MOORHEAD. I agree your cases are amazing situations where the law has been misused.

Mr. KOMIE. We at the Illinois Bar Association support law enforcement's efforts to eradicate drugs, but that is not what we are talking about. We are talking about a program that was thought to be good on the drawing board, that is turning out to be a disaster.

Mr. MOORHEAD. It certainly sounds that way.

I yield back.

Mr. HYDE [presiding]. I want to thank this panel for very compelling testimony. I wish the world could hear it, or at least those people who are interested in justice, which we all ought to be.

I thank you for your contributions. I hope some day we will have a signing ceremony at which all of you can be present.

Mr. KOMIE. We would be honored to attend, I am sure.

Mr. HYDE. Thank you, Mr. Jones. Thank you, Mr. Cutkomp. Thank you, Mr. Komie. Thank you, Mr. Edwards.

Our next panel consists of Stefan D. Cassella, Deputy Chief of the Asset Forfeiture and Money Laundering Section of the Department of Justice; and Jan P. Blanton, Director of the Treasury Executive Office for Asset Forfeiture at the Department of Treasury.

Together these two agencies represent the bulk of civil asset forfeitures at the Federal level. Joining them is James W. McMahon, superintendent of the New York State Police, here representing the International Association of Chiefs of Police.

Perhaps we can start with Mr. Cassella.

Normally we try to limit statements to 5 minutes, but I will, just with the admonition that we have several witnesses, if you could be less prolix than perhaps you would like to be, that is a softer way of saying it, but I don't want to cut anybody off.

**STATEMENT OF STEFAN D. CASSELLA, DEPUTY CHIEFS ASSET  
FORFEITURE AND MONEY LAUNDERING SECTION, CRIMI-  
NAL DIVISION, DEPARTMENT OF JUSTICE**

Mr. CASSELLA. Good morning, Mr. Chairman.

Five minutes will be fine. I understand that our formal state-  
ment will be included in the record.

I would ask that the transmittal of the forfeiture bill that we  
sent Congress last week and the analysis of it also be included in  
the record.

Mr. HYDE. Without objection, so ordered.

[The information follows:]



U. S. Department of Justice

Office of Legislative Affairs

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Office of the Assistant Attorney General

Washington, D.C. 20530

July 17, 1996

The Honorable Newt Gingrich  
Speaker  
United States House of Representatives  
Washington, D.C. 20515

Dear Mr. Speaker:

Enclosed is a draft bill, the "Forfeiture Act of 1996," which contains comprehensive legislative proposals to improve the asset forfeiture program. The proposals are designed to strengthen and enhance asset forfeiture, improve procedures to ensure fairness and due process to innocent property owners, and resolve inconsistencies and ambiguities that have developed in forfeiture law.

This proposal is the result of a thorough review of the federal statutes relating to asset forfeiture that has been undertaken by the Department of Justice for the past two years. As you know, forfeiture statutes were enacted by the First Congress and have been an important part of federal law enforcement for over two hundred years. That is no less true today. The forfeiture statutes enacted by Congress since 1970 are an essential aspect of the federal arsenal of law enforcement tools that may be deployed in the war on crime. We have found, however, that the procedures that may have been appropriate historically for the forfeiture of smuggled goods, ships on the high seas, and certain types of contraband may need to be modified when forfeiture is directed toward assets such as residences, businesses and bank accounts.

In formulating our own proposals to revise the forfeiture laws, we have sought to convey a sense of balance. Forfeiture is an essential law enforcement tool that can be made even more effective by enhancing and clarifying the powers of the government while improving procedures to ensure that the rights of innocent parties are fully protected. The bill recognizes the important role that both civil and criminal forfeiture have come

to play in federal law enforcement and takes into account the procedural and substantive needs of the law enforcement community. Yet it acknowledges the need for procedural reform and adopts many of the changes suggested recently by Members of Congress and the organized bar. In short, the bill would ensure that the enforcement of the forfeiture laws will be tough but fair.

The most significant provisions of the bill include the following: The bill expands the categories of crimes for which forfeiture may be imposed. Most important, the proceeds of all crimes in Title 18 of the United States Code would be subject to forfeiture so that forfeiture would be available as a sanction in white collar crimes such as fraud and public corruption. In addition, the bill includes provisions expanding the category of property forfeitable in connection with alien smuggling and terrorism, and authorizing forfeiture for additional money laundering violations.

The bill also includes several provisions designed to enhance the investigative tools available to law enforcement in forfeiture cases. These provisions are intended to assist the government in meeting the heightened burden of proof requirements set forth elsewhere in the bill by improving the government's ability to gather the evidence needed to build a competent case. Thus, the bill authorizes the use of grand jury material by government attorneys in civil forfeiture investigations, authorizes the issuance of civil investigative demands to gather evidence leading to the filing of a forfeiture complaint, gives government attorneys access to tax and credit report information in the course of forfeiture investigations, and permits the dismissal of claims where the claimant refuses to waive bank secrecy protections in foreign jurisdictions that limit the government's access to relevant documents.

Finally, the bill includes a number of provisions that resolve ambiguities in the present forfeiture statutes. For example, the bill preserves the availability of property for criminal forfeiture by allowing courts to order defendants to repatriate forfeitable property from a foreign jurisdiction, and by authorizing the pretrial restraint of substitute assets in criminal cases.

In addition to strengthening asset forfeiture as a law enforcement tool, the package contains proposals designed to ensure that the rights of innocent property owners are protected and to avoid unduly harsh application of the forfeiture laws. The most important of these provisions involve the burden of proof and the cost bond requirement in the area of civil forfeiture. The bill shifts the burden of proof from the property owner to the government and provides for waiver of the

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cost bond in certain situations. It also extends the deadline for the filing of claims by property owners.

Finally, the bill contains a uniform innocent owner defense. Presently, some civil forfeiture statutes contain no provision allowing even an innocent property owner to resist the forfeiture of his or her property if it was used by another person for an illegal purpose. Other statutes contain conflicting, inconsistent and sometimes inadequate innocent owner provisions. The uniform innocent owner provision is intended to ensure that property will not be forfeited if the owner establishes that he or she did not know of the illegal use of the property or that the owner did what any reasonable person would have done to stop the illegal use of the property once he or she found out about it.

The purpose of this bill is to strengthen and improve the structure and operation of the Nation's asset forfeiture laws. It is not intended to be a revenue raising measure. The Omnibus Budget Reconciliation Act (OBRA) requires that all revenue and direct spending legislation meet a pay-as-you-go requirement. That is, no bill should result in an increase in the deficit; and if it does, it will trigger a sequester if it is not fully offset. The Forfeiture Act of 1996 would increase receipts and direct spending. Considered alone, it meets the pay-as-you-go requirement of OBRA.

Our estimate of the impact of this proposed bill on the deficit is:

Fiscal Years  
(in millions of dollars)

	<u>1996</u>	<u>1997</u>	<u>1998</u>	<u>1996- 1998</u>
Receipts	33.250	33.250	33.250	99.750
Outlays	30.495	30.495	30.495	91.485
Net deficit effect	-2.755	-2.755	-2.755	-8.265

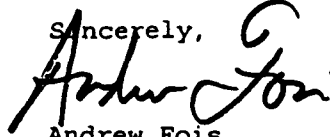
With respect to potential impacts on the criminal justice system, all of the criminal sanctions addressed by this legislation are economic in nature. It does not impose any new penalties involving incarceration, nor does it create any new offenses for which incarceration may be imposed.

It would be appreciated if you would lay this bill before the House of Representatives. An identical proposal has been transmitted to the President of the Senate.

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The Office of Management and Budget has advised that there is no objection to the presentation of this proposal to the Congress from the standpoint of the Administration's program.

Sincerely,

A handwritten signature in black ink, appearing to read "Andrew Fois". The signature is written in a cursive style with a large, prominent initial "A".

Andrew Fois  
Assistant Attorney General

## FORFEITURE ACT OF 1996

## SECTION-BY-SECTION ANALYSIS

## Title I

## Section 101 Time for Filing Claim; Waiver of Cost Bond

Under current law, a claimant may file a claim and bond to convert an administrative forfeiture to a judicial one at any time after the property is seized. United States v. \$52,800 in U.S. Currency, 33 F.3d 1337 (11th Cir. 1994). But the claim must be filed not later than 20 days from the date of first publication of notice of forfeiture. This requirement, which is applicable to all civil forfeitures based on the customs laws, see 19 U.S.C. § 1608, is much more restrictive than its counterpart in the criminal forfeiture statutes, and has been criticized for giving property owners too narrow an opportunity to exercise their right to a "day in court."

The criminal forfeiture statutes give claimants 30 days from the final date of publication of the notice of forfeiture to file a claim. See e.g. 18 U.S.C. § 1963(1)(2). This procedure represents a reasonable compromise between the property owner's interest in having a fair opportunity to file a claim in a forfeiture proceeding and the government's interest in expediting the forfeiture process and avoiding unnecessary storage and maintenance costs in the vast majority of forfeiture cases in which no claim is ever filed. Accordingly, section 1608 is amended to replace the 20-day rule with the 30-day rule that governs the filing of claims in criminal forfeiture cases.

In filing the claim, the claimant will have to describe the nature of his or her ownership interest in the property, and how and when it was acquired. This minimal requirement is necessary to discourage the filing of spurious or baseless claims; but it is not intended to place on the seizing agency any duty to evaluate the merits of the claim. To the contrary, the seizing agency will simply transfer the claim to the United States Attorney to take whatever action is appropriate under the law.

The amendment also amends the cost bond requirement presently set forth in 19 U.S.C. § 1608 to make it clear that no bond is required in forma pauperis cases as long as the petition is properly filed with all supporting information. In addition, the amendment authorizes the Attorney General and the Secretary of the Treasury to waive or reduce the cost bond requirement with respect to matters within their respective jurisdiction in categories of cases other than those involving indigency or substantial hardship. This provision will give the Attorney General and the Secretary the opportunity to review the policy reasons for requiring a cost bond and to waive or reduce the bond if those reasons do not apply in a given category of cases.

The amendment also amends current law by allowing the seizing agency to turn the case over to the U.S. Attorney in any district where venue for the judicial forfeiture action would lie, thus reflecting the enactment of the broadened venue and jurisdiction provision in 1992 which no longer limits venue to the district in which the property is located. United States v. \$633,021.67 in U.S. Currency, 842 F. Supp. 528 (N.D. Ga. 1993); 28 U.S.C. § 1355(b).

Other changes in the wording of § 1608 are merely for the purpose of clarity. Except as explicitly described above, the amendments are not intended to alter the ways in which seizing agencies process administrative forfeitures or turn them over to the U.S. Attorney when a claim and cost bond are filed.

#### Section 102 Jurisdiction and Venue

Historically, courts had in rem jurisdiction only over property located within the judicial district. Since 1986, however, Congress has enacted a number of jurisdictional and venue statutes permitting the courts to exercise authority over property located in other districts under certain circumstances. See 28 U.S.C. § 1355(b) (authorizing forfeiture over property in other districts where act giving rise to the forfeiture occurred in district where the court is located); 18 U.S.C. § 981(h) (creating expanded venue and jurisdiction over property located elsewhere that is related to a criminal prosecution pending in the district); 28 U.S.C. § 1355(d) (authorizing nationwide service of process in forfeiture cases)-----

Many older statutes and rules, however, still contain language reflecting the old within-the-district requirements. These technical amendments bring those provisions up to date in accordance with the new venue and jurisdictional statutes. Indeed, several courts have already held that nationwide service of process provisions necessarily override Rule E(3)(a). See United States v. Parcel I, Beginning at a Stake, 731 F. Supp. 1348, 1352 (S.D. Ill. 1990); United States v. Premises Known as Lots 50 & 51, 681 F. Supp. 309, 313 (E.D.N.C. 1988). The amendment is therefore intended merely to remove any ambiguity resulting from Congress's previous omission in conforming Rule E and the other amended provisions to § 1355(d) as they apply to forfeiture cases.

#### Section 103 Judicial Review of Administrative Forfeitures

Administrative forfeitures are generally not subject to judicial review. See 19 U.S.C. § 1609(b) ("a declaration of forfeiture under this section shall have the same force and effect as a final decree and order of forfeiture in a judicial forfeiture proceeding in a district court"). Thus, if a claimant fails to file a claim opposing an administrative forfeiture



action, he may not subsequently ask a court to review the declaration of forfeiture on the merits. Linarez v. Department of Justice, 2 F.3d 208, 213 (7th Cir. 1993) ("A forfeiture cannot be challenged in district court under any legal theory if the claims could have been raised in an administrative proceeding, but were not.").

Fundamental fairness, however, requires that a claimant have the opportunity to attack an administrative forfeiture on the ground that he did not file a timely claim because the government failed to provide him with notice of the administrative action. In such cases, it is appropriate for a court to determine if the government complied with the statutory notice provisions set forth in § 1607, and if not, to allow the claimant to file a claim in accordance with § 1608 notwithstanding the expiration of the claims period. See United States v. Woodall, 12 F.3d 791, 793 (8th Cir. 1993).

Under current law, however, it is unclear what statute gives the district courts jurisdiction to review due process challenges to administrative forfeiture; indeed, plaintiffs have attempted to base claims on a variety of provisions including the Tucker Act, 28 U.S.C. § 1346(a)(2); the Federal Tort Claims Act, 28 U.S.C. § 1346(b); the Administrative Procedures Act, 5 U.S.C. § 702; Rule 41(e) of the Federal Rules of Criminal Procedure; 28 U.S.C. § 1356; and the Fourth and Fifth Amendments to the Constitution. See Wright v. United States, \_\_\_ F. Supp. \_\_\_, 1995 WL 649560 (S.D.N.Y. Nov. 3, 1995). This has led to widespread confusion as different procedures are applied in different cases, including different statutes of limitations depending on the statute employed. See Williams v. DEA, 51 F.3d 732 (7th Cir. 1995) (applying two-year statute of limitations but noting that the contours of the exercise of the court's equitable jurisdiction are "largely undefined"); Demma v. United States, 1995 WL 642831 (N.D. Ill. Oct. 31, 1995) (applying six-year statute of limitations to Tucker Act theory).

This amendment establishes a uniform procedure for litigating due process issues in accordance with the leading cases. See Toure v. United States, 24 F.3d 444 (2d Cir. 1994); Woodall, supra. Under this procedure, which is intended to be the exclusive procedure for challenging administrative forfeiture declarations, a claimant who establishes that the government failed to comply with the statutory notice requirements would be entitled to have the administrative forfeiture set aside so that he may file a claim and cost bond and force the government to initiate a judicial forfeiture action. If the property itself has already been disposed of, the claim would be made against a sum of money of equivalent value. See Republic National Bank v. United States, 113 S. Ct. 554 (1992). To invoke the jurisdiction of the district court under this provision, an action to set aside a declaration of forfeiture would have to be filed within

two years of the last date of publication of notice of the forfeiture of the property.

As the appellate courts have held, the review of an administrative forfeiture under this section is limited to whether notice was adequate. Toure, 24 F.3d at \_\_\_\_\_. The claimant would not be entitled to use this section to seek review of the administrative forfeiture decree on the merits; nor could the claimant seek relief under this section if, notwithstanding the defect in the government's compliance with the notice provision, the claimant had actual notice of the seizure from some other source, or was actually present when the property was seized and knew that it would be forfeited. See United States v. Giovanelli, 807 F. Supp. 351 (S.D.N.Y. 1992) (claimant who had actual knowledge of the forfeiture cannot sit on his claim and then argue that the government's efforts to provide notice were inadequate), rev'd 998 F.2d 116 (2d Cir. 1993); United States v. One 1987 Jeep Wrangler, 972 F.2d 472 (2d Cir. 1992) (lack of publication did not amount to violation of due process where claimant had actual knowledge of the seizure); Lopes v. United States, 862 F. Supp. 1178, 1188 (S.D.N.Y. 1994) (where there is actual notice of an impending forfeiture, there is no violation of due process); U-Series International Service v. United States, 1995 WL 649932 (S.D.N.Y. Nov. 6, 1995) (same).

The limitations in this section are applicable only to actions to set aside forfeiture decrees, and do not apply to actions against agencies for damages relating to the loss or destruction of seized property.

#### Section 104 Judicial Forfeiture of Real Property

This amendment makes all real property "not subject to section 1607," see 19 U.S.C. § 1610, and thereby requires its judicial forfeiture rather than permitting the forfeiture to proceed administratively. The amendment provides added assurance that the requirements of due process that attend forfeitures of residences and business real estate will be observed.

#### Section 105 Preservation of Arrested Real Property

Rule E(4)(b) of the Supplemental Rules for Certain Admiralty and Maritime Claims governs the service of arrest warrants in rem in most civil forfeiture cases. The Rule provides that certain tangible property, including real property, may be arrested without seizing the property and displacing the owners or occupants. Commonly in such cases, the marshal or other person executing the warrant posts the warrant in a conspicuous place and leaves a copy of the forfeiture complaint with the person in possession or his agent. The government may also file a lis pendens to apprise all interested persons of the pendency of the forfeiture action. See United States v. James Daniel Good Real

Property, 114 S. Ct. 492 (1993); United States v. Twp. 17 R 4, 970 F.2d 984 (1st Cir. 1992).

This procedure is preferable in many cases to the actual seizure of the property because it permits the owners or occupants of the property to remain in possession of the property during the pendency of the forfeiture action. Government agents are sometimes reluctant to follow this procedure, however, because of legitimate concerns about the destruction or removal of the property or its contents by the persons in possession. The amendment is intended to address these concerns and thereby to encourage the use of the least intrusive means of arresting property by explicitly authorizing and directing the courts to issue any order necessary to prevent such diminution in the value of the property, including the value of the contents of the premises and any income, such as rents, generated by the property.

#### Section 106 Amendment to Federal Tort Claims Act Exceptions

The Federal Tort Claims Act currently bars claims arising from the detention of "goods and merchandise" by law enforcement officers in certain circumstances. See 28 U.S.C. § 2680(c). In Kurinsky v. United States, 33 F.3d 594 (6th Cir. 1994), the court limited this provision to cases involving the enforcement of the customs and excise laws, thus exposing law enforcement agencies to liability when property is detained in other circumstances. This is of particular concern to the United States Marshals Service which is responsible for the detention of property in a variety of circumstances not connected to the customs and excise laws.

The amendment corrects the problem identified in Kurinsky by expanding § 2680(c) to cover any property detained by any law enforcement officer performing any official law enforcement function. In addition, however, this section exempts from the § 2680(c) exception (and thereby allows) those tort claims that are based on damages to property while the property is in law enforcement custody for the purpose of forfeiture.

This proposal addresses a legitimate concern that the law provide a remedy for citizens whose property is seized and is damaged or lost while it is in the possession of a government agency. This concern only applies, however, if the property is seized for the purpose of forfeiture but is not ultimately found to be subject to forfeiture. A pending forfeiture proceeding against seized property has the potential to make the related property damage claim moot. Therefore, the proposal makes clear that the claims would be permitted only if no forfeiture action is filed, or after forfeiture litigation is complete. The amendment also makes clear that this provision is limited to instances where property was seized for the purpose of

forfeiture. It does not apply in the types of routine customs cases that are exempted from the Tort Claims Act under current law.

#### Section 107 Pre-Judgment Interest

This amendment clarifies the law regarding the government's liability for pre-judgment interest in a forfeiture case that results in the entry of judgment for the claimant. Because the United States has not waived sovereign immunity, it is generally not liable for pre-judgment interest in forfeiture cases. See Library of Congress v. Shaw, 478 U.S. 310, 311 (1986) (the government is not liable for interest on seized currency "in the absence of an express waiver of sovereign immunity from the award of interest"). Some courts have held, however, that sovereign immunity is not implicated when a court orders the government to disgorge benefits actually received as a result of the seizure of the claimant's property. See United States v. \$277,000 U.S. Currency, \_\_\_ F.3d \_\_\_, 1995 WL 675831 (9th Cir. Nov. 15, 1995); County of Oakland v. VISTA Disposal, Inc., \_\_\_ F. Supp. \_\_\_ (E.D. Mich. Sept. 26, 1995).

The amendment adopts the reasoning of these courts and provides that notwithstanding the absence of a waiver of sovereign immunity, the United States will disgorge any money actually received as a result of investing seized property in an interest-bearing account or monetary instrument. The amendment makes clear, however, that the government is liable only for funds actually received; it is not liable for the interest that could have been realized had the seized funds been invested at a higher rate or for a longer period of time. Nor is the government required to disgorge any intangible benefits. In particular, one court suggested that the government had to disgorge an amount of money equal to any savings the government enjoyed by virtue of not having to borrow money to finance the national debt as long as it held the seized property. \$277,000, supra. Under the amendment, liability for such intangible benefits is precluded.

#### Subtitle B -- Civil Forfeiture Investigations

##### Section 121 Trial Procedure for Civil Forfeiture

This section enacts a comprehensive set of procedures governing civil forfeiture cases under most federal statutes to be codified at 18 U.S.C. § 987. Modeled to a large extent on model civil forfeiture statute produced by the President's Commission on Model State Drug Laws, see Commission Forfeiture Reform Act ("CFRA"), it replaces the references to the customs laws that presently govern judicial proceedings in civil forfeiture cases. See 19 U.S.C. § 1615.

Subsection (a) provides that the Attorney General may file a civil forfeiture action in a district court under any statute for which civil forfeiture is authorized. In most cases, the filing of the complaint will follow the initiation of an administrative forfeiture under the customs laws, and the referral of the case to the U.S. Attorney when someone files a claim and cost bond pursuant to 19 U.S.C. § 1608. This is the same procedure as exists under current law, and would continue to be the normal procedure.

The complaint would be filed in the manner set forth in Rules C and E of the Federal Rules of Civil Procedure, Supplemental Rules for Certain Admiralty and Maritime Claims. See 28 U.S.C. § 2461(b). Because the provisions of the customs laws will no longer apply to the judicial forfeiture proceedings, the requirement that the Attorney General have probable cause for the initiation of a forfeiture action would not apply. See United States v. \$191,910.00 in U.S. Currency, 16 F.3d 1051 (9th Cir. 1994). Instead, the Attorney General could file the forfeiture action under the same criteria that apply to the initiation of any other civil enforcement action under federal law. The government would, of course, have to have probably cause and in most cases a warrant before it could seize any property. See seizure warrant provisions, infra.

Where Congress has authorized both criminal and civil forfeiture for the same offense, the Attorney General would have the discretion to determine whether to institute a civil forfeiture action by filing a complaint, ~~or~~ a criminal action by including a forfeiture count in an indictment, information or criminal complaint. Where Congress has enacted a criminal forfeiture statute and a criminal prosecution is pending, it is usually more efficient to combine the forfeiture action with the criminal prosecution. But the civil forfeiture laws permit the government to bring forfeiture actions separate from and in addition to criminal prosecutions where the Attorney General determines that it is appropriate to do so. This is frequently the case where the criminal defendant is a fugitive, where the government's investigation regarding the forfeiture is not complete at the time the criminal indictment is filed, or where third party interests in the property must be adjudicated. Moreover, where Congress has not enacted a criminal forfeiture provision for a given offense, parallel civil and criminal cases are unavoidable. Thus, the statute authorizes the Attorney General to file a civil forfeiture action and a criminal indictment with respect to the same offense.

Subsection (b) deals with situations in which a law enforcement agency has previously seized property for forfeiture but the forfeiture must be handled judicially instead of administratively either because the claimant has filed a claim and cost bond under the customs laws, see 19 U.S.C. § 1608, or

because the customs laws do not permit an administrative forfeiture of the particular property, see 19 U.S.C. § 1607 (limiting administrative forfeitures generally to personal property valued at less than \$500,000). The statute provides that in such cases, the Attorney General must determine whether to file a forfeiture action as soon as practicable.

The statute avoids setting a definite time limit because there will be cases where the premature filing of a forfeiture action could adversely affect an ongoing criminal investigation. In particular, it is appropriate for the Attorney General to take into account the impact the filing of the civil case might have on on-going undercover operations and the disclosure of evidence being presented to a grand jury.

Subsection (c) provides for the filing of a claim and answer by the claimant in the manner prescribed in Rule C of the Admiralty Rules. In addition, the statute sets forth certain requirements regarding the description of the claimant's ownership interest in the property that must be included in the claim. These are the same criteria currently required of a claimant in a criminal forfeiture case. See 18 U.S.C. § 1963(1)(3); CFRA, § 16(d).

Subsection (d) provides that the claimant has the threshold burden of establishing his or her standing to contest the forfeiture action. The standing provision parallels the standing provision for third parties challenging criminal forfeitures. See 18 U.S.C. § 1963(1)(2); United States v. BCCI Holdings (Luxembourg) S.A., 833 F. Supp. 9 (D.D.C. 1993), aff'd 46 F.3d 1185 (D.C. Cir. 1995). Under that rule, the claimant must establish that he has an ownership interest in the property, including a lien, mortgage, recorded security device or valid assignment of an ownership interest. In other words, for standing purposes a claimant must establish the same ownership interest he or she must establish to assert an innocent ownership defense under the uniform innocent owner statute, 18 U.S.C. § 983. General creditors of the property owner do not have standing, see BCCI Holdings, supra, nor do nominees who exercise no dominion and control over the property, see United States v. One 1990 Chevrolet Corvette, 37 F.3d 421 (8th Cir. 1994). To the extent that some courts have found standing based on mere possession, those cases are overruled by the new statute. See, e.g., United States v. \$191,910.00 in U.S. Currency, 16 F.3d 1051 (9th Cir. 1994) (holding that it is sufficient for standing purposes for claimant to assert that he is holding money for a friend).

The statutes also creates a mechanism for litigating standing issues pre-trial. In the pre-trial standing hearing, the government has the burden of challenging the claimant's standing in the first instance, and the claimant has the ultimate

burden to establish standing once the issue has been raised. The pre-trial hearing is intended only to resolve the standing issues, and is not intended to be a mini-trial in which the government's case-in-chief and the claimant's affirmative defenses are litigated.

Subsection (e) follows the model state rule in placing the burden on the government to prove by a preponderance of the evidence that the property is subject to forfeiture, and in placing the burden on the claimant, by the same standard, to prove an affirmative defense. See CFRA, § 16(g). This is a major change from current law which places the burden of proof on the claimant on both issues. See 19 U.S.C. § 1615.

Under current law, a law enforcement officer may seize property based on probable cause to believe that the property is subject to forfeiture. If, upon publication of the intent to forfeit the property and the sending of notice to persons with an interest therein, no one files a claim to the property, it may be forfeited based on the same showing of probable cause that supported the initial seizure.

If a claim is filed, the U.S. Attorney must file a complaint in the district court. At a trial on the forfeiture issues, the property is forfeited if the judge or jury finds, by a preponderance of the evidence, that the property is subject to forfeiture under the applicable statute. The burden of establishing that the property is not subject to forfeiture is on the person filing the claim. 19 U.S.C. § 1615.

Many courts have criticized this latter aspect of forfeiture procedure, and have insisted on a presentation of evidence by the government at trial that effectively places the burden on the government to establish the forfeitability of the property. See United States v. \$30,600, 39 F.3d 1039 (9th Cir. 1994); United States v. \$31,990 in U.S. Currency, 982 F.2d 851 (2d Cir. 1993). Accordingly, subsection (e) changes current law to provide that the government, not the claimant, bears the burden of proof regarding the forfeitability of the property, while the claimant retains the burden of proof regarding any affirmative defenses. See United States v. One Parcel . . . 194 Quaker Farms Road, \_\_\_ F.3d \_\_\_, 1996 WL 292036 (2d Cir. Jun. 4, 1996) (claimants asserting affirmative innocent owner defenses have "unique access to evidence regarding such claims;" they know what facts were brought to their attention and "why facts of which owners are generally aware were unknown to them;" accordingly, placing the burden of proof on the claimant regarding the affirmative defense is appropriate). While the allocation of the burden of proof would change, the standard of proof -- i.e., preponderance of the evidence, would remain the same as it is under current law.

Moreover, the change in the burden of proof would apply only to judicial forfeitures; it would have no effect on the seizure of property based on probable cause, or the administrative or civil forfeiture of the property based solely on the showing of probable cause if no one files a timely claim to the property.

Subsection (e) also specifies that when the government's theory of forfeiture is that the property facilitated the commission of a criminal offense, see, e.g. 21 U.S.C. §§ 881(a)(4) and (7), the government must establish that there was a substantial connection between the property and the offense. This codifies the majority rule as expressed in United States v. One 1986 Ford Pickup, 56 F.3d 1181 (9th Cir. 1995); United States v. 1966 Beechcraft Aircraft, 777 F.2d 947, 953 (4th Cir. 1985); United States v. One 1976 Ford F-150 Pick-Up, 769 F.2d 525, 527 (8th Cir. 1985); United States v. 1972 Chevrolet Corvette, 625 F.2d 1026, 1029 (1st Cir. 1980); and United States v. 100 Chadwick Drive, \_\_\_ F. Supp. \_\_\_, 1995 WL 786581 (W.D.N.C. Nov. 20, 1995). The Second, Fifth and Seventh Circuits currently require a lesser degree of connection between the property and the criminal activity underlying the forfeiture. See United States v. Daccarett, 6 F.3d 37 (2d Cir. 1993) (gov't must demonstrate only a "nexus," not a "substantial connection"); United States v. 1990 Toyota 4Runner, 9 F.3d 651, 653-54 (7th Cir. 1993); United States v. 1964 Beechcraft Baron Aircraft, 691 F.2d 725, 727 (5th Cir. 1982).

Subsection (f) requires claimants to set forth all affirmative defenses in the initial pleadings. This is consistent with Rule 8(c) and other provisions of the Fed. R. Civ. P. which require a party to assert his or her affirmative defenses in the initial pleadings and to submit to discovery on those matters pre-trial. The balance of the subsection is intended only to make clear that once trial has commenced, a claimant will not be required to assume either the burden of proof regarding an affirmative defense or the burden of production of evidence until the government has establish a prima facie case in its case-in-chief.

Subsection (g) establishes rules regarding motions to suppress seized evidence. It recognizes that a claimant must be afforded some remedy if the government's initial seizure of the property was illegal for lack of probable cause and the claimant has standing to object to the 4th Amendment violation. See Rawlings v. Kentucky, 448 U.S. 98 (1980). The statute codifies the general rule that the remedy in such cases is the suppression of the illegally seized evidence. In such cases, civil forfeiture law is analogous to the criminal law which provides for the suppression of illegally seized evidence while permitting the government to go forward with its case based on other admissible evidence. See United States v. \$7,850.00 in U.S. Currency, 7 F.3d 1355 (8th Cir. 1993); United States v. A Parcel



of Land (92 Buena Vista), 937 F.2d 98 (3rd Cir. 1991), aff'd on separate issue 113 S. Ct. 1126 (1993); United States v. Premises and Real Property at 4492 S. Livonia Rd., 889 F.2d 1258, 1268 (2d Cir. 1989); United States v. \$67,220.00 in United States Currency, 957 F.2d 280, 284 (6th Cir. 1992); United States v. 155 Bemis Road, 760 F. Supp. 245, 251 (D.N.H. 1991); United States v. Certain Real Property Located on Hanson Brook, 770 F. Supp. 722, 730 (D. Me. 1991); United States v. \$633,021.67 in U.S. Currency, 842 F. Supp. 528 (N.D. Ga. 1993).

Outside of the context of a motion to suppress, the claimant has no right to any preliminary hearing on the status of the government's evidence, nor any right to move to dismiss a case for lack of evidence pre-trial. Pre-trial dispositive motions are limited to those based on defects in the pleadings, as set forth in Rule 12 of the Federal Rules of Civil Procedure. A claimant may, of course, move for the entry of summary judgment pursuant to Rule 56, Fed. R. Civ. P., once discovery is complete.

Subsection (h) authorizes the use of hearsay at pre-trial hearings. This is consistent with the present rule regarding criminal forfeitures. See 18 U.S.C. § 1963(d)(3) permitting hearsay to be considered in pre-trial hearings in criminal forfeiture cases. The statute also codifies McCray v. Illinois, 386 U.S. 300 (1967) (in pre-trial motion to suppress, informer's identity need not be revealed in a pre-trial hearing if the government can establish, through another person's testimony, that the informer is reliable and the information credible), and makes it applicable to all pre-trial hearings in civil forfeiture cases. The term "hearing" means either an oral hearing or a determination on written papers, as provided in Rule 43(e), Federal Rules of Civil Procedure. Hearsay will not be admissible at trial except as provided in the Federal Rules of Evidence.

Subsection (i) gives the government the benefit of certain adverse inferences when the claimant invokes the Fifth Amendment at trial or during the discovery phase of a forfeiture case. This is consistent with current case law regarding adverse inferences, see Baxter v. Palmigiano, 425 U.S. 308, 318 (1976); United States v. Ianniello, 824 F.2d 203, 208 (2d Cir. 1987); United States v. A Single Family Residence, 803 F.2d 625, 629 n.4 (11th Cir. 1986); United States v. \$75,040.00 in U.S. Currency, 785 F. Supp. 1423, 1429 (D. Or. 1991); but see United States v. Real Property (Box 137-B), 24 F.3d 845 (6th Cir. 1994), and is necessary, given the government's burden of proof, to prevent claimants from defeating forfeiture by refusing to reveal the source of property or its nexus to a criminal offense. See United States v. Certain Real Property . . . 4003-4005 5th Avenue, 55 F.3d 78 (2d Cir. 1995) ("If it appears that a litigant has sought to use the Fifth Amendment to abuse or obstruct the discovery process, trial courts, to prevent prejudice to opposing parties, may adopt remedial procedures or impose sanctions.").

Also consistent with current law, the provision precludes the government from relying solely on the adverse inference to establish its burden of proof. LaSalle Bank Lake View v. Sequaban, 54 F.3d 387 (7th Cir. 1995).

Subsection (j), relating to stipulations, ensures that the government will have an opportunity to present the facts underlying the forfeiture action to the jury so that the jury understands the context of the case even if the claimant concedes forfeitability and relies exclusively on an affirmative defense.

Subsection (k) is taken directly from Section 15(b) of CFRA. It authorizes the court to take whatever action may be necessary to preserve the availability of property for forfeiture. Although not limited to such instances, it will apply mainly in cases where the government has not seized the subject property in advance of trial. See United States v. James Daniel Good Property, 114 S. Ct. 492 (1993) (government need not seize real property, but may use restraining orders to preserve its availability at trial).

Subsection (l) is also derived from CFRA. See § 15(f). It authorizes the court to make a pre-trial determination of whether probable cause exists to continue to hold property for trial in a civil forfeiture case where the claimant alleges that the property is needed to pay the costs of his or her defense in a criminal case. The court will be called upon to make such a pre-trial determination only where the defendant establishes that he has no other funds available to hire criminal defense counsel. All of this is consistent with existing case law. See United States v. Michelle's Lounge, 39 F.3d 684 (7th Cir. 1994). In addition, the statute provides that in determining whether the government has probable cause for the forfeiture, the court may not consider any affirmative defenses. Such a rule is necessary to prevent the pre-trial probable cause hearing from turning into a rehearsal of the criminal case which is what would happen if the defendant were permitted to assert that he was an innocent owner of the property and the government was required to rebut that assertion.

If the court determines that probable cause does exist for the forfeiture, the property will remain subject to forfeiture notwithstanding the claimant's criminal defense costs. See United States v. Monsanto, 491 U.S. 600 (1989). But if the court determines that there is no probable cause for the forfeiture of particular assets, it is required to release those assets to the claimant.

Subsection (m) provides that Eighth Amendment issues are to be resolved by the court alone following return of the verdict of forfeiture.

The appropriate procedure for determining Eighth Amendment issues has confused the courts and litigants since the Supreme Court decided Austin v. United States, \_\_\_ U.S. \_\_\_, 113 S. Ct. 2801 (1993) and Alexander v. United States, \_\_\_ U.S. \_\_\_, 113 S. Ct. 2766 (1993) (holding that Excessive Fines Clause of the Eighth Amendments may apply to civil and criminal forfeitures respectively). See, e.g., United States v. Premises Known as RR #1, 14 F.3d 864, 876 (3d Cir. 1994) (noting that "neither Austin nor Alexander addresses the question of whether judge or jury decides if a civil forfeiture is excessive" and suggesting that in view of the "present uncertainty of the law," the issue be submitted to the jury by special interrogatory and that the answer be treated as "non-binding" on the court).

The subsection provides that the Eighth Amendment determination is to be made after return of the verdict of forfeiture. This is consistent with cases holding that the Eighth Amendment's guarantee against Cruel and Unusual Punishment does not apply until after a verdict of guilt is returned. See Hewitt v. City of Truth or Consequences, 758 F.2d 1375, 1377 n.2 (10th Cir.), cert. denied, 474 U.S. 844 (1985) ("The Eighth Amendment does not apply until after an adjudication of guilt"); see also Ingraham v. Wright, 430 U.S. 651, 671-72 n.40, 97 S. Ct. 1401, 1412-13 n.40 (1977). It also makes sense because it is premature to make excessiveness determination before the court determines if, and to what extent, property is forfeitable. United States v. One Parcel, . . . 13143 S.W. 15th Lane, 872 F. Supp. 968 (S.D. Fla. 1994); United States v. \$633,021.67 in U.S. Currency, 842 F. Supp. 528 (N.D. Ga. 1993) (denying pre-trial motion to dismiss on excessiveness grounds).

The subsection also provides that Eighth Amendment determinations are to be made by the court alone and not by the jury. Again, there has been some confusion in the case law on this issue. The Supreme Court has recognized that the right to a jury trial extends only to factual determinations of guilt or innocence.<sup>1</sup> Eighth Amendment determinations, by contrast, are made by the court alone,<sup>2</sup> generally after the jury has been discharged. This is consistent with the view that constitutional

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<sup>1</sup>Cabana v. Bullock, 474 U.S. 376, 384 (1986).

<sup>2</sup> Id., 474 U.S. at 697 (determinations of whether Eighth Amendment has been violated "has long been viewed as one that a trial judge or an appellate court is fully competent to make" and the violation "can be remedied by any court that has the power to find the facts and vacate the sentence"). See also Electro Services, Inc. v. Exide Corp., 847 F.2d 1524, 1530-31 (11th Cir. 1988) (dictum: "we believe an appropriate test would be whether the award is so large as to shock the judicial conscience" (emphasis added)).

issues generally present questions of law for resolution by the court.<sup>3</sup>

Finally, the subsection provides that, where an Eighth Amendment violation is found, the court should adjust the forfeiture so as to meet constitutional standards. Again, this provision is consistent with Eighth Amendment case law. See United States v. Sarbello, 985 F.2d 716, 718 (3d Cir. 1993) ("We hold that the court may reduce the statutory penalty in order to conform to the eighth amendment"); United States v. Busher, 817 F.2d 1409, 1415 (9th Cir. 1987); United States v. Bieri, 21 F.3d 819 (8th Cir. 1994); United States v. Chandler, 36 F.3d 358 (4th Cir. 1994).

This subsection is purely procedural in nature. It is not intended to define any standard upon which the excessiveness determination under Austin is to be made nor does it expand the remedies available to the claimant beyond those required by the Eighth Amendment.

Subsection (n) provides that the procedures set forth in the new statute will apply to all civil judicial forfeitures under title 18, the Controlled Substances Act and the Immigration and Naturalization Act. It will not apply to customs forfeitures or other forfeitures undertaken by the U.S. Customs Service except those pursuant to offenses codified in titles 8, 18 and 21 of the U.S. Code.

Subsection (o) provides that a ~~civil~~ forfeiture action does not abate because of the death of any person. Notwithstanding recent decisions of the Supreme Court holding that civil forfeitures may be considered punitive for certain constitutional purposes, a civil forfeiture is in rem in nature; therefore the death of a person who did or could have filed a claim to the property is irrelevant to the government's right to forfeit the property. This provision clarifies any confusion that might exist in the law on this point. See United States v. One Hundred Twenty Thousand Seven Hundred Fifty One Dollars (\$120,751.00) in United States Currency, Civ. No. 4:94CV 2235 LOD (E.D. Mo. Oct. 30, 1995) (dismissing forfeiture action against drug proceeds under 21 U.S.C. § 881(a)(6) on the theory that the forfeiture was punitive in nature and accordingly abated when the drug trafficker from whom the proceeds were seized was murdered).

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<sup>3</sup>Quick v. Jones, 754 F.2d 1521, 1523 (9th Cir. 1984) (question of what process is due is a question of law); Burris v. Willis Independent School District, 713 F.2d 1087, 1094 (1983) ("The question of whether specific conduct or speech is protected by the first amendment is ultimately a question of law").

The balance of this section establishes certain rebuttable presumptions intended to assist the government in meeting its burden of proof in certain drug and money laundering cases. Most important, the section establishes rebuttable presumptions applicable to money laundering forfeitures for violations of 18 U.S.C. § 1956 and 1957 which frequently involve sophisticated efforts to transfer, by wire or other means, large sums of money through shell corporations or bank secrecy jurisdictions in a manner calculated to avoid detection. In such cases, a rebuttable presumption is particularly necessary to allow the government to overcome the efforts made to obscure the true nature of the transaction and to force the claimant to come forward with evidence regarding the source of the money. The definition of "shell corporation" is taken from Financial Action Task Force recommendation 13 which defines "domiciliary companies," a diplomatic term for shell corporations.

A presumption will also apply to the forfeiture of the proceeds of foreign drug offenses under 18 U.S.C. § 981(a)(1)(B).

#### Section 122 Time for Filing Claim and Answer

This section expands the time limit for filing a claim in a judicial proceeding. Current law requires the claimant to file the claim within 10 days of the service of the arrest warrant in rem on the property. Because the claimant frequently has no notice of the arrest of the property, starting the 10 day period from the date of the arrest can impose an undue hardship. Rule C of the Admiralty Rules is therefore amended to start the time period for filing a claim from the date of the receipt of actual notice of the arrest, or the last date of publication of the arrest pursuant to Rule C(4), whichever is earlier, and to extend the time from 10 days to 20 days. The Admiralty Rule will apply in civil forfeiture cases notwithstanding the provisions in the 1993 amendments to Rule 4.1 of the Federal Rules of Civil Procedure.

#### Section 123 Uniform Innocent Owner Defense

The Constitution does not require any protection for innocent owners in civil forfeiture statutes. Bennis v. Michigan, 116 S. Ct. \_\_\_, 1996 WL 88269 (Mar. 4, 1996). Because civil forfeitures are directed against the property and not against the property owner, the property may be forfeited whether the owner was aware of, or consented to, the illegal use of the property or not. Id.

Congress, however, can afford property owners greater protection than the Constitution requires. Since 1984, Congress has included innocent owner provisions in the most commonly used civil forfeiture statutes. See 21 U.S.C. § 881(a)(4), (6)(7); 18 U.S.C. § 981(a)(2). Moreover, the Department of Justice, as a

matter of policy, does not seek to forfeiture property belonging to innocent owners. See Policy Directive 92-8 (1992).

Nevertheless, the law in this area remains confused. The innocent owner provisions in the drug and money laundering statutes are inconsistent with each other, and many forfeiture statutes contain no innocent owner provision. For example, § 881(a)(4) (forfeiture of vehicles used to transport drugs), protects an owner whose property was used without his "knowledge, consent or willful blindness." Sections 881(a)(6) (drug proceeds) and 881(a)(7) (real property facilitating drug offenses), on the other hand, contain no willful blindness requirement; they protect those who demonstrate lack of "knowledge or consent." And 18 U.S.C. § 981(a)(2) (property involved in money laundering), requires only a showing of lack of "knowledge." The forfeiture statute for gambling offenses, 18 U.S.C. § 1955(d), contains no innocent owner defense at all.

The courts also differ as to what these defenses mean. The Ninth Circuit interprets "knowledge or consent" to mean that a person must prove that he or she did not have knowledge of the criminal offense and did not consent to that offense. See United States v. One Parcel of Land, 902 F.2d 1443, 1445 (9th Cir. 1990) ("knowledge" and "consent" are conjunctive terms, and claimant must prove lack of both). Thus, in the Ninth Circuit, a wife who knows that her husband is using her property to commit a criminal offense cannot defeat the forfeiture of that property even if she did not consent to the illegal use. But the Second, Third and Eleventh Circuits hold that a person who has knowledge that his property is being used for an illegal purpose may nevertheless avoid forfeiture if he shows that he did not consent to that use of his property. See United States v. 141st Street Corp., 911 F.2d 870, 877-78 (2nd Cir. 1990) (landlord who knew building was being used for drug trafficking had opportunity to show he did not consent to such use), cert. denied, 111 S. Ct. 1017 (1991); United States v. Parcel of Real Property Known as 6109 Grubb Road, 886 F.2d 618, 626 (3rd Cir. 1989) (wife who knew of husband's use of residence for drug trafficking had opportunity to show she did not consent to such use); United States v. One Parcel of Real Estate at 1012 Germantown Road, 963 F.2d 1496 (11th Cir. 1992).

The rule is entirely different for money laundering and bank fraud cases. Because § 981(a)(2) lacks a "consent" requirement and contains only a "lack of knowledge" requirement, there is no burden on the claimant to show that he or she took any steps at all to avoid the illegal activity. Lack of knowledge alone is sufficient. United States v. Real Property 874 Gartel Drive, \_\_\_ F.3d \_\_\_, 1996 WL 125533 (9th Cir. Mar. 22, 1996) (per curiam) (because § 981(a)(2) does not contain a consent prong, "all reasonable steps" test does not apply); United States v. \$705,270.00 in U.S. Currency, 820 F. Supp. 1398, 1402 (S.D. Fla.

1993); United States v. Eleven Vehicles, 836 F. Supp. 1147, 1160 n.16 (E.D. Pa. 1993); but see United States v. All Monies, 754 F. Supp. 1467, 1478 (D. Haw. 1991) (claimant must prove "that he did not know of the illegal activity, did not willfully blind himself from the illegal activity, and did all that reasonably could be expected to prevent the illegal use" of his property); United States v. All Funds Presently on Deposit at American Express Bank, 832 F. Supp. 542 (E.D.N.Y. 1993) (same).

The courts are also divided with respect to the application of the innocent owner defense to property acquired after the crime giving rise to the forfeiture occurred. In the Eleventh Circuit, a person who acquires property knowing that it was used to commit an illegal act is not an innocent owner. United States v. One Parcel of Real Estate Located at 6640 SW 48th Street, 41 F.3d 1448 (11th Cir. 1995) (lawyer who acquires interest in forfeitable property as his fee is not an innocent owner). But in the Third Circuit, the rule is the opposite: a person who knowingly acquires forfeitable property is considered an innocent owner because he could not have consented to the illegal use of the property before he owned it. See United States v. One 1973 Rolls Royce, 43 F.3d 794 (3d Cir. 1994).

In the Rolls Royce case, the court said that if its decision left the innocent owner statute in "a mess," the problem "originated in Congress when it failed to draft a statute that takes into account the substantial differences between those owners who own the property during the improper use and some of those who acquire it afterwards." The court concluded, "Congress should redraft the statute if it desires a different result."

In United States v. A Parcel of Land (92 Buena Vista Ave.), 113 S. Ct. 1126 (1993), the Supreme Court identified another loophole in the statute as it applies to persons who acquire the property after it is used to commit an illegal act. Because, unlike its criminal forfeiture counterpart, 21 U.S.C. § 853(n)(6)(B), the civil statute does not limit the innocent owner defense to persons who purchase the property in good faith, it applies to innocent donees. Justice Kennedy, in a dissenting opinion, noted that this allows drug dealers to shield their property from forfeiture through transfers to relatives or other innocent persons. The ruling, Justice Kennedy said, "rips out the most effective enforcement provisions in all of the drug forfeiture laws," 113 S. Ct. at 1146, and "leaves the forfeiture scheme that is the centerpiece of the Nation's drug enforcement laws in quite a mess." 113 S. Ct. at 1145 (Kennedy, J. dissenting). Justice Stevens, however, writing for the plurality, said that the Court was bound by the statutory language enacted by Congress. "That a statutory provision contains 'puzzling' language, or seems unwise, is not an appropriate reason for simply ignoring the text." 113 S. Ct. at 1135, n.20.

Finally, there is widespread confusion among the courts with respect to the standard that should be used to determine if a person had "knowledge" of or "consented" to the illegal use of his or her property. Some courts equate "knowledge" with "willful blindness" so that a person who willfully blinds himself to the illegal use of his property is considered to have had knowledge of the illegal act. See *Rolls Royce, supra*. But other courts allow a person to show lack of knowledge by showing a lack of actual knowledge. See *United States v. Lots 12, 13, 14 and 15*, 869 F.2d 942, 946-47 (6th Cir. 1989). Most courts focus on the "consent" prong of the defense, and hold that the property owner must "take every reasonable step, and do all that reasonably can be done, to prevent the illegal activity" in order to be considered an innocent owner. See *United States v. 141st Street Corp.*, 911 F.2d 870 (2d Cir. 1990); *United States v. One Parcel of Real Estate at 1012 Germantown Road*, 963 F.2d 1496 (11th Cir. 1992); *United States v. One Parcel of Property (755 Forest Road)*, 985 F.2d 70 (2d Cir. 1993); *United States v. 5.382 Acres*, 871 F. Supp. 880 (W.D. Va. 1994) ("Property owners are required to meet a significant burden in proving lack of consent for they must remain accountable for the use of their property. Unless an owner with knowledge can prove every action, reasonable under the circumstances, was taken to curtail drug-related activity, consent is inferred and the property is subject to forfeiture.").

To remedy the inconsistencies in the statutes, and to ensure that innocent owners are protected under all forfeiture statutes in the federal criminal code, the Justice Department has proposed a Uniform Innocent Owner Defense to be codified at 18 U.S.C. § 983.<sup>4</sup> It applies to all civil forfeitures in titles 8, 18 and 21 and it may be incorporated into other forfeiture statutes as Congress may see fit. Thus, there will no longer be civil forfeiture provisions lacking statutory protection for innocent owners.

Second, the new statute will have two parts dealing respectively with property owned at the time of the illegal offense, and property acquired afterward. In the first category, property owners will be able to defeat forfeiture in two ways: 1) by showing that they lacked knowledge of the offense, or 2) that upon learning of the illegal use of the property, they "did all that reasonably could be expected to terminate such use of the

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<sup>4</sup> For a detailed discussion of all of these issues, and a legislative proposal similar to the one in this bill, see Franze, "Note: Casualties of War?: Drugs, Civil Forfeiture, and the Plight of the 'Innocent Owner,'" *The Notre Dame Law Review*, Vol. 70, Issue 2 (1994) 369-413. See also Cassella, "Forfeiture Reform: A View from the Justice Department," *Journal of Legislation, Notre Dame Law School*, 21:2 (1995).



property." Thus, as the majority of courts now hold, under the second defense a spouse could defeat forfeiture of her property, even if she knew that it was being used illegally, by showing that she did everything that a reasonable person in her circumstances would have done to prevent the illegal use.

Under the first defense, a showing of a lack of knowledge would be a complete defense to forfeiture. But to show lack of knowledge, the owner would have to show that he was not willfully blind to the illegal use of the property. This means that if the government establishes the existence of facts and circumstances that should have created a reasonable suspicion that the property was being or would be used for an illegal purpose, the owner would have to show that he did all that reasonably could be expected in light of such circumstances to prevent the illegal use of the property. See United States v. Property Titled in the Names of Ponce, 751 F. Supp. 1436, 1440 n.3 (D. Haw. 1990) (claimant must show that he did not consent in advance to illegal use of his property even if he proves that he did not actually know whether such illegal use ever occurred).

The statute employs a different formulation of the innocent owner defense in cases involving property acquired after the offense giving rise to the forfeiture. This is necessarily so, because in such cases, the critical issue concerns what the property owner knew or should have known at the time he acquired the property, not what he knew when the crime occurred. 6640 SW 48th Street, supra. So, in the case of after-acquired property, a person would be considered an innocent owner if he establishes that he acquired the property as a bona fide purchaser for value who at the time of the purchase did not know and was reasonably without cause to believe that the property was subject to forfeiture. This means that a purchaser is an innocent owner if in light of the circumstances surrounding the purchase he did all that a person would be expected to do to ensure that he was not acquiring property that was subject to forfeiture.

This provision will be of particular importance in cases involving the acquisition of drug dollars on the black market in South America. In such cases, wealthy persons assist in the laundering of the drug money by purchasing U.S. dollars, or dollar-denominated instruments and send the money to the United States while maintaining ignorance of its source. See United States v. All Monies, 754 F. Supp. 1467 (D. Haw. 1991); United States v. Funds Seized From Account Number 20548408 at Baybank, N.A., 1995 WL 381659 (D. Mass. Jun. 16, 1995) (unpublished). The new statute would put the burden on such individuals to show that they took all reasonable steps to ensure that they were not acquiring drug proceeds.

Limiting the innocent owner defense to "purchasers" in this circumstance tracks the language of the criminal innocent owner

defense, 21 U.S.C. § 853(n)(6)(B), and eliminates the problem identified by Justice Kennedy in 92 Buena Vista.

The remainder of the new statute addresses a number of other concerns that have arisen in the courts under the current law. First, the statute makes clear that under no circumstances may a person other than a bona fide purchaser be considered an innocent owner of criminal proceeds. This avoids a situation that arises in community property states when a spouse claims title to her husband's drug proceeds as marital property.

The statute also defines "owner" to include lienholders and others with secured interests in the subject property, but to exclude, consistent with the prevailing view under current law, general creditors, bailees, nominees and beneficiaries of constructive trusts. See e.g., United States v. One 1990 Chevrolet Corvette, 37 F.3d 421 (8th Cir. 1994) (titled owner lacks standing to contest forfeiture of property over which she exercised no dominion or control); United States v. BCCI Holdings (Luxembourg) S.A., 46 F.3d 1185 (D.C. Cir. 1995) (general creditors and beneficiaries of constructive trusts lack sufficient interest in the property to contest forfeiture); United States v. \$3,000 in Cash, \_\_\_ F. Supp. \_\_\_, 1995 WL 707879 (E.D. Va. Nov. 29, 1995) (person who voluntarily transfers his property to another is no longer the "owner" and therefore lacks standing to contest the forfeiture).

The statute also resolves a split in the courts regarding the disposition of property jointly owned by a guilty person and an innocent spouse, business partner or co-tenant. The statute gives the district court three alternatives: sever the property; liquidate the property and order the return a portion of the proceeds to the innocent party; or allow the innocent party to remain in possession of the property, subject to a lien in favor of the government to the extent of the guilty party's interest.

Finally, the statute contains a rebuttable presumption relating to innocent owner defenses raised by financial institutions that hold liens, mortgages or other secured interests in forfeitable property. The provision, which was suggested by representatives of the financial community, creates the presumption that the institution acted reasonably in acquiring a property interest, or in attempting to curtail the illegal use of property in which it already held an interest, if the institution establishes that it acted in accordance with rigorous internal standards adopted to ensure the exercise of due diligence in making loans and acquiring property interests, and did not have actual notice that the property was subject to forfeiture before acquiring its interest. The government could rebut the presumption by establishing the existence of facts and circumstances that should have put the institution on notice that its ordinary procedures were inadequate.

## Section 124 Stay of Civil Forfeiture Case

This provision is intended to give both the government and the claimant in a civil forfeiture case the right to seek a stay of the forfeiture proceeding in order to protect a vital interest in a related criminal case.

Current law provides that the filing of a related criminal indictment or information shall stay a civil forfeiture proceeding upon the motion of the government and a showing of "good cause." 18 U.S.C. § 981(g); 21 U.S.C. § 881(i). Numerous courts have held that the possibility that the broader civil discovery available to a claimant in a civil case will interfere with the criminal prosecution constitutes "good cause." See United States v. One Single Family Residence Located at 2820 Taft St., 710 F. Supp. 1351, 1352 (S.D. Fla. 1989) (stay granted where "scope of civil discovery could interfere with criminal prosecution"); United States v. Property at 297 Hawley St., 727 F. Supp. 90, 91 (W.D.N.Y. 1990) (good cause requirement satisfied where stay necessary to protect criminal case from "potentially" broad discovery demands of claimant/defendant). Other courts have required the government to demonstrate some specific harm. See United States v. Leasehold Interests in 118 Avenue D, 754 F. Supp. 282, 287 (E.D.N.Y. 1990) ("mere conclusory allegations of potential abuse or simply the opportunity by the claimant to improperly exploit civil discovery . . . will not avail on a motion for a stay").

Recent cases indicate that courts balance multiple factors to determine whether "good cause" justifies a stay requested either by the government or by the claimant. See United States v. All Funds, Monies, Securities, Mutual Fund Shares and Stocks, 162 F.R.D. 4 (D. Mass. 1995) (continuation of stay pending criminal proceedings denied because rationale behind 21 U.S.C. § 881(i) to avoid abuse of civil discovery did not apply where local civil rules required claimant to make disclosures to government before conducting discovery and criminal forfeiture counts in related indictment enabled government to readily avoid double jeopardy concerns); United States v. Section 17 Township, 40 F.3d 320 (10th Cir. 1994) (no appellate jurisdiction under 28 U.S.C. § 1291 or § 1292(a)(1) to review district court's stay based on potential for civil discovery in federal forfeiture action to undermine pending state criminal proceedings and interest in preservation of claimants' Fifth Amendment privilege against self-incrimination); United States v. Four Contiguous Parcels, 864 F. Supp. 652 (W.D. Ky. 1994) (Government did not meet burden of showing "good cause" where government could have avoided prejudice caused by civil discovery by pursuing criminal forfeiture and extension of 18 month delay since seizure raised serious due process concerns); United States v. Lot 5, Fox Grove, 23 F.3d 359 (11th Cir. 1994) (claimant's mere blanket assertion of Fifth Amendment protection against self incrimination in

connection with related criminal case insufficient grounds for stay); additional factors were claimant's stipulation to probable cause, claimant's failure to use the testimony of others to defend against forfeiture, and claimant's failure to explain prejudice from continuation of forfeiture action; In re Phillips, Beckwith & Hall, 896 F.Supp. 553 (E.D.Va. 1995) (denying stay requested by attorney/claimant in forfeiture action against drug proceeds paid as attorney fees where attorney is also target of criminal investigation because stay to accommodate attorney's Fifth Amendment rights would prejudice the government's forfeiture case).

The amendment is intended to give greater guidance to the courts by providing specifically that a stay shall be entered whenever the court determines that civil discovery may adversely affect the ability of the government to investigate or prosecute a related criminal case. It also removes a limitation in the law that currently provides for a stay only after a criminal indictment or information is filed. The reference to "a related criminal investigation" recognizes that civil discovery is at least as likely to interfere with an on-going undercover investigation, the use of court-ordered electronic surveillance, or the grand jury's performance of its duties as with the government's ability to bring a criminal case to trial. The definition of "a related criminal case" and "a related criminal investigation" also make clear that neither the parties nor the facts in the civil and criminal cases need be identical for the two cases to be considered related. Instead, the sum of several factors, which are set forth in ~~the~~ disjunctive, would have to indicate that the two cases were substantially the same. This is consistent with recent cases holding that a stay was authorized under § 881(i) or § 981(g) even if the claimant in the civil case was not one of persons under indictment in the criminal case. See United States v. A Parcel of Realty Commonly Known as 4808 South Winchester, No. 88-C-1312, 1988 WL 107346 (N.D.Ill. Oct. 11, 1988); United States v. All Monies (\$3,258,694.54), No. 89-00382 ACK (D. Hawaii June 6, 1990).

The amendment also gives the claimant an equal opportunity to seek a stay of the civil case in the appropriate circumstances. As mentioned, under current law, only the government may seek a stay of the forfeiture proceeding. Under the amendment, however, a claimant may obtain a stay if the claimant is able to establish that he or she is the subject of an actual, ongoing criminal investigation or prosecution, and that denial of a stay of the civil forfeiture proceeding would infringe upon the claimant's Fifth Amendment rights in the criminal proceeding. This provision protects defendants and individuals under criminal investigation by a grand jury from having the government use the civil forfeiture procedure as a means of forcing the claimant to make a "Hobson's Choice" between defending his property in the civil case and defending his liberty in the criminal one. See

United States v. Certain Real Property, . . . 4003-4005 5th Avenue, 55 F.3d 78 (2d Cir. 1995) (claimant in civil forfeiture cases faces the dilemma of remaining silent and allowing the forfeiture or testifying against the forfeiture and exposing himself to incriminating admissions); United States v. Parcels of Land (Laliberte), 903 F.2d 36 (1st Cir.), cert. denied, 111 S. Ct. 289 (1990) (claimant's insistence on asserting Fifth Amendment rights in civil proceeding could result in dismissal of claim). The amendment is consistent with recent cases in which the courts have stayed civil forfeiture proceedings in order to avoid Fifth Amendment conflicts. See United States v. All Assets of Statewide Autoparts, Inc., 971 F.2d 896 (2d Cir. 1992); United States v. A Certain Parcel of Land, 781 F. Supp. 830, 833 (D.N.H. 1992).

The provision requires the existence of an actual prosecution or investigation, however, to ensure that claimants are not able to bring civil forfeiture cases to a standstill on the basis of speculation about future criminal exposure. As is true under current law, claimants seeking a stay under the revised statute could not rely on a blanket assertion of the Fifth Amendment but would have to assert with precision how they would be prejudiced if the civil action went forward. See United States v. Lot 5, 23 F.3d 359 (11th Cir. 1994); United States v. Certain Real Property 566 Hendrickson Boulevard, 986 F.2d 990, 997 (6th Cir. 1993).

The provision also requires a claimant to establish that he or she has standing to contest the forfeiture before a stay may be entered at the claimant's request. Even if the court determines that the claimant has standing for this purpose, that determination will not be binding on the court should the government later object to the claimant's standing pretrial as provided elsewhere in the Act. The intended effect of this provision is to permit the government to consent to a stay without risk of being estopped from objecting to the claimant's standing once the stay is lifted.

Some courts in the past have attempted to ameliorate the burden on the claimant who is simultaneously the subject of a criminal proceeding by entering a protective order limiting discovery. See Laliberte, 903 F.2d at 44-45. Under the amendment, a court could still take this course. The amendment recognizes, however, the unfairness of limiting one party's right to take discovery while allowing the other party free rein. In cases where such unfairness would result, it is preferable that the court simply stay the civil case. See United States v. A Certain Parcel of Property (155 Bemis Road), Civ. No. 90-424-D (D.N.H. May 8, 1992) (entering stay of civil forfeiture case after attempts to protect Fifth Amendment rights with protective order proved unworkable as claimant continued to seek discovery from the government while government was limited in ability to take discovery from claimant). Thus, if the effect of the

protective order were, for example, to enable the government to obtain little of value from a claimant in discovery while the claimant was able to review the government's files and depose its witnesses, the statute would require that a stay be imposed instead.

Finally, the amendment provides that the Attorney General and the Secretary of the Treasury must promulgate guidelines governing the preservation of the property subject to forfeiture while the case is stayed. This provision takes into account the interest of both the government and the property owner in ensuring that the property in question is not subject to vandalism, lack of maintenance, fire damage, mismanagement, depreciation through excessive use or other reduction in value before the forfeiture action is concluded.

The guidelines would necessarily require different measures to be taken for different types of real and personal property. For example, a vehicle might have to be held in storage to ensure that it was available for forfeiture. But where the property in question is an on-going business, a lease-back or occupancy arrangement between the government and claimant might be sufficient to guarantee the availability of the business for forfeiture once the stay is removed while allowing the claimant the opportunity to preserve the value of his or her property in the meantime. In this way, the guidelines would address the concerns of those courts that have denied the government's request for a stay where it would have an adverse effect on an on-going business and where less drastic means existed to preserve the value of the property. See United States v. All Right, Title and Interest in Real Property (228 Blair Ave.), 821 F. Supp. 893 (S.D.N.Y. 1993).

The revised statute would also provide that the Court should enter any order necessary to preserve the value of the property while the stay was in effect. This would include an order requiring that mortgage payments should continue to be made in order to protect the rights of third party lienholders, tenants, and other innocent persons. Id.

## Section 125 Application of Forfeiture Procedures

Chapter 46 of title 18 comprises a number of statutes describing the procedures applicable to civil and criminal forfeiture cases. For example, Sections 981(b) through (j) contain procedures relating to pre-trial seizure, disbursement of forfeited property, extended venue and pre-trial stays. Sections 984 and 986 contain procedures relating to fungible property and the subpoenas for bank records. Moreover, this Act adds Sections 983, 985 and 987 relating to a uniform innocent owner defense, administrative subpoenas and trial procedure in civil forfeiture

cases. Finally, Section 982 contains procedures governing criminal forfeitures.

The intent of the Act is to make these procedures applicable to all civil and criminal forfeitures authorized by a statute in Title 18, United States Code. Some of the procedures, by their own terms, would already apply to all Title 18 forfeitures, as well as forfeitures brought under other statutes. See e.g. Section 983, applying the uniform innocent owner defense to all civil forfeitures in title 18, the Controlled Substances Act and the Immigration and Naturalization Act. Other provisions, however, either contain no provision regarding the scope of their application or presently apply only to forfeitures under §§ 981 and 982.

Moreover, there are many older civil forfeiture procedures scattered throughout Title 18 that contain no procedural provisions at all or that incorporate the customs laws but not the procedures in Chapter 46. See e.g. 18 U.S.C. §§ 492, 512, 544-45, 548, 962-69, 981, 1165, 1762, 1955, 2274 and 2513.<sup>5</sup> The same is true for a smaller number of criminal forfeiture statutes. See e.g. 18 U.S.C. § 1082. This section fills in any gaps and makes the provisions in Chapter 46 applicable to other civil and criminal forfeiture statutes, respectively. Because Section 981(d) incorporates the customs laws, the application of all Chapter 46 procedures to other forfeiture statutes will make the customs laws applicable to those statutes as well.

This provision would not, however, override any specific forfeiture procedures set forth or incorporated in any forfeiture statute that are inconsistent with the provisions of Chapter 46. Therefore, for example, the provisions of the pornography statutes, 18 U.S.C. §§ 1467 and 2254-55, that are unique to the pornography laws would not be affected by this provision. Similarly, the provisions of 31 U.S.C. § 9703(o) that already make the customs laws applicable to Title 18 cases within the jurisdiction of the Bureau of Alcohol, Tobacco and Firearms would not be affected by this section.

#### Subtitle C -- Seizures and Investigations

##### Section 131 Seizure Warrant Requirement

This section simplifies and clarifies the government's authority to seize property for forfeiture. First, 18 U.S.C. § 981(b)(1) is amended to update the authority of the Attorney General, and in appropriate cases the Secretary of the Treasury and the Postal Service, to seize forfeitable property. This

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<sup>5</sup> Some of these statutes are amended in this Act to correct this omission, e.g. 18 U.S.C. § 492.

section was last amended in 1989 before paragraphs (D), (E) and (F) were added to § 981(a)(1). Absent this amendment, the seizure warrant authority for property forfeitable under those provisions is unclear. Otherwise, the amendment is not meant to alter the investigative authority of the respective agencies.

Subsection (b)(2) is revised to provide that a seizure warrant is obtained "in the same manner" as provided in the Rules of Criminal Procedure, not "pursuant to" those Rules which, of course, do not apply to civil forfeitures. See Rule 54(b)(5). Subsection (b)(2) also conforms § 981(b) to the current version of 21 U.S.C. § 881(b) (the parallel seizure statute for drug forfeitures) by authorizing warrantless seizures in cases where an exception to the Fourth Amendment warrant requirement would apply. For example, in § 881 cases, courts have approved warrantless seizures in cases where there is probable cause for the seizure but exigent circumstances preclude obtaining a seizure warrant. See United States v. Daccarett, 6 F.3d 37 (2d Cir. 1993). See also United States v. Dixon, 1 F.3d 1080 (10th Cir. 1993) (warrantless seizure under § 881(b)(4) upheld where plain view exception applies). The amendment to § 981(b) is necessary because such circumstances occur frequently in money laundering cases involving electronic funds transfers.

The remaining subsections are new provisions. The first, to be codified as § 981(b)(3), makes clear that the seizure warrant may be issued by a judge or magistrate judge in any district in which it would be proper to file civil forfeiture complaint against the property to be seized, even if the property is located, and the seizure is to occur, in another district. Previously, there was no ambiguity in the statute, since in rem actions could only be filed in the district in which the property was located. In 1992, however, Congress amended 28 U.S.C. § 1355 to provide for in rem jurisdiction in the district in which the criminal acts giving rise to the forfeiture took place, and to provide for nationwide service of process so that the court in which the civil action was filed could bring the subject property within the control of the court. See 28 U.S.C. § 1355(d). In accord with this new statute, the amendment makes clear that it is not necessary for the government to obtain a seizure warrant from a judge or magistrate judge in the district where the property is located, but rather that it may obtain such process from the court that will be responsible for the civil case once the property is seized and the complaint is filed. Any motion for the return of seized property filed pursuant to Rule 41(e) will have to be filed in the district where the seizure warrant was issued so that judges and prosecutors in other districts are not required to deal with warrants involving property unrelated to any case or investigation pending in the district.

The second new provision, to be codified as § 981(b)(4), clarifies the requirement that the government promptly institute



forfeiture proceedings once property is seized. It provides that either civil or criminal proceedings may be instituted. Without the amendment, the statute appears to require the government to initiate an administrative forfeiture even if the same property is subject to forfeiture in a criminal indictment. Such unnecessary duplication was never the intent of the legislation. As is true with respect to the filing of a civil complaint under 18 U.S.C. § 987, the statute avoids setting a definite time limit for instituting forfeiture proceedings because there will be cases where the premature filing of a forfeiture action could adversely affect an ongoing criminal investigation. In particular, it is appropriate for the Attorney General to take into account the impact the filing of the civil case might have on on-going undercover operations and the disclosure of evidence being presented to a grand jury.

The third new provision, set forth as § 981(b)(5), relates to situations where a person has been arrested in a foreign country and there is a danger that property subject to forfeiture in the United States in connection with the foreign offenses will disappear if it is not immediately restrained. In the case of foreign arrests, it is possible for the property of the arrested person to be transferred out of the United States before U.S. law enforcement officials have received from the foreign country the evidence necessary to support a finding a probable cause for the seizure of the property in accordance with federal law. This situation is most likely to arise in the case of drug traffickers and money launderers whose bank accounts in the United States may be emptied within hours of an arrest by ~~foreign~~ authorities in the Latin America or Europe. To ensure that property subject to forfeiture in such cases is preserved, the new provision provides for the issuance of an ex parte restraining order upon the application of the Attorney General and a statement that the order is needed to preserve the property while evidence supporting probable cause for seizure is obtained. A party whose property is restrained would have a right to a post-restraint hearing in accordance with Rule 65(b), Fed.R.Civ.P.

Finally, 21 U.S.C. § 888(d), which was enacted as part of the Anti-Drug Abuse Act of 1988, provides a mechanism whereby the owner of a conveyance seized for forfeiture in a drug case may substitute other property for the conveyance so that it is the substitute res, not the conveyance, that is subject to the forfeiture action. This allows property owners who require the use of their property pending resolution of a forfeiture action to retain use of the property while the forfeiture action proceeds against the substitute res. See also 21 CFR §1316.98 (implementing § 888(d) in judicial forfeiture cases).

Paragraph (6) of the redrafted § 981(b) generalizes this provision to all property seized for forfeiture under § 981, and, because § 981(b) is incorporated by reference into 21 U.S.C.

§ 881 and 853, to all property seized in drug cases and criminal forfeiture cases as well. The opportunity to post a substitute res is not, however, available in four categories of cases: where the property is contraband, where it is evidence of a crime, where it has been specially chosen or equipped to make it particularly suited to committing criminal acts, or where it is likely to be used to commit future criminal acts if returned to the owner.

The statute authorizes the government to forfeit the substitute res in place of the property originally seized, but it makes the decision to accept such substitution a matter of discretion for the responsible government official. This is needed to avoid creating the appearance that wealthy criminals could mock the intent of the forfeiture law by recovering their tainted property simply by paying a sum of money as a cost of doing business while continuing to enjoy the use of the seized property.

A conforming amendment repeals § 888(d) as no longer necessary in light of the enactment of this provision.

Subsection (b) makes parallel changes to 21 U.S.C. § 881(b). Most important, the amendment repeals § 881(b)(4) which was construed to authorize warrantless seizures based on probable cause alone. See United States v. Lasanta, 978 F.2d 1300 (2d Cir. 1992). The amendment makes clear that seizures must be made pursuant to a warrant unless an exception to the warrant requirement of the Fourth Amendment applies.

#### Section 132 Civil Investigative Demands

This provision passed both the Senate and the House in the 102d Congress in slightly different form. See § 943 of S.543; § 31 of H.R.26 (relating to title 18 and 21 civil forfeitures). It gives the Attorney General the means, by way of a civil investigative demand, to acquire evidence in contemplation of a civil forfeiture action. Such authority is necessary because in the context of a civil law enforcement action there is no procedure analogous to the issuance of a grand jury subpoena that allows the government to gather evidence before the filing of a complaint.

As Congress has recognized in several other contexts, civil proceedings can be an effective adjunct to law enforcement only if the statutory tools needed to gather evidence are enacted. Thus, civil investigative authority was made a part of the civil enforcement provisions of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA") (12 U.S.C. 1833a), the civil provisions of RICO, 18 U.S.C. §1968, relating to suits brought by the government, and the Anti-Trust Civil

Process Act, 15 U.S.C. §§ 1311-1314.<sup>6</sup> The language of the present proposal is derived from section 951 of FIRREA.

The proposed new section differs from earlier enactments, and from the version passed by both houses of Congress in the 102d Congress, in one important respect. To address the concerns of Members of Congress who, in the past, have expressed opposition to any new investigative authority that could be delegated to a law enforcement agency, the authority to issue a civil investigative demand is explicitly limited to attorneys for the government such as Trial Attorneys in the Department of Justice or Assistant U.S. Attorneys. Also, subsection (d) of the proposed statute has been revised to make clear that civil investigative demands relating to the forfeiture of a given piece of property may not be used once a civil complaint has been filed against that property, but that such demands may be issued regarding the forfeiture of other property not named in the complaint. This language ensures that investigative demands are not used to circumvent the discovery rules in the Federal Rules of Civil Procedure.

Other new provisions include an amendment to 18 U.S.C. § 1505 in subsection (c) to add a criminal penalty for obstruction of a civil investigative demand, an amendment to the Right to Financial Privacy Act in subsection (d) to extend the same non-disclosure rules applicable to grand jury subpoenas served on financial institutions to civil investigative demands, and an amendment in subsection (e) to the Fair Credit Reporting Act to authorize disclosure of credit reports pursuant to civil investigative demands in the same manner as disclosure is authorized in response to grand jury subpoenas.

### Section 133 Access to Records in Bank Secrecy Jurisdictions

This section deals with financial records located in foreign jurisdictions that may be material to a claim filed in either a civil or criminal forfeiture case.

It is frequently the case that in order for the government to respond to a claim, it must have access to financial records abroad. For example, in a drug proceeds case where a claimant asserts that the forfeited funds were derived from a legitimate business abroad, the government might need access to foreign bank records to demonstrate in rebuttal that the funds actually came

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<sup>6</sup> See S. Rep. No. 91-617, 91st Cong., 1st Sess. 161 (1969). For a list of other statutes that authorize the gathering of evidence by means of an administrative subpoena, see H. Rep. No. 94-1343, 94th Cong., 2nd Sess. 22 n.2 reprinted in 1970 U.S. CODE & ADMIN. NEWS 2617.

from an account controlled by international drug traffickers or money launderers.

Numerous mutual legal assistance treaties (MLAT's) and other international agreements now in existence provide a mechanism for the government to obtain such records through requests made to a foreign government. In other cases, the government is able to request the records only through letters rogatory.

This proposal deals with the situation that commonly arises where a foreign government declines to make the requested financial records available because of the application of secrecy laws. In such cases, where the claimant is the person protected by the secrecy laws, he or she has it within his or her power to waive the protection of the foreign law to allow the records to be made available to the United States, or to obtain the records him- or herself and turn them over to the government. It would be unreasonable to allow a claimant to file a claim to property in federal court and yet hide behind foreign secrecy laws to prevent the United States from obtaining documents that may be material to the claim. Therefore, proposed subsection 986(d) provides that the refusal of a claimant to waive secrecy in this situation may result in the dismissal of the claim with prejudice as to the property to which the financial records pertain.

#### Section 134 Access to Other Records

This amendment allows disclosure of tax returns and return information to federal law enforcement ~~officials~~ for use in investigations leading to civil forfeiture proceedings in the same circumstances, and pursuant to the same limitations, as currently apply to the use of such information in criminal investigations. Current law, 26 U.S.C. § 6103(i)(4), permits the use of returns and return information in civil forfeiture proceedings, but only in criminal cases does it authorize the disclosure of such information to law enforcement officials at the investigative stage. The amendment thus revises the relevant statute to treat civil forfeiture investigations and criminal investigations the same.

#### Section 135 Currency Forfeitures

This section creates a rebuttable presumption in civil forfeiture cases brought under the drug forfeiture statute, 21 U.S.C. § 881, applicable to large quantities of currency. The presumption would apply in either of two instances: 1) where the currency is found in close proximity to a measurable quantity of a controlled substance; or 2) where there is more than \$10,000 dollars being transported in one of the places commonly used by drug couriers -- i.e. interstate highways, airports and off-shore waters -- and the person possessing the currency either disclaims

ownership or gives a demonstrably false explanation for the source of the currency.

Because a measurable quantity of a controlled substance must be involved, a positive "dog sniff" would not be sufficient to trigger the first presumption. Detection of a measurable quantity with an ion-scan machine, however, would suffice.

The second presumption is intended to overrule recent decisions holding that the government failed to establish probable cause for forfeiture even where a large quantity of currency was transported in a manner inconsistent with legitimate possession, and the government could show, through admissible evidence, that the explanation given for the currency was patently false. See United States v. \$30,060, 39 F.3d 1039 (9th Cir. 1994).

An example of a situation where the second presumption would apply is United States v. \$200,226.00 in United States Currency, 1995 WL 357904 (1st Cir. Jun. 13, 1995), where government agents stopped a woman at an airport carrying \$200,226 in cash wrapped in towels in her luggage, and she stated that the money represented a gift from her wealthy Italian boyfriend, whose address, telephone number and occupation were unknown to her, and was delivered to her in a brown paper bag by a stranger. See also United States v. \$39,873.00, \_\_\_ F.3d \_\_\_ (8th Cir. Apr. 9, 1996) (dog sniff, packaging of currency, and proximity to drug paraphernalia provided sufficient probable cause for seizure of currency during highway stop).

The presumption is intended to place a burden on the claimant to produce credible evidence tending to rebut the inference that currency seized under the specified circumstances is drug money. If the claimant fails to produce such evidence, the inferences drawn from the circumstances will be sufficient to support a judgment for the government. Thus, in no case will a motion for judgment of acquittal be granted dismissing the government's complaint if the government has presented sufficient evidence to establish the presumption in its case in chief. However, the provision makes clear that notwithstanding the imposition of a burden of production on the claimant, the burden of proof remains at all times on the government.

## Title II -- CRIMINAL FORFEITURE

### Section 201 Standard of Proof for Criminal Forfeiture

Criminal forfeiture is a part of the sentence imposed in a criminal case. Libretti v. United States, \_\_\_ U.S. \_\_\_, 1995 WL 648120 (Nov. 7, 1995). Accordingly, the standard of proof for criminal forfeiture is the same as it is for all other aspects of sentencing: preponderance of the evidence. See United States v.

Smith, 966 F.2d 1045, 1050-53 (6th Cir. 1992); United States v. Bieri, 21 F.3d 819 (8th Cir. 1994); United States v. Myers, 21 F.3d 826 (8th Cir. 1994); United States v. Ben-Hur, 20 F.3d 313 (7th Cir. 1994); United States v. Herrero, 893 F.2d 1512, 1541-42 (7th Cir.), cert. denied, 110 S. Ct. 2623 (1990); United States v. Hernandez-Escarsega, 886 F.2d 1560, 1576-77 (9th Cir. 1989), cert. denied, 110 S. Ct. 3237 (1990); United States v. Sandini, 816 F.2d 869, 975-75 (3d Cir. 1987); but see United States v. Elgersma, 971 F.2d 690 (11th Cir. 1992) (applying the preponderance standard to the forfeiture of proceeds and reserving judgment with respect to other property).

Before the Supreme Court clarified this point in Libretti, however, some lower courts considered the standard of proof issue an open question, see United States v. Saccoccia, 823 F. Supp. 994 (D.R.I. 1993), and one appellate court held, based on legislative history, that the reasonable doubt standard applied to forfeitures in RICO cases. See United States v. Pelullo, 14 F.3d 881 (3rd Cir. 1994).

The amendment removes any remaining ambiguity by codifying the preponderance standard for all criminal forfeitures as Libretti requires.

#### Section 202      Non-Abatement of Criminal Forfeiture When Defendant Dies Pending Appeal

This amendment (which passed the Senate in 1990 as §1905 of § S.1970) would overturn the questionable decision of the Ninth Circuit in United States v. Oberlin, 718 F.2d 894 (1983), which held that a criminal forfeiture proceeding abated upon the post-verdict suicide of the defendant. Compare United States v. Dudley, 739 F.2d 175 (4th Cir. 1984) (order of restitution does not abate with defendant's death). See also United States v. Miscellaneous Jewelry, 667 F. Supp. 232, 245 (D. Md. 1987). The Solicitor General's Office in the Oberlin case, supra, and in a later Ninth Circuit case (United States v. Mitchell), while deeming the issue not to warrant Supreme Court review, has written memoranda criticizing the court's rationale for abatement in the criminal forfeiture context.

#### Section 203      Repatriation of Property Placed Beyond the Jurisdiction of the Court

In all criminal forfeitures under RICO, the Controlled Substances Act, and 18 U.S.C. § 982, the sentencing court is authorized to order the forfeiture of "substitute assets" when the defendant has placed the property otherwise subject to forfeiture "beyond the jurisdiction of the court." Most commonly, this provision is applied when a defendant has transferred drug proceeds or other criminally derived property to a foreign country.

In many cases, however, the defendant has no other assets in the United States of a value commensurate with the forfeitable property overseas. In such cases, ordering the forfeiture of substitute assets is a hollow sanction.

Other countries, such as the United Kingdom, address this problem by authorizing the court to order the defendant to repatriate the property that he has sent abroad. Because the sentencing court has in personam jurisdiction over the defendant, it can use this authority to reach assets that are otherwise beyond the jurisdiction of the court, as long as the defendant retains control of the property.

This section amends the substitute assets provisions of RICO and the drug forfeiture statute (which are also incorporated by reference into Section 982) to authorize the sentencing court to issue a repatriation order. That order may be issued post-trial as part of the criminal sentence and judgment, or pre-trial pursuant to the court's authority under 18 U.S.C. § 1963(d) and 21 U.S.C. § 853(e) to restrain property, including substitute assets, so that they will be available for forfeiture. See United States v. Sellers, 848 F. Supp. 73 (E.D. La. 1994) (pre-trial repatriation order). Failure to comply with such an order would be punishable as a contempt of court, or it could result in a sentencing enhancement, such as a longer prison term, under the U.S. Sentencing Guidelines, or both. The government has the authority to grant use immunity to a defendant for the act of repatriating property to the United States pre-trial or while an appeal was pending if such act would tend to implicate the defendant in a criminal act in violation of the Fifth Amendment. Id. (no 5th Amendment violation if government does not use evidence of the repatriation in its case in chief).

Subsection (b) directs the U.S. Sentencing Commission to promulgate a guideline defining the appropriate sentencing enhancement in these circumstances.

#### Section 204      Motion and Discovery Procedures for Ancillary Proceedings

This section codifies certain procedures governing the litigation of post-trial petitions filed by third parties in criminal forfeiture cases. When the ancillary hearing provisions were added to 18 U.S.C. § 1963 and 21 U.S.C. § 853 in 1984, Congress apparently assumed that the proceedings under the new provisions would involve simple questions of ownership that could, in the ordinary case, be resolved in 30 days. See 18 U.S.C. § 1963(1)(4). Presumably for that reason, the statute contains no procedures governing motions practice or discovery such as would be available in an ordinary civil case.

Experience has shown, however, that ancillary hearings can involve issues of enormous complexity that require years to resolve. See United States v. BCCI Holdings (Luxembourg) S.A., 833 F. Supp. 9 (D.D.C. 1993) (ancillary proceeding involving over 100 claimants and \$451 million); United States v. Porcelli, CR-85-00756 (CPS), 1992 U.S. Dist. LEXIS 17928 (E.D.N.Y. Nov. 5, 1992) (litigation over third party claim continuing 6 years after RICO conviction). In such cases, procedures akin to those available under the Federal Rules of Civil Procedure should be available to the court and the parties to aid in the efficient resolution of the claims.

Because an ancillary hearing is part of a criminal case, it would not be appropriate to make the civil Rules applicable in all respects. The amendment, however, describes several fundamental areas in which procedures analogous to those in the civil Rules may be followed. These include the filing of a motion to dismiss a claim, the conduct of discovery, the disposition of a claim on a motion for summary judgment, and the taking of an appeal from final disposition of a claim. Where applicable, the amendment follows the prevailing case law on the issue. See, e.g., United States v. Lavin, 942 F.2d 177 (3rd Cir. 1991) (ancillary proceeding treated as civil case for purposes of applying Rules of Appellate Procedure); United States v. BCCI (Holdings) Luxembourg S.A., 1993 WL 760232 (D.D.C. 1993) (applying court's inherent powers to permit third party to obtain discovery from defendant in accordance with civil rules). The provision governing appeals in cases where there are multiple claims is derived from Fed.R.Civ.P. 54(b).

The last provision of subsection (a) provides that a district court is not divested of jurisdiction over an ancillary proceeding even if the defendant appeals his or her conviction. This allows the court to proceed with the resolution of third party claims even as the appeal is considered by the appellate court. Otherwise, third parties would have to await the conclusion of the appellate process even to begin to have their claims heard.

Subsection (b), however, provides a method to allow a defendant, who has filed an appeal from his conviction and the order of forfeiture, to intervene in the ancillary proceeding for the limited purpose of contesting a third party petitioner's assertion of a legal right, title or interest in the forfeited property. This provision resolves a problem that could otherwise arise if the court were to adjudicate a petitioner's claim and find in favor of the petitioner while an appeal is pending, only to have the defendant prevail on the appeal and seek to reclaim the forfeited property. Under the amendment, if the defendant does not contest the third party's alleged interest by intervening in the ancillary proceeding, he will be considered to have waived any claim to the property even if prevails on appeal. On



the other hand, if the defendant does intervene, the court may determine, with finality, either that the third party does have an interest in the property superior to the defendant's (and the government's), or that the defendant has the superior interest which is forfeitable to the government if the conviction is affirmed, and which is returnable to the defendant if the conviction is reversed.

This amendment does not alter the general rule, set forth in Sections 1963(l)(2) and 853(n)(2), that a defendant has no standing to file a claim of his own. Nor does it alter the rule that the only issue involved in the ancillary hearing is the third party's ownership interest. All issues relating to the forfeitability of the property were resolved at trial; they are of no interest to the third party and may not be re-litigated by an intervening defendant.

Subsection (c) clarifies an ambiguity in the present law. It is well-established that in a criminal forfeiture case, the court, in lieu of ordering the forfeiture of specific assets, can enter a personal money judgment against the defendant for an amount of money equal to the amount otherwise subject to forfeiture. United States v. Ginsburg, 773 F.2d 798, 801 (7th Cir. 1985) (en banc), cert. denied, 475 U.S. 1011 (1986); United States v. Conner, 752 F.2d 566, 576 (11th Cir.), cert. denied, 474 U.S. 821 (1985); United States v. Sokolow, 1995 WL 113079 (E.D. Pa. 1995), aff'd \_\_\_ F.3d \_\_\_, 1996 WL 183816 (3rd Cir. Apr. 18, 1996). In such cases, obviously, no interests of any third parties can be implicated. Therefore, there is no need for any ancillary hearing. The amendment makes this clear.

#### Section 205 Pre-Trial Restraint of Substitute Assets

This amendment is necessary to resolve a split in the circuits regarding the proper interpretation of the pre-trial restraining order provisions of the criminal forfeiture statutes. Under 18 U.S.C. § 1963(d)(1) and 21 U.S.C. § 853(e)(1), a court may enter a pre-trial restraining order to preserve the availability of forfeitable property pending trial. Until recently, the courts were unanimous in their view that the restraining order provisions applied both to property directly traceable to the offense and to property forfeitable as substitute assets. See Assets of Tom J. Billman, 915 F.2d 916 (4th Cir. 1990); United States v. Regan, 858 F.2d 115 (2d Cir. 1988); United States v. O'Brien, 836 F. Supp. 438 (S.D. Ohio 1993); United States v. Swank Corp., 797 F. Supp. 497 (E.D. Va. 1992). The Third, Fifth and Ninth Circuits have now held, however, that because Congress did not specifically reference the substitute assets provisions in the restraining order statutes, pre-trial restraint of substitute assets is not permitted. United States v. Floyd, 992 F.2d 498 (5th Cir. 1993); In Re Assets of Martin, 1

F.3d 1351 (3rd Cir. 1993); United States v. Ripinsky, 20 F.3d 359 (9th Cir. 1994).

At least one of the recent cases was based on an erroneous reading of the legislative history. Martin relies on a footnote in a 1982 Senate Report that states that the restraining order provision in Section 1963 would not apply to substitute assets. Slip op. at 17, citing S. Rep. 97-520, 97th Cong., 2d Sess. (1982) at 10 n.18. The appellate court was apparently unaware that before the restraining order provision was finally enacted in 1984, the footnote in question was dropped from the Senate Report, thus negating any suggestion that Congress did not intend for the new statute to apply to substitute assets. See S. Rep. 98-225, 98th Cong., 1st Sess. (1983) at 201-05.

The amendment cures this problem of statutory interpretation by including specific cross-references to 18 U.S.C. § 1963(m) and 21 U.S.C. § 853(p) at the appropriate places.

#### Section 206 Defenses Applicable to Ancillary Proceedings in Criminal Cases

This provision conforms the statutes governing the rights of third parties who assert interests in property subject to forfeiture in a criminal case to the uniform innocent owner defense applicable to civil forfeitures. The intent is to make it possible to adjudicate fully the interests of all third parties in property subject to criminal forfeiture so that it is no longer necessary to file a parallel ~~civil~~ forfeiture action to resolve such matters.

Most civil forfeiture statutes require a party asserting an interest in the property to prove that he or she was at all times an "innocent owner" of the property. See, e.g., 21 U.S.C. §881(a)(4) (requiring proof by third party claimant that he or she was without knowledge of, did not consent to, and was not wilfully blind to the illegal acts giving rise to the forfeiture). Presently, the criminal forfeiture statutes contain essentially the same provision for third parties asserting an interest in the property acquired after the commission of the offense. See 21 U.S.C. §853(n)(6)(B); 18 U.S.C. §1963(l)(6)(B) (requiring proof by third party claimant that he was a bona fide purchaser for value without reason to know that the property was subject to forfeiture).

The criminal statutes, however, contain no innocent owner requirement for persons claiming to have been the owners of the property at the time the offense giving rise to forfeiture was committed. This allows a claimant to recover the property even if he was aware of or consented to the illegal acts committed by the defendant. This loophole exists because under current law, a criminal forfeiture proceeding is limited to adjudicating the

interests of the defendant; interests of third parties have to be litigated in parallel civil proceedings. The amendment closes this loophole by requiring would-be claimants to the subject property in a criminal forfeiture case to meet the same standards that they would be required to meet if the forfeiture were prosecuted as a civil in rem action.

Making the civil definition of "innocent owner" applicable to criminal cases also resolves a conflict in the circuits regarding the type of legal interest that Congress intended to allow a third party to assert in a forfeiture proceeding under 21 U.S.C. § 853(n)(6) or 18 U.S.C. § 1963(1)(6). The issue is whether only persons with an ownership interest in the specific property subject to forfeiture -- such as a mortgage lender with an interest in forfeitable real property -- are covered by the statute, or whether the procedure is open to any person with a general unsecured claim against the property or estate of the criminal defendant. To date, four circuits have denied standing to general creditors while one has granted it. Compare United States v. BCCI Holdings (Luxembourg) S.A., 46 F.3d 1185 (D.C. Cir. 1995), cert. denied, 115 S. Ct. 2613 (1995); United States v. Schwimmer, 968 F.2d 1570, 1581 (2d Cir. 1992) (general creditors may not file claims); United States v. Campos, 859 F.2d 1233 (6th Cir. 1988) (same); and United States v. Lavin, 942 F.2d 177 (3rd Cir. 1991) (tort victims may not file claims) with United States v. Reckmeyer, 836 F.2d 200 (4th Cir. 1987) (general creditors have a legal interest in forfeited property).

The ancillary hearing procedure set forth in §§ 1963(1) and 853(n) was designed to ensure a speedy judicial resolution of specific claims to the property being forfeited, not to resolve the claims of general unsecured creditors and other persons with claims arising in contract or in tort against the criminal defendant. To allow every victim of a tort or breach of contract committed by the defendant to intervene in the criminal forfeiture proceeding to attempt to assert a claim to the forfeited property would pervert the criminal process beyond its intended scope.

By cross-referencing the uniform innocent owner statute and the definition of "owner" at 18 U.S.C. § 983(c)(1), the amendment preserves the original intent of Congress and codifies the leading court decisions on this issue such as United States v. BCCI Holdings (Luxembourg) S.A., 833 F. Supp. 9 (D.D.C. 1993), by providing that only persons with the equivalent of a secured interest in the specific property subject to forfeiture may petition for disposition of that property under §§ 1963(1) and 853(n). Victims of the crimes giving rise to the forfeiture will be protected by the restitution provisions of the criminal forfeiture statutes that permit the use of forfeited funds to restore property to victims.

## Section 207 Uniform Procedures for Criminal Forfeiture

Section 982 does not contain its own set of definitions and procedures. Rather, all such matters are incorporated by reference to the definitions and procedures set forth in 21 U.S.C. § 853. This has been true since § 982 was enacted in 1986.

The cross-reference to § 853, however, has become very complicated as § 982 has been amended and expanded in every Congress since 1986. Currently, different subsections of § 853 are incorporated into § 982 depending upon the nature of the offense giving rise to the forfeiture. The differences, however, are not very great. With respect to forfeitures under §§ 982(a)(1) and (2), the only substantive differences are 1) the definition of "property" in § 853(b) is incorporated for FIRREA, counterfeiting, explosives and other forfeitures under § 982(a)(2) but not for money laundering under § 982(a)(1); 2) the reverse is true for the seizure warrant authority in § 853(f), which is incorporated for § 982(a)(1) forfeitures but not for those brought under § 982(a)(2); and 3) the provision in § 853(a) giving federal forfeiture law precedence over State law is omitted from § 982 entirely. More important, Congress failed to incorporate any procedures for forfeitures pursuant to § 982(a)(3), (4) and (5), the provisions added in 1990 and 1992, leaving it unclear what procedures should apply in those cases.

This convoluted cross-referencing system no longer makes any sense and should be abandoned in favor of a simplified statute that incorporates all provisions of § 853 for all § 982 forfeitures. The section dealing with rebuttable presumptions in drug cases (subsection (d)) is the only provision omitted because it has no application outside of the context of narcotics violations and because rebuttable presumptions applicable to § 982 offenses are enacted by other provisions of this Act.

The amended version of § 982(b)(2) is drafted in such a way that it need not be amended again each time Congress adds a new forfeiture provision to subsection (a).

## Section 208 Seizure Warrant Authority

This amendment is intended to encourage greater use of the criminal forfeiture statutes. In all civil forfeiture cases governed by 18 U.S.C. § 981 and 21 U.S.C. § 881, the government may seek the issuance of a warrant from a judge or magistrate to seize property subject to forfeiture. 18 U.S.C. § 981(b); 21 U.S.C. § 881(b). Under the amendments made by this Act, property seized under those statutes may be forfeited either civilly or criminally. See 18 U.S.C. § 987. This amendment underscores that point by amending the criminal forfeiture statutes themselves to provide that property may be seized for criminal forfeiture pursuant to § 981(b).

### Section 209      Forfeitable Property Transferred to Third Parties

This section closes a possible loophole in the criminal forfeiture statutes that may permit third parties who acquire property from a defendant in a sham transaction to frustrate a forfeiture order by dissipating the property or converting it to another form. See In re Moffitt, Zwerling & Kemler, P.C., 864 F. Supp. 527 (E.D. Va. 1994) (forfeitable property transferred to third party could not be recovered where third party dissipated the property).

18 U.S.C. § 1963(c) and 21 U.S.C. § 853(c) each provide that property transferred by a criminal defendant to a third party, if otherwise subject to forfeiture, is forfeitable from the third party unless such party acquired the property as a bona fide purchaser for value without cause to know that the property was forfeitable. In this way, the statute prevents criminal defendants from protecting their property from forfeiture by transferring it to friends, relatives, heirs or associates who do not pay value for the property in an arms length transaction or who acquire it knowing that it is subject to forfeiture. Moffitt, supra. As Moffitt explained, however, the current statute contains no provision to address a situation that can arise should a third party conceal or dissipate the forfeitable property. In such situations, the criminal forfeiture statute "is a weak tool for divesting third parties of property received from criminal defendants." Id. The court explicitly called on Congress to "remedy" this situation. Id.

Under the amendment, a third party who is not a bona fide purchaser of the forfeitable property, would become personally liable for an amount equal to the value of property in the event the property cannot be turned over to the government due to the third party's act or omission. For example, if the defendant gave his forfeitable property to his defense attorney who then dissipated the property instead of turning it over to the government, the defense attorney would be personally liable for the amount of the dissipated property.

### Section 210      Right of Third Parties to Contest Forfeiture of Substitute Assets

Current law is unclear with respect to when the government's interest in substitute assets vests. See United States v. Ripinsky, No. CR 93-409(A) WJR (C.D. Cal. Mar. 24, 1995). Some have argued that because the relation-back provisions of §§ 853(c) and 1963(c) do not expressly apply to substitute assets, the government's interest in substitute assets does not vest until the jury returns a special verdict of forfeiture or the court enters a preliminary order of forfeiture. Others have argued that because the substitute asset is forfeited in place of property in which the government's interest vested at the time of

the act giving rise to forfeiture, the government's interest in the substitute asset vests on the date on which the crimes were committed. Still another interpretation is that the government's interest in substitute assets vests at the time the grand jury returns an indictment including a substitute assets provision, because at that time the defendant and any potential claimants (including potential bona fide purchasers) are placed on notice that the defendant's estate is subject to forfeiture up to the amount of the proceeds of his criminal activity.

The amendment ends this uncertainty by adopting the third interpretation as a reasonable compromise between the other two more extreme positions. Under this provision, a defendant would be free to transfer his untainted property to a third person at any time prior to the filing of an indictment, information or bill of particulars identifying the property as subject to forfeiture (unless, of course, the property was subject to a pre-indictment restraining order). After that time, however, the defendant and potential transferees would be on notice that the government was seeking to forfeit the property as substitute assets in a criminal case, and that the property would belong to the government upon the conviction of the defendant and the entry of an order of forfeiture. Accordingly, any transfer by the defendant to a third party after the property was identified in an indictment, information or bill of particulars would be void, unless the transferee establishes, pursuant to the provisions of the Uniform Innocent Owner Defense applicable to after-the-fact transferees, 18 U.S.C. § 983(b)(2), that he or she was a bona fide purchaser for value of the property who was reasonably without cause to believe that the property was subject to forfeiture.

#### Section 211 Hearings on Pre-trial Restraining Orders; Assets Needed to Pay Attorneys Fees

The criminal forfeiture statutes provide that in order to preserve assets for forfeiture at trial, the government may seek, and the court may issue, an ex parte pre-trial restraining order. See 18 U.S.C. § 1963(d); 21 U.S.C. § 853(e). This procedure supplements, and does not preclude, seizure of the property pursuant to a seizure warrant.

If a restraining order is to be issued before any indictment is returned, "persons appearing to have an interest in the property" are entitled to an immediate hearing.<sup>7</sup> 18 U.S.C. § 1963(d)(1)(B) & (2); 21 U.S.C. § 853(e)(1)(B) & (2). The

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<sup>7</sup> Restraining orders apply to both the criminal defendant and to any third party who might otherwise have access to the subject property. United States v. Jenkins, 974 F.2d 32 (5th Cir. 1992); In re Assets of Tom J. Billman, 915 F.2d 916 (4th Cir. 1990); United States v. Regan, 858 F.2d 115 (2d Cir. 1988).

statute, however, makes no provision for any hearing -- either pre- or post-restraint -- where the property is not restrained until after an indictment is filed.

The legislative history of these provisions makes clear that Congress considered a hearing unnecessary in the post-indictment context because the grand jury's finding of probable cause to believe that the restrained property was subject to forfeiture was sufficient to satisfy the due process rights guaranteed by the Fifth Amendment.

[T]he probable cause established in the indictment or information is, in itself, to be a sufficient basis for issuance of a restraining order. While the court may consider factors bearing on the reasonableness of the order sought, it is not to "look behind" the indictment or require the government to produce additional evidence regarding the merits of the case as a prerequisite to issuing a post-indictment restraining order.

S. Rep. 255, 98th Cong., 1st Sess. (1983) at 202-03.

The Senate Report went on to explain that the statute was not intended to preclude the court from holding a post-restraint hearing in appropriate circumstances to determine if a restraining order should be continued, but it stressed that in that context as well, the court was not to reexamine the validity of the indictment or the grand jury's finding of probable cause for the forfeiture.

This provision does not exclude, however, the authority to hold a hearing subsequent to the initial entry of the order and the court may at that time modify the order or vacate an order that was clearly improper (e.g., where information presented at the hearing shows that the property restrained was not among the property named in the indictment. However, it is stressed that at such a hearing the court is not to entertain challenges to the validity of the indictment. For the purposes of issuing a restraining order, the probable cause established in the indictment or information is to be determinative of any issue regarding the merits of the government's case on which the forfeiture is to be based.

Id. at 203 (emphasis supplied).

Congress' principal concern in precluding any re-examination by the court of the validity of the indictment was that such an examination might force the government to make a "damaging premature disclosure of the government's case and trial strategy." Id. at 196.

Since the restraining order provisions were enacted in 1984, several appellate courts have had occasion to determine whether the statutory structure comports with due process under the 5th Amendment. The courts unanimously hold that due process does not require an pre-restraint adversary hearing where the restraining order is not issued until after the return of an indictment. See e.g. United States v. Monsanto, 924 F.2d 1186, 1192 (2d Cir. 1991); United States v. Bissell, 866 F.2d 1343, 1352 (11th Cir. 1989). In such circumstances, the property owner's right to a hearing is outweighed by the government's need for "some means of promptly heading off any attempted disposal of assets that might be made in anticipation of a criminal forfeiture." Monsanto, 924 F.2d at 1192.

The courts differ, however, as to whether a post-indictment restraining order may be continued up to and through trial without granting the defendant an opportunity for a post-restraint hearing. Those courts that would require such a hearing also differ among themselves as to whether the scope the hearing should include a re-examination by the court of the validity of the indictment and the grand jury's finding of probable cause for forfeiture.

On the one extreme, the Eleventh Circuit has held that there is no constitutional right to a post-restraint hearing on the validity of a restraining order because the Speedy Trial Act ensures that a defendant will have a prompt opportunity to challenge the validity of the order at trial. Bissell, 866 F.2d at 1354. See In Re Protective Order, 790 F. Supp. 1140 (S.D. Fla. 1992). The Eleventh Circuit holds this view even where the defendant alleges that the restraining order infringes upon his Sixth Amendment right to hire counsel of his choice. Bissell, supra. The Tenth Circuit is in accord, at least where the right-to-counsel issue is not implicated. See United States v. Musson, 802 F.2d 384, 387 (10th Cir. 1986) (no hearing required); but see United States v. Nichols, 841 F.2d 1485, 1491 n.4 (10th Cir. 1988) (leaving open question whether hearing is required if Sixth Amendment issue is raised).

On the other extreme, the Second Circuit, in a 7-6 en banc opinion, has held not only that a post-restraint, pre-trial hearing is required whenever Sixth Amendment right to counsel issues are raised, but that at such hearing the court is required "to reexamine the probable cause determinations" embodied in the grand jury indictment. Monsanto, 924 F.2d at 1195-97. In so holding, the Second Circuit expressly declined to follow Congress' admonition that the courts should not "entertain challenges to the validity of the indictment." 924 F.2d at 1197, quoting S. Rep. 225, supra, at 196. See also United States v. Crozier, 777 F.2d 1376, 1383-84 (9th Cir. 1985).



In between these two extremes, several courts have held that a defendant's Sixth Amendment right to counsel is an interest of such importance that due process requires that the defendant be granted a hearing pre-trial to determine the validity of an order that restrains the assets the defendant would use to retain counsel of his choice. See e.g. United States v. Moya-Gomez, 860 F.2d 706, 729 (7th Cir. 1988); United States v. Thier, 801 F.2d 1463, 1469 (5th Cir. 1986). As the Seventh Circuit noted in Moya-Gomez, cases implicating the Sixth Amendment are unique because a "defendant needs the attorney [pre-trial] if the attorney is to do him any good." 860 F.2d at 726. Thus, where the defendant asserts that the assets he would use to hire counsel have been improperly restrained, forcing the defendant to wait until the time of trial to contest the restraining order would constitute an unconstitutional "permanent deprivation" of property without a hearing. Id.

These courts, however, have declined to go as far as the Second Circuit in Monsanto in sanctioning a full-blown reexamination of the validity of the indictment. For example, in Thier, the Fifth Circuit noted Congress' "clear intent to specifically forbid a court to 'entertain challenges to the validity of the indictment' at a hearing on a motion to modify or vacate a restraining order," 801 F.2d at 1469-70, and held that the grand jury's finding of probable cause that the defendant's property was subject to forfeiture should be regarded as a strong, though not irrebuttable, showing in support of the restraining order. 801 F.2d at 1470. The court continued:

The court is not free to question whether the grand jury should have acted as it did, but it is free, and indeed required, to exercise its discretion as to whether and to what extent to enjoin based on all matters developed at the hearing.

Id.

Similarly, the Seventh Circuit in Moya-Gomez held that where Sixth Amendment issues are implicated, the defendant is entitled to a hearing at which the government is "required to prove the likelihood that the restrained assets are subject to forfeiture." 860 F.2d at 731. But at the same time the court held that the "careful and deliberate judgment of Congress" was entitled to "respect," 860 F.2d at 729, and that therefore "[w]hatever may be the precise limits on the authority of the district judge at a [post-restraint] hearing . . . , it is clear that the court may not inquire as to the validity of the indictment and must accept that 'the probable cause established in the indictment or information is . . . determinative of any issue regarding the merits of the government's case on which the forfeiture is to be based.'" 860 F.2d at 728 (emphasis supplied), quoting S. Rep. 225, supra.

The Seventh Circuit continued as follows:

It is therefore not open to the defendant to attempt to persuade the court that the government's claim to the property is any less strong than suggested by the government in the indictment . . . .

Id. See Monsanto (Cardamone, J. dissenting), 924 F.2d at 1206 ("The prosecution's ability to prepare its case without being forced to 'tip its hand' prematurely was of paramount importance to the drafters and provides a persuasive reason for delaying a full adversarial hearing on the merits of the government's case during the post-restraint, pre-trial period."); United States v. O'Brien, 836 F. Supp. 438 (S.D. Ohio 1993) (following Moya-Gomez).

The proposed legislation attempts to end the uncertainty and ambiguity in the law by codifying the majority view, consistent with the original intent of Congress, on the issues raised. Proposed paragraph (4) codifies the rule that permits the district court, in its discretion, to grant a request for a hearing for modification of the restraining order.

Paragraph (4) also sets forth two grounds, other than the Sixth Amendment grounds, upon which a court may be asked to modify a restraining order. As the Second Circuit held in Monsanto, an order may be modified upon a showing that even if all of the facts set forth in the indictment are established at trial, the restrained property would NOT be subject to forfeiture. 924 F.2d at 1199, quoting S. Rep. 225 at 203. The court would also have the discretion to revise an order, in light of evidence produced at a hearing, to employ less restrictive means of restraint if such means are available to protect the government's interests without infringing on the defendant's property rights unnecessarily. Id. at 1207 (Cardamone, J. dissenting). Under the statute, the court would have the discretion to grant a hearing for such purposes at any time before trial.

With respect to the use of restrained property to retain criminal defense counsel, the restraining order would be modified if the defendant establishes that he or she has no other assets available with which to retain counsel, demonstrates that there is no probable cause to believe that the restrained property is likely to be forfeited if the defendant is convicted. The issue before the court, however, would be solely the likelihood of forfeiture assuming a conviction. As Congress stated in the 1984 legislative history, and as the majority of courts have held since that time, the indictment itself conclusively establishes probable cause regarding the criminal offense upon which the forfeiture would be based. Thus, in a money laundering case, for example, the court would require the government to establish probable cause to believe that the restrained assets were

"involved in" the money laundering offense(s) set forth in the indictment, see 18 U.S.C. § 982(a)(1), but it would not look behind the indictment to determine independently whether there was probable cause to believe that the money laundering offense itself had been committed.

This provision explicitly codifies the 1984 legislative history and recent case law regarding challenges to the sufficiency of the indictment. It would prohibit the defendant from challenging the validity of the indictment itself, and would bar the court from reexamining the factual basis for the grand jury's finding of probable cause. In this way, the statute would protect the defendant from the unlawful restraint of his property when there is no legal basis for the restraint, but it would preclude the use of the pretrial hearing as pretext for forcing the government to 'tip its hand' prematurely as to its evidence and trial strategy.

New paragraph (4) also contains a provision permitting, for the first time, third parties to contest pre-trial restraining orders in certain circumstances. Generally, third parties may not intervene in a criminal case until after the preliminary order of forfeiture is entered post-verdict. See 18 U.S.C. § 1963(i); 21 U.S.C. § 853(k). The amendment does not alter that general rule. However, if the restraining order causes a serious hardship to a third party, the court could modify the restraining order to impose a less-burdensome, but equally effective, alternative means of preserving the property for forfeiture.

The third party, however, could not assert his "innocent owner" defense in such a pre-trial hearing as a reason for modifying the restraining order. Such defenses are clearly limited by §§ 1963(i) and 853(k) to the ancillary hearing.

Subparagraph (E) of new paragraph (4) provides that when the pre-trial restraining order pertains to "substitute assets," the order shall exempt money needed to pay attorneys fees, cost of living expenses, and other costs without the necessity of any showing by the defendant other than a showing that the property is in fact needed for the designated purposes. The reason the restraint of substitute assets is treated differently from the restraint of property directly subject to forfeiture is that property in the latter category is "tainted" property that, under the relation back doctrine, belongs to the United States. A criminal defendant has no right to use such property for any purpose as long as there is a prima facie showing that the property is subject to forfeiture. In contrast, substitute assets are, by definition, untainted assets which may be exempted from forfeiture for certain limited purposes.

The amendment to paragraph (3) is intended to make clear that the court should take whatever steps are necessary to avoid

use to of a restraining order hearing to expose on-going law enforcement operations, to examine law enforcement agents concerning the subject matter of their testimony at an upcoming criminal trial, or to learn the names and addresses of witnesses who might be susceptible to intimidation.

Finally, the amendment also revises paragraph (3) to remove an ambiguity in the law, reflected in cases in the Fifth Circuit, regarding the applicability of Rule 65 of the Federal Rules of Civil Procedure to restraining orders under 21 U.S.C. § 853(e) and 18 U.S.C. § 1963(d). See United States v. Thier, *supra*, applying the standards of temporary restraining orders under Rule 65 to § 853(e)(1) restraints. The amendment makes clear that Rule 65 does not apply to restraints imposed under any of the provisions of § 853(e) and § 1963(d) because, in light of the amendments made by this section, those provisions will contain their own procedural requirements.

#### Section 212 Availability of Criminal Forfeiture

Under current law, 28 U.S.C. § 2461(a), a statute that provides for forfeiture without prescribing whether the forfeiture is civil or criminal is assumed to authorize only civil forfeiture. Thus, in such cases the government is required to file parallel civil and criminal cases in order to prosecute an individual and forfeit the proceeds of the offense. See *e.g.* 18 U.S.C. § 1955 (gambling).

The amendment resolves this problem by authorizing criminal forfeiture whenever any form of forfeiture is otherwise authorized by statute.

#### Section 213 Appeals in Criminal Forfeiture Cases

The amendments in this section clarify the government's authority to appeal an adverse pre-trial or post-trial decision in a criminal forfeiture case.

In United States v. Horak, 833 F.2d 1235, 1244 (7th Cir. 1987), the Court of Appeals for the Seventh Circuit held that it did not have jurisdiction under 18 U.S.C. § 3731 to hear an appeal by the government from a district court's denial of forfeiture pursuant to 18 U.S.C. § 1963(a). As noted by the Court of Appeals, absent express Congressional authorization, the government has no authority to appeal in a criminal case. *Id.* at 1244. The Court concluded that there is no statutory basis for a government appeal under § 3731 when a district court refuses to enter an order of forfeiture because that statute provides only that the government can appeal upon the dismissal of an indictment or information or a count thereof, or upon the granting of a new trial as to one or more counts after verdict or judgment.

The Court reasoned that the denial of a forfeiture is not analogous to the dismissal of an indictment and held that section 3731 did not authorize a government appeal from the district court's decision denying the forfeiture. *Id.* at 1248. The Court held that the forfeiture order was part of Horak's sentence and that section 3731 does not provide a basis for a government appeal from a sentence. *Id.* at 1246-48.

The government has been allowed to appeal forfeiture decisions in other cases. In United States v. Investment Enterprises, Inc., 10 F.3d 263, 264 (5th Cir. 1993), the Court of Appeals for the Fifth Circuit held that the denial of a motion for order of forfeiture was appealable by the government under 18 U.S.C. § 3742(b) which permits the government to appeal a sentence. But that statute does not presently make clear whether the government may appeal when the district court orders the forfeiture of some but not all of the subject property, or when the district court mitigates a forfeiture in order to address a perceived violation of the Excessive Fines Clause. (Avoidance of a constitutional violation is the only basis on which a court may mitigate a forfeiture in a criminal case.)

Accordingly, § 3731 is amended to permit the government to appeal from orders dismissing a forfeiture count in an indictment or dismissing individual assets named in a forfeiture count. In addition, § 3742 is amended to make explicit the statutory basis for a government appeal from a denial or mitigation of forfeiture, in whole or in part.

#### Section 214 Discovery Procedure For Locating Forfeited Assets

This section amends 18 U.S.C. § 1963(k) and 21 U.S.C. § 853(m) to give the court the discretion to exclude a convicted defendant from a post-trial deposition conducted for the purpose of locating the defendant's forfeited assets if the defendant's presence could frustrate the purpose of the inquiry. The provision is necessary because otherwise, under Rule 15 of the Federal Rules of Criminal Procedure, the defendant would have the right to be present at a deposition conducted for the purpose of locating assets that have been declared forfeited. United States v. Saccoccia, \_\_\_ F. Supp. \_\_\_, 1996 WL 28968 (D.R.I. Jan. 19, 1996). If, for example, the assets include funds in bank accounts that the defendant had hoped to conceal from the government and the court, the defendant's presence at the deposition could frustrate its purpose because upon learning that the government had discovered the location of his secret accounts, the defendant could quickly take steps to remove the assets before government agents could recover them.

#### Section 215 Scope of Criminal Forfeiture

This section makes a significant change in the scope of criminal forfeiture. Under current law, only the property of the defendant is forfeitable in a criminal case. That is, if a court or a jury pursuant to Rule 31(e) of the Federal Rules of Criminal Procedure, finds that property is subject to forfeiture and that the defendant has an interest in the property, the property is forfeited to the extent of the defendant's interest. But property in which the defendant has no interest is not forfeitable in a criminal case. See United States v. Ham, 58 F.3d 78 (4th Cir. 1995) (district court cannot enter order of forfeiture unless jury has entered a special verdict regarding the extent of the defendant's interest in the property).

Thus, in a drug case, the defendant's interest in real property used to facilitate the drug violation is subject to forfeiture, but the interest of his spouse is not, even if the spouse was complicit in the crime. To forfeit the spouse's interest, the government has to file a parallel civil forfeiture action. See United States v. Jimerson, 5 F.3d 1453 (11th Cir. 1993).

The ancillary proceeding provisions in 21 U.S.C. § 853(n) and 18 U.S.C. § 1963(l) exist to give third parties the opportunity to dispute the court or jury's finding that the defendant was the owner of the property. They do not, however, currently provide a vehicle to allow the government to forfeit a third party's interest in the criminal case where there has been no finding that the property belonged exclusively to the defendant. In other words, unlike a civil-in-rem provision, the ancillary hearing provision does not allow the government to forfeit the interest of a spouse, lienholder or other co-owner of property who knowingly allowed the defendant to use the property for an illegal purpose; if a third party establishes superior ownership, he or she will prevail in the ancillary proceeding even if he or she is not an "innocent owner."

This situation leads to wasteful and duplicative litigation as the government must file parallel civil proceedings every time it seeks to divest a non-innocent third party of his or her interest in property. The amendment resolves this problem by explicitly authorizing the government to forfeit in a criminal case any property in which the defendant has an interest, notwithstanding the interest of a spouse, lienholder or other third party. It also allows the ancillary proceeding to be used as an in rem proceeding to forfeit the third party interests so that it is no longer necessary to file a parallel civil proceeding.

In a case where the government invokes this provision to forfeit a third party's interest in the criminal case, the third party would, of course, have the right to challenge the finding, by the court or jury, that the property was subject to

forfeiture. This does not alter the general rule that where only the defendant's property is being forfeited, a third party may attempt to show a superior interest in the property, but may not contest the finding that a crime occurred and that the property involved in or derived from that criminal offense.

### TITLE III -- PROPERTY SUBJECT TO FORFEITURE

#### Section 301 Forfeiture of Proceeds of Federal Crimes

This amendment makes the proceeds of any crime in title 18, United States Code, subject to civil and criminal forfeiture. It does not override more specific provisions authorizing forfeiture of facilitating property and instrumentalities of crime under existing forfeiture statutes. See e.g. 18 U.S.C. § 1955(d) (relating to gambling); § 981(a)(1)(A) and § 982(a)(1) (relating to money laundering).

By providing for forfeiture of the proceeds of all federal title 18 offenses, the amendment ensures that the government will have a means of depriving criminals of the fruits of their criminal acts without having to resort to the RICO and money laundering statutes -- provisions which currently permit forfeiture of criminal proceeds but which also carry higher penalties -- in cases where it is unnecessary to do so or where the defendant is willing to enter a guilty plea to the offense that generated the forfeitable proceeds but not to the RICO or money laundering offense.

The section includes a set of congressional findings intended to make it clear that Congress regards the forfeiture of criminal proceeds to be remedial, not punitive, in nature. This conforms with the majority of cases to address this issue in the context of the 8th Amendment's Excessive Fines Clause and the 5th Amendment's Double Jeopardy Clause. See United States v. Tilley, 18 F.3d 295 (5th Cir. 1994) (forfeiture of proceeds does not implicate double jeopardy because it is not punitive); United States v. Alexander, 32 F.3d 1231 (8th Cir. 1994) (forfeiture of proceeds cannot constitute an excessive fine because it is not punitive).

#### Section 302 Uniform Definition of Proceeds

Sections 981 and 982 were amended and expanded in 1988, 1989, 1990 and 1992 to add new offenses to the list of crimes for which forfeiture is authorized. In each instance, Congress chose a different term to describe the property that could be forfeited, leading to great confusion as to the difference, if any, between "proceeds" and "gross proceeds" and between "gross proceeds" and "gross receipts." The amendment eliminates this problem by using the term "proceeds" throughout the statutes and by defining that term to mean all of the property derived, di-

rectly or indirectly, from an offense or scheme, not just the net profit.<sup>8</sup>

A recent example of the confusion inherent in current law is the decision in United States v. 122,942 Shares of Common Stock, 847 F. Supp. 105 (N.D. Ill. 1994). In that case, a court found that stock in a financial institution had been obtained through fraud and that the stock was forfeitable under § 981(a)(1)(C). The court held, however, that in the absence of a definition of "proceeds," it had to interpret "proceeds" to mean only net profits. Therefore, the court ordered the government to return to the wrongdoer the money he had fraudulently invested to obtain the stock.

This makes no sense. A person committing a fraud on a financial institution has no greater right to recover the money he invested in the fraud scheme than a drug dealer has to recover his overhead expenses when ordered to forfeit the proceeds of drug trafficking.

The definition of "proceeds" is intended to be interpreted broadly. It applies to any kind of property, real or personal, obtained at any time as a result of the commission of a criminal offense, and any property traceable to it. Thus, for example, the money received as a result of a false loan application would be the proceeds of the bank fraud offense. If the loan proceeds were used to buy a car, the car would be considered traceable to the proceeds of the bank fraud offense and would be forfeitable even if the loan were subsequently repaid because the offender would have had the use of the fraudulently obtained loan to purchase the property, and the statute makes all property obtained as a result of the offense forfeitable, not just the net profit.

The last two sections of the amendment extend the same uniform definition of proceeds to the drug forfeiture statutes and RICO.

#### Section 303 Forfeiture of Firearms Used in Federal Crimes

The amendment adds the authority to forfeit firearms used to commit crimes of violence and all felonies to 18 U.S.C. §§ 981

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<sup>8</sup> The amendments to the criminal forfeiture statutes refer to the proceeds of the entire scheme or course of conduct because otherwise the forfeiture might be construed as limited to the property derived directly from the offense of conviction. There is no need for a similar provision in the civil forfeiture statutes, because property is subject to forfeiture *in rem* if it was derived from criminal activity generally. See United States v. Parcels of Land, 903 F.2d 36, 42 (1st Cir. 1990).



and 982. This authority would be in addition to the authority already available to Treasury agencies under 18 U.S.C. § 924(d).

The purpose of the amendment is 1) to provide for criminal as well as civil forfeiture of firearms; and 2) to permit forfeiture actions to be undertaken by Department of Justice law enforcement agencies who have authority to enforce the statutes governing crimes of violence but who do not have authority to pursue forfeitures of firearms under the existing statutes.

Section 924(d) of title 18 already provides for the civil forfeiture of any firearm used or involved in the commission of any "criminal law of the United States." The statute, however, is enforced only by the Treasury Department and its agencies; it provides no authority for the FBI, for example, to forfeit a gun used in the commission of an offense over which it has sole jurisdiction. Moreover, § 924(d) provides for civil forfeiture only.

Subsection (d) adds a provision to 18 U.S.C. § 924(d) intended to permit the Bureau of Alcohol, Tobacco and Firearms to forfeit property that otherwise would have to be forfeited by another agency. Under § 924(d), ATF is presently authorized to forfeit a firearm used or carried in a drug trafficking crime. Property involved in the drug offense itself, such as drug proceeds, may also be forfeitable under the Controlled Substances Act, 21 U.S.C. § 881, but ATF does not presently have authority to forfeit property under that statute and has to turn the forfeitable property over to another agency. The amendment does not expand the scope of what is forfeitable in any way, but does allow the forfeiture to be pursued by ATF when the agency is already involved in the forfeiture of a firearm in the same case.

#### Section 304      Forfeiture of Proceeds Traceable to Facilitating Property in Drug Cases

Currently 21 U.S.C. § 881(a)(4) permits the forfeiture of conveyances used to facilitate a controlled substance violation. Similarly, § 881(a)(7) permits the forfeiture of real property used to facilitate such a violation. Neither statute, however, explicitly extends to the forfeiture to the proceeds traceable to the sale of such conveyances or real property. Not infrequently, for investigative reasons, facilitating property is not immediately seized. Thus, the owners are able to sell the property and the proceeds of that sale are outside the purview of the statute. Similarly, if property is destroyed before it is seized, the government is unable to forfeit the insurance proceeds.

The amendment revises §§ 881(a)(4) and (7) to permit forfeiture of proceeds traceable to forfeitable property, including proceeds of a sale or exchange as well as insurance proceeds in the event the property is destroyed. The amendment also insures

that the "innocent owner" exceptions apply to the forfeiture of traceable property in all cases where the facilitating property itself would not be forfeitable. (This latter provision is necessary, of course, only if the uniform innocent owner provisions of 18 U.S.C. § 983 are not enacted. If § 983 is enacted, these innocent owner provisions will be stricken by conforming amendments.)

The portion of this amendment relating to § 881(a)(4) passed the Senate in 1990 as § 1907 of S. 1970.

#### **Section 305 Forfeiture for Alien Smuggling**

These amendments to the Immigration and Nationality Act (the INA) would enhance the ability of the Immigration and Naturalization Service (the Service) to address the problem of alien smuggling by broadening the authority to obtain forfeiture of property used in or derived from smuggling operations.

Under current law, the Service may obtain forfeiture of conveyances (vehicles, boats, aircraft) used to smuggle, transport, or harbor aliens. This section would amend section 274(b) of the INA, 8 U.S.C. 1324(b), to broaden this forfeiture authority. The amendment makes subject to civil and criminal forfeiture all property, both real and personal, used or intended to be used to smuggle aliens. Also subject to forfeiture would be any property, real or personal, which constitutes, is derived from, or is traceable directly or indirectly to the proceeds of the smuggling, transportation, or harboring of aliens.

Innocent owners of property are protected by the proposed uniform innocent owner statute, to be codified at 18 U.S.C. § 983.

#### **Section 306 Forfeiture of Proceeds of Certain Foreign Crimes**

Inspired by the government's experience in the BCCI case and certain terrorism cases, this provision expands the scope of the forfeiture statutes to permit forfeiture of the proceeds of certain foreign crimes, including bank fraud, murder, robbery, kidnapping and extortion, if found in the United States.

In 1992, the same foreign crimes were added to the definition of "specified unlawful activity" in the money laundering statute, 18 U.S.C. § 1956(c)(7)(B). Thus, it is presently a crime to launder the proceeds of some of these offenses in the United States, and such proceeds are forfeitable if they are laundered under § 981(a)(1)(A). The amendment, which passed the Senate in another form as § 955 of S.543 in 1991, would amend § 981(a)(1)(B) so that the same proceeds and the proceeds of additional offenses are forfeitable directly without the government's having the additional and unnecessary burden of

showing that a money laundering violation took place. This would be consistent with the treatment of foreign drug proceeds which are forfeitable if found in the United States whether they are laundered here or not.

The purpose of the amendment is two-fold: to make it more difficult for terrorists and perpetrators of international bank fraud schemes to use the United States as a haven for the profits from their crimes, and to permit the United States to assist foreign governments in recovering the proceeds of crimes committed abroad. Foreign organized crime groups frequently invest the proceeds of the illegal activities in real property. For example, this is a particularly serious problem in Hawaii where real property has been purchased by the Japanese Yakuza. Under current law, those properties may be forfeited only if and when they are involved in a future money laundering offense. Under the amendment, they would become forfeitable immediately, and any foreign government that assisted the United States in the forfeiture action would be eligible to receive a portion of the forfeited property under § 981(i). Because the federal courts are not currently authorized to enforce foreign forfeiture orders, the property cannot be returned to the foreign government if it is not forfeitable under our law.

As is the case for the existing provision relating to foreign drug crimes, the forfeiture provision in § 981 would only apply where the foreign offense was punishable by at least one year in prison in the foreign country, and would be recognized as a felony under federal law if committed within the jurisdiction of the United States.

#### Section 307 Forfeiture of Property Used to Facilitate Foreign Drug Crimes

In accordance with the United Nations Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the "Vienna Convention"), which the United States ratified on November 11, 1990, the United States is obligated to enact procedures for the forfeiture of both the proceeds and the instrumentalities of foreign crimes involving drug trafficking. 18 U.S.C. § 981(a)(1)(B) already provides for the forfeiture of foreign drug proceeds, but it does not provide for the forfeiture of facilitating property. The amendment rectifies this omission.

#### Section 308 Forfeiture for Violations of Section 6050I

Sections 981 and 982 are the civil and criminal forfeiture statutes pertaining to money laundering. Presently, they provide for forfeiture for money laundering violations under the Bank Secrecy Act (31 U.S.C. § 5311 et seq.) and the Money Laundering Control Act (18 U.S.C. §§ 1956-57). The amendment would add

Section 6050I of the Internal Revenue Code to this list in both statutes.

Section 6050I is the statute that requires any trade or business receiving more than \$10,000 in cash to report the transaction to the IRS on Form 8300. Subsection (f) makes it an offense to structure a transaction with the intent to avoid the filing of such form. Thus, Section 6050I is the counterpart to 31 U.S.C. §§ 5313 and 5324 which require the filing of CTR and CMIR forms by financial institutions whenever a \$10,000 cash transaction takes place, and by other persons whenever they send more than \$10,000 in currency into or out of the United States. Including a reference to Section 6050I in Sections 981 and 982 thus means that violations of the Form 8300 requirement will be treated the same as CTR and CMIR violations for forfeiture purposes.

**Section 309      Criminal Forfeiture for Money Laundering  
                  Conspiracies**

Current law provides for the forfeiture of property involved in the substantive money laundering offenses set forth in titles 18 and 31. It also provides for the forfeiture of property involved in conspiracies to commit violations of 18 U.S.C. §§ 1956 and 1957 because such conspiracies are charged as violations of § 1956(h). There is no provision, however, for the forfeiture of property involved in conspiracies to violate the title 31 money laundering offenses because such conspiracies are charged as violations of 18 U.S.C. § 371, a statute for which forfeiture is not presently authorized. The amendment plugs this loophole by providing for forfeiture of the property involved in a conspiracy to commit any of the offenses listed in § 982(a)(1) following a criminal conviction on the conspiracy count.

**Section 310      Seizure of Vehicles with Concealed Compartments  
Used for Smuggling**

This section amends the seizure and forfeiture provisions of the Anti-Smuggling Act of 1935, 19 U.S.C. § 1703, to subject trucks and private automobiles to seizure if there is a concealed compartment used for smuggling, whether or not there is contraband or narcotics residue.

Under current law, vessels and aircraft having a hidden compartment can be seized and forfeited under 19 U.S.C. §§ 1590 and 1703. These provisions, however, do not permit the seizure and forfeiture of automobiles, trucks, or other vehicles that are similarly equipped with hidden compartments designed to smuggle contraband. This provision would cover compartments that are specifically built or fitted for smuggling; it would not reach other compartments (e.g., glove boxes or car trunks) that are part of the normal vehicle configuration.

**Section 311      Forfeiture of Instrumentalities of Terrorism,  
Telemarketing Fraud and Other Offenses**

This section adds new civil and criminal forfeiture provisions to sections 981 and 982, respectively, to cover the instrumentalities used to commit certain fraud offenses and violations of the Explosives Control Act. These provisions are necessary because in many such cases forfeiture of the proceeds of the offense alone is an inadequate sanction. For example, in a computer crime case in which the defendant has penetrated the security of a computer network, there may not be any proceeds of the offense to forfeit, but the perpetrator should be made to forfeit the computer or other access device used to commit the offense. The description of the articles subject to forfeiture in such cases is derived from 18 U.S.C. 492, the forfeiture provision for instrumentalities used to commit counterfeiting crimes. The reference to specific items such as computers in the statutory language is not intended to limit the generic description of the articles subject to forfeiture to those particular items.

The provision relating to fraud offenses states that only property used on a "continuing basis" is subject to forfeiture. This is intended to make clear, as many courts have already held, that there must be a substantial temporal connection between the forfeited property and the act giving rise to forfeiture. Under the statute, property otherwise used for lawful purposes will be subject to forfeiture if it is used to commit two or more offenses, or if it used to commit a single offense that involved the use of the property on a number of occasions. On the other hand, property otherwise used for lawful purposes would not be subject to forfeiture if used only in an isolated instance to commit or facilitate the commission of an offense.

### Section 312      Forfeiture of Vehicles Used in Gun Running

This section provides for the forfeiture, under 18 U.S.C. §§ 981 and 982, of vehicles used to commit gun running crimes, such as transporting stolen firearms. The provision is limited to instances in which 5 or more firearms are involved, thus making it clear that it is not intended to be used in instances where an individual commits a violation involving a small number of firearms in his personal possession.

### Section 313      Forfeiture of Criminal Proceeds Transported in Interstate Commerce

Section 1952(a)(1) of title 18 makes it a crime to distribute the proceeds of an "unlawful activity" in interstate commerce. "Unlawful activity" includes gambling, drug trafficking, prostitution, extortion, bribery and arson. 18 U.S.C. § 1952(b). There is, however, no statute authorizing forfeiture of the criminal proceeds distributed in violation of § 1952(a)(1).

Prosecutors have attempted to work around this problem by charging interstate transportation of drug proceeds as a money laundering offense under 18 U.S.C. § 1956(a)(1)(B)(i), an offense for which forfeiture of all property involved is authorized. See 18 U.S.C. §§ 981(a)(1)(A) and 982(a)(1). The courts, however, have not endorsed this theory either on the ground that mere transportation of drug money is not a "financial transaction," see United States v. Puig-Infante, 19 F.3d 929 (5th Cir. 1994) (transporting drug proceeds from Fla. to Tex. not a "transaction" absent evidence of disposition once cash arrived at destination), or because transporting cash does not, by itself, evidence an intent to "conceal or disguise" drug proceeds, see United States v. Garcia-Emanuel, 14 F.3d 1469 (10th Cir. 1994) (simple wire transfer of proceeds to Colombia evidences no intent to conceal or disguise); United States v. Dimeck, 24 F.3d 1239 (10th Cir. 1994) (covert nature of transportation of funds from one state to another not sufficient to imply intent to conceal or disguise).

The amendment to § 1952 cures this problem by authorizing civil and criminal forfeiture of the proceeds of unlawful activity distributed in violation of subsection (a)(1). In each instance, the applicable procedures would be the same as those applicable to money laundering forfeitures.

### Section 314      Forfeiture of Proceeds of Federal Food, Drug, and Cosmetic Act Violations

This section creates civil and criminal forfeiture provisions for proceeds traceable to Federal Food, Drug, and Cosmetic Act (FFDCA) violations codified in chapter 9 of title 21

(21 U.S.C. § 301 et seq.). The new forfeiture provisions would be additions to chapter 9 (new 21 U.S.C. §§ \_\_\_\_ (civil forfeiture) and \_\_\_\_ (criminal forfeiture)).

FFDCA violations are investigated by the Food and Drug Administration's Office of Criminal Investigations (FDAOI). The FFDCA presently provides for forfeiture of only the specific articles of food, drugs, or cosmetics that are in violation of the FFDCA. See 21 U.S.C. § 334 (seizure, judicial condemnation, and court-ordered destruction or sale of adulterated or misbranded foods, drugs, or cosmetics, with net proceeds of any sale going to the Treasury of the United States). In order to achieve forfeitures of the proceeds of FFDCA violations, FDAOI has to expand FFDCA cases to include additional offenses (e.g., mail or wire fraud and the laundering of fraud proceeds) which serve as predicate offenses for adoptive forfeitures undertaken by other federal law enforcement agencies under statutes outside the FFDCA (e.g., 18 U.S.C. §§ 981 and 982). FDAOI forfeiture cases under the FFDCA forfeiture statutes will simplify the process by which FDAOI investigations lead to proceeds forfeitures.

FDAOI does not seek forfeiture of facilitating property; nor does FDAOI seek administrative forfeiture authority. FDAOI does not want to establish organizational infrastructures for managing property seized for facilitating FFDCA violations (e.g. factories and warehouses) or for executing administrative forfeitures. All forfeitures of articles that are in violation of the FFDCA under the existing FFDCA forfeiture statute (21 U.S.C. § 334) are judicial.

#### Section 315      Summary Destruction of Explosives Subject to Forfeiture

This section provides legal authority for the Secretary of the Treasury to destroy summarily explosives that are subject to forfeiture and that are too dangerous to store pending the completion of forfeiture proceedings. The statute provides for compensation, up to the value of the destroyed property, to any owner or person with an interest in the property who, within a period of 90 days, files an application with the Secretary and establishes that he or she was an innocent owner of the property.

#### Section 316      Archeological Resources Protection Act

This section expands the forfeiture provisions of the Archeological Resources Protection Act of 1979 (16 U.S.C. § 470gg(b)) to include proceeds of a violation of the Act and to provide that the procedures governing criminal and civil forfeiture in title 18, as amended by the Forfeiture Act, apply to such forfeitures.

## TITLE IV -- MISCELLANEOUS AND MINOR AND TECHNICAL AMENDMENTS

## Section 401 Use of Forfeited Funds to Pay Restitution to Crime Victims and Regulatory Agencies

This section amends the civil and criminal forfeiture statutes to make it clear that the forfeited property may be used to restore property to victims of the offense giving rise to the forfeiture.

The civil statute, 18 U.S.C. § 981, explicitly authorizes the use of forfeited funds to restore property only in cases based on the offenses set forth in §§ 981(a)(1)(C) and (D), most of which involve financial institution fraud.<sup>9</sup> At the same time, the criminal statute, § 982, permits forfeited funds to be restored to victims in virtually all instances. See 21 U.S.C. § 853(i) incorporated by reference in § 982(b). Taken together, these statutes imply that the Attorney General may not use forfeited funds to restore property to victims in other civil cases -- such as consumer fraud and money laundering. These amendments negate that implication by making it clear that the Attorney General make use the forfeiture laws to restore property to victims in all cases.

First, subsection (e)(6), which presently authorizes the payment of restitution to victims of any crime listed in § 981(a)(1)(C), is expanded to cover all offenses for which forfeiture is authorized under § 981. In the case of money laundering offenses, this includes the offense that constituted the underlying "specified unlawful activity."

Second, subsections (e)(3), (4) and (5), which authorize restitution to financial institutions in cases governed by § 981(a)(1)(C), is revised to take into account the fact that not all financial institution offenses are covered by subsection (a)(1)(C). See subsection (a)(1)(A) relating to money laundering offenses in which the underlying unlawful activity may be a financial institution offense. Thus, the introduction to each subsection, respectively, is amended to refer to "property forfeited in connection with an offense resulting in pecuniary loss to a financial institution or regulatory agency" regardless of what statutory provision is employed to accomplish the forfeiture.

Third, a similar amendment is made to subsection (e)(7) to reflect that not all crimes relating to the sale of assets by receivers of failed financial institutions are covered by subsec-

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<sup>9</sup> The restitution provisions were enacted as part of the Financial Institutions Reform and Recovery Act (FIRREA) of 1989, which explains their limitation to these particular offenses.



tion (a) (1) (D), see subsections (a) (1) (A) and (E), and to eliminate the need to revise the cross references in this section in the future each time the various subparagraphs of subsection (a) (1) are amended or redesignated.

Finally, the criminal forfeiture provision, which as mentioned, is contained in a cross-reference to 21 U.S.C. § 853(i) (1), is revised to clarify its application in money laundering cases and cases where there are persons who were victimized by a the same scheme but not by the particular offenses that were the subject of the criminal prosecution. Thus, in money laundering cases, property could be restored to victims of the offense that constituted the underlying "specified unlawful activity," and in all cases, property could be restored to the victim of any offense that was part of the same scheme, conspiracy, or pattern of criminal activity, a formulation derived from the restitution provision of the Victim and Witness Protection Act, 18 U.S.C. § 3663. (It is not necessary to make reference to a "scheme" or "pattern" in the civil forfeiture statute because civil forfeiture, unlike criminal forfeiture, need not be tied to the commission of a specific offense.)

#### Section 402 Compliance with Vienna Convention Regarding Enforcement of Foreign Drug Forfeiture Orders

The United States was the eighth country to ratify the United Nations Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances (hereinafter the Vienna Convention), and has been under an obligation to meet the Convention's requirements since the treaty went into effect on November 11, 1990.

Article V of the Vienna Convention requires the member nations (the Parties) to enact legislation providing for the forfeiture of proceeds and instrumentalities of drug trafficking and drug-related money laundering offenses. Specifically, paragraph 1(a) of Article V says that each Party shall adopt measures authorizing the forfeiture of "proceeds derived from offenses established in accordance with article 3, paragraph 1, [which defines the predicate drug and drug-related money laundering offenses], or property the value of which corresponds to that of such proceeds."

The United States is in full compliance with these requirements insofar as they relate to domestic forfeitures. The drug and money laundering forfeiture statutes enacted by Congress since 1978 authorize the forfeiture of both drug proceeds and property involved in money laundering offenses where the underlying crime is committed in the United States. The substitute assets provisions of these statutes permit the forfeiture of property of "equivalent value" when the property traceable to the criminal offense is unavailable. See 21 U.S.C. § 853(p). In-

deed, these statutes frequently serve as models for other Parties seeking to comply with the Vienna Convention's requirements. Additional legislation, however, will support our compliance with the Convention's international forfeiture obligations.

Under Article V, a Party must provide for the forfeiture of drug proceeds derived from an offense occurring in another country by providing forfeiture assistance to a Party in whose jurisdiction the underlying drug or money laundering offense occurred. This obligation applies both to the drug proceeds themselves and to property of equivalent value. Under 18 U.S.C. § 981(a)(1)(B), the United States can initiate a civil action against foreign drug proceeds that would result in the seizure and confiscation of such property. But because that statute is a civil in rem statute, it does not authorize the forfeiture of substitute assets of equivalent value.

The proposed statute is intended reinforce our compliance with the Vienna Convention in this regard by giving our treaty partners access to our courts for enforcement of their forfeiture judgments. Under the proposal, once a defendant is convicted of a drug trafficking or money laundering offense in a foreign country and an order of forfeiture is entered against him, the foreign country, as the Party requesting assistance under the Vienna Convention, would file a civil action as a plaintiff in federal court seeking enforcement of the judgment against assets that may be found in the United States. The Requesting Party, however, would not be allowed to file for enforcement without approval from the United States Department of Justice, thereby permitting the United States to screen out requests that are factually deficient or based on unacceptable foreign proceedings.

The concept of placing the Requesting Party in the posture of a plaintiff seeking enforcement of a judgment is drawn from Canada's Mutual Legal Assistance in Criminal Matters Act. Section 9 of the Act provides, in pertinent part:

Where the Minister [of Justice] approves a request of a foreign state to enforce the payment of a fine imposed in respect of an offense by a court of criminal jurisdiction of the foreign state, a court in Canada has jurisdiction to enforce the payment of the fine and the fine is recoverable in civil proceedings instituted by the foreign state, as if the fine had been imposed by a court in Canada.

The Justice Department has been informed by Canadian Justice Ministry authorities that, although this provision has not yet been applied, it is expected to cover foreign criminal forfeiture orders. Canada views Section 9 as part of its response to the Vienna Convention.

Enactment of this proposal would bring the United States into line with an important trend in international law enforcement while preserving our in rem/in personam distinctions and without requiring the government to become a party to the enforcement of a foreign order. Laws providing for the enforcement of foreign confiscation orders have been enacted by a number of jurisdictions, including Australia, Denmark, Hong Kong, Japan, the Netherlands, Singapore, and the United Kingdom. We can anticipate that more countries will enact laws to give full faith and credit to their treaty partners' "equivalent value" forfeiture orders. If we expect such countries to enforce our forfeiture orders against substitute assets located abroad, we must be prepared to render reciprocal assistance.

**Section 403      Minor and Technical Amendments Relating to 1992  
Forfeiture Amendments**

These are minor and technical corrections to statutes amended by the Anti-Money Laundering Act of 1992, the Anti-Car Theft Act, and the 1993 Treasury Appropriations bill.

Subsection (a) amends section 982(b)(2) to clarify, in light of additions made to section 982(a) in 1990 and 1992, that the substitute asset limitation in that section applies only to money laundering cases.

Subsection (b) makes several clarifying changes to the statute authorizing forfeiture of fungible property in civil cases when no property traceable to the underlying offense is available. It also makes the statute applicable to all civil forfeitures. See United States v. All Funds Presently on Deposit at American Express Bank, 832 F. Supp. 542 (E.D.N.Y. 1993) (questioning failure to make § 984 applicable to drug offenses).

The clarifying changes are necessary to make sure that the provisions of § 984, including the limitations set forth in the statute, only apply to instances where the government seeks to invoke the fungible property provisions of the statute because neither the property actually involved in the offense giving rise to forfeiture nor any property traceable to it is available for forfeiture. If such property is available, there is no need to invoke § 984 and none of its provisions would apply. This answers the question raised in Marine Midland Bank, N.A. v. United States, 11 F.3d 1119 (2d Cir. 1993), where the appellate court remanded a case to determine if the limitations relating to interbank accounts in § 984 applied when property traceable to a money laundering offense was forfeited under § 981.

The amendments also make clear that § 984 does not abrogate any other applicable theory of forfeiture. See American Express Bank which suggested, in dicta, that § 984 was intended to abrogate the case law authorizing the forfeiture of facilitating

property under § 981(a)(1)(A). Under § 984, a court may forfeit fungible property in place of any property forfeitable under any civil forfeiture statute, including facilitating property if the forfeiture of such property is authorized by another statute. See United States v. All Monies, 754 F. Supp. 1467, 1473 (D. Haw. 1991) (facilitating property is forfeitable in money laundering cases under § 981(a)(1)(A); United States v. Certain Accounts, 795 F. Supp. 391, 396 (S.D. Fla. 1992) (same).

The amendment also extends the period within which the forfeiture action must be commenced for the provisions of § 984 to apply from one year to two years, which is consistent with the Senate-passed version of the statute when it was enacted in 1992. See American Express Bank, supra (seized property returned to Ecuadorian money exchanger despite evidence of drug trafficking because seizure occurred 18 months after money laundering and outside of § 984's one-year limitations period). The amendment makes clear that for the purposes of the limitations period, a forfeiture action is "commenced" either when the property is seized or when an arrest in rem is served.

Finally, the amendment provides that a "financial institution" includes a foreign bank so that interbank accounts maintained by foreign banks are covered by the provision exempting interbank accounts from the application of the rule permitting the forfeiture of fungible property.

Subsection (c) makes similar stylistic changes to section 986, making it applicable to all § 981 forfeitures including the provisions added in 1992, and eliminating the erroneous reference to § 1960. The amendment also strikes a meaningless cross-reference to a non-existent statute, 18 U.S.C. § 985.

Subsection (d) amends 18 U.S.C. § 3554, the statute enacted as part of the Sentencing Reform Act of 1984 to provide for the entry of an order of forfeiture in criminal cases, to reflect the enactment of various criminal forfeiture statutes that were not in existence at the time of the 1984 legislation. The amendment also inserts a reference to Rule 32, Fed.R.Crim.P., to make clear that nothing in § 3554 is intended to be inconsistent with the Rule as it may be amended from time to time.

Subsection (e) adds an attempt provision to the statute making it an offense to fail to file a CMIR form, or to file a false or incomplete form. This makes it clear that a person who boards a domestic flight in the United States with the intention of transferring to an international flight at another airport in the United States, and who does so with the intent to evade the CMIR reporting requirement, is guilty of the offense at the point where he boards or prepares to board the first flight. Otherwise, the statute could be read to make it impossible to take any law enforcement action under the CMIR statutes until

such time as the traveller changed planes en route to his international destination. For example, under the amendment, a traveller carrying a large quantity of cash who boards a plane in Ohio to fly to New York where he will change planes for a flight to South America, will be in violation of 31 U.S.C. § 5324(b) at the point when he is about to board the plane in Ohio with the intent to evade the CMIR reporting requirement.

Subsection (f) amends the civil penalty provision of 18 U.S.C. § 1956. The first new provision is a long arm statute that gives the district court jurisdiction over a foreign bank that violates the money laundering statute, provided that the bank maintains an account in the United States and that the bank receives service of process pursuant to the applicable statutes or rules of procedure. The purpose of the provision is to ensure that a bank that violates the money laundering laws of the United States and that conducts banking business through an account in the United States does not escape liability under Section 1956(b) by asserting that its contacts with the United States are not sufficient to satisfy the "minimum contacts" requirements for in personam jurisdiction. The second provision, modeled on 18 U.S.C. § 1345(b), gives the district court the power to restrain property or take other action necessary to ensure that a defendant in a § 1956 action does not dissipate the assets that would be needed to satisfy a judgment under that section.

#### Section 404 Civil Forfeiture of Coins and Currency in Confiscated Gambling Devices

This section makes a change in the civil forfeiture provisions in the Gambling Devices Act, 15 U.S.C. 1171 et seq. The Gambling Devices Act, set out as chapter 24 of title 15, United States Code, is a scheme for regulating devices like slot machines and other machines used for gambling. In general, the chapter makes it illegal to ship such devices into states where they are illegal and to use or possess them in areas of special federal responsibility such as in the special maritime and territorial jurisdiction and in Indian country. 15 U.S.C. 1175 provides for the seizure and civil forfeiture of gambling machines involved in a violation of the chapter. Occasionally a slot machine or video game involved in a violation will contain money. This section clarifies that money in such a machine at the time it is seized is also subject to seizure and forfeiture. Such a forfeiture is justified and the section eliminates any need for a complicated procedure under which such a machine would have to be opened and the money counted and removed before it can be seized.

#### Section 405 Drug Paraphernalia Technical Amendments

Section 511(a)(10) of the Controlled Substances Act (21 U.S.C. 881(a)(10)) provides for the civil forfeiture of "[a]ny

drug paraphernalia (as defined in section 857 of this title). Section 2401 of the Crime Control Act of 1990, Pub.L. 101-647, 104 Stat. 4858, November 29, 1990, transferred 21 U.S.C. 857 (drug paraphernalia violations) to a new 21 U.S.C. 863 and made it part of the Controlled Substances Act. "Drug paraphernalia" is defined at 863(d). Paragraph (a) above amends 21 U.S.C. 881(a)(10) to correct the misreference to the repealed section 857.

Prior to enactment of 21 U.S.C. § 863, references in 21 U.S.C. 881 and 853 to violations of "this subchapter" as bases for forfeiture did not include drug paraphernalia violations because 21 U.S.C. 857 was part of the Anti-Drug Abuse Act of 1986. The references to "this subchapter" in 21 U.S.C. 853 and 881 are actually references to the original legislation (Title II of Pub.L. 91-513, October 27, 1970, 84 Stat. 1242) popularly known as the "Controlled Substances Act". See editorial note entitled "References in Text" after 21 U.S.C. 801 in West's Federal Criminal Code and Rules (1991 Revised Edition) at 962. Consequently, the reference to "this title" in 21 U.S.C. 881(a)(10) should be corrected to "this subchapter" when the proposed amendment is codified.

Section 863 penalizes sale, use of any facility of interstate commerce to transport, and import or export of drug paraphernalia with imprisonment for up to three years. Additionally, 21 U.S.C. 863(c) provides for criminal forfeiture of drug paraphernalia involved in a violation of 21 U.S.C. 863 "upon the conviction of a person for such violation" and directs forfeited drug paraphernalia to be delivered to the Administrator of General Services, who may order its destruction or authorize its use by federal, state, or local authorities for law enforcement or educational purposes. Paragraph (b) above deletes section 863(c) as unnecessary because 21 U.S.C. 853(a)(2) provides for criminal forfeiture of any property used to commit "a violation of this subchapter" that is punishable by imprisonment for more than one year. Section 863 is such a violation. Deletion of section 863(c) also removes section 863(c)'s contradiction of section 853(h)'s provision for disposition of criminally forfeited drug paraphernalia by the Attorney General. Disposition of drug paraphernalia forfeited civilly under section 881 is also by the Attorney General pursuant to 21 U.S.C. 881(e).

**Section 406 Authorization to Share Forfeited Property with Cooperating Foreign Governments.**

Section 981(i) authorizes the sharing of forfeited property with foreign governments in certain circumstances. It currently applies to all civil and criminal forfeitures under 18 U.S.C. §§ 981-82, which are the forfeiture statutes for most federal offenses in Title 18. Older parallel provisions applicable only

to drug cases and Customs cases appear in 21 U.S.C. § 881(e)(1)(E) and 19 U.S.C. § 1616a(c)(2), respectively.

The amendment simply extends the existing sharing authority to all other criminal and civil forfeitures, including those undertaken pursuant to RICO, the Immigration and Naturalization Act, the anti-pornography and gambling laws, and other statutes throughout the United States Code. Because the amendment makes the parallel provisions in the drug and customs statutes unnecessary, Section 881(e) is amended to remove the redundancy.

#### Section 407 Forfeiture of Counterfeit Paraphernalia

18 U.S.C. § 492 has provided for the civil forfeiture of counterfeiting paraphernalia since 1909. It was last amended in 1938. The amendments are intended to bring the statute up to date and in conformance with modern civil forfeiture statutes by cross-referencing procedures pertaining to administrative forfeitures in the customs laws, 19 U.S.C. § 1602 *et seq.*, and the civil forfeiture procedures in 18 U.S.C. § 981-87. The amendment also adds a criminal forfeiture provision that cross-references the procedures in § 982.

#### Section 408 Closing Loophole to Defeat Criminal Forfeiture Through Bankruptcy

These provisions passed the Senate in 1990 as Section 1904 of S.1970. They would prevent the circumvention of criminal forfeiture through the use of forfeitable property to satisfy debts owed to unsecured general creditors. The limitation to those bankruptcy proceedings commenced after or in contemplation of criminal proceedings safeguards against interference with legitimate bankruptcy filings.

#### Section 409 Statute of Limitations for Civil Forfeiture

The first part of this amendment makes a minor change to the wording of the statute of limitations for civil forfeitures. Presently, forfeiture actions must be filed within 5 years of the discovery of the offense giving rise to the forfeiture. In customs cases, in which the property is the offender, this presents no problem. In such cases, the discovery of the offense and the discovery of the involvement of the property in the offense, occur simultaneously.

This provision of the customs laws, however, is incorporated into other forfeiture statutes. In those cases, the government may be aware of an offense long before it learns that particular property is the proceeds of that offense. For example, the government may know that a defendant robbed a bank in 1990 but not discover that the proceeds of the robbery were used to buy a motorboat until 1993. Under current law the forfeiture of the

motorboat would be barred by the statute of limitations. The amendment rectifies this situation by allowing the government 5 years from the discovery of the involvement of the property in the offense to file the forfeiture action.

The second part of the amendment extends the statute of limitations for civil forfeiture proceedings involving banking law violations, as enumerated in 18 U.S.C. § 981(a)(1)(C), to ten years. This conforms to the extension, accomplished by section 2533 of the Crime Control Act of 1990, of the statute of limitations for bringing civil actions under section 951 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA) to ten years. There is no reason to distinguish in terms of the applicable period of limitations between civil actions for a monetary penalty under section 951 and civil forfeiture actions under 18 U.S.C. 981(a)(1)(C). (The same principle applies to the offenses enumerated in the current law in sub-paragraph (D). Another provision of this Act, however, would strike sub-paragraph (D) and combine it with sub-paragraph (C). Thus, the amendment does not cross-reference sub-paragraph (D).)

The extended limitations period would apply to acts giving rise to forfeiture that are not time barred when the amendment becomes law.

#### Section 410 Assets Forfeiture Fund and Property Disposition

This section makes a variety of minor and technical amendments to the statute governing the ~~use~~ of the Justice Department Assets Forfeiture Fund. Subsection (a) makes technical amendments to ensure correct cross-references within the statute. This subsection includes a number of conforming amendments required by the redesignation of paragraphs in § 524(c)(1) and other statutes, in this Act and in previous legislation. Subsection (a)(6) is a technical amendment intended to conform with the intent of the Federal Reports Elimination and Sunset Act of 1995 (Public Law 104-66). That Act repealed § 524(c)(7) (dealing with reports and audits) but failed to repeal § 524(c)(6) which concerns the filing of another annual report. The amendment corrects this oversight.

Subsection (b) amends 28 U.S.C. § 524(c)(8), as redesignated in the Section, to provide a set of disposal authorities of the Attorney General for forfeited property. These amendments will be neutral in their effect on the federal budget. For the most part, they merely restate in one place authorities that currently exist in several places. This is intended to clarify the interplay between the substantive forfeiture statutes, which specify the uses that may be made of the forfeited property, and § 524(c) which authorizes uses to be made of property deposited in the Assets Forfeiture Fund.



The Attorney General's current authority to warrant clear title to forfeited property pursuant to 28 U.S.C. § 524(c)(9) does not provide for the expenditure of funds to indemnify title insurers who rely upon the Attorney General's action but are nevertheless found liable if a defect in the title is established. The last sentence of subsection (b) is intended to correct this possible defect by authorizing the use of appropriated funds for such purposes.

Subsection (c) makes clear the requirement that any monetary amount obtained from settlement in lieu of forfeiture be deposited into the Department of Justice Assets Forfeiture Fund. Essentially, all amounts accepted in lieu of forfeiture would be treated in the same manner as the proceeds of sale of a forfeited item.

Subsection (d) is intended only to make clear that the Fund may accept deposits of amounts representing reimbursement of costs paid by the Fund.

Subsection (e) amends § 524(c)(1) to add authority to indemnify foreign governments held liable in connection with assistance rendered to the United States in a forfeiture action. Under current U.S. law, there is no provision allowing the return of forfeited property to a foreign country or other entity, such as a foreign bank, that suffers foreign legal liability as the result of assisting a United States forfeiture action. This amendment authorizes the Attorney General to return the forfeited property plus any earned interest in such circumstances. Without assurances that the property plus interest can be returned, a number of foreign jurisdictions have been unwilling to seize or repatriate property on behalf of the United States.

Moreover, the international sharing statutes (i.e., 18 U.S.C. § 981(i) and 21 U.S.C. § 881(e)(1)(E)) do not furnish the means to address this problem since these statutes provide simply for the distribution of forfeited assets among the United States and other countries in proportion to the effort each has expended in bringing about a forfeiture of property under United States law.

As a result of this vacuum, foreign jurisdictions have declined to provide the United States with forfeiture-related assistance unless the United States first promises to return the property plus interest in the event the seizure or repatriation by the foreign authorities results in an adverse judgment against the foreign government and those acting at its instructions (e.g., banking officials that wire funds to the United States for forfeiture at the behest of the foreign authorities). Without such an agreement, some foreign countries have been unwilling to take any risk on the United States' behalf, with the consequence

that criminal proceeds have been insulated from our forfeiture laws.

This proposal is meant primarily to satisfy foreign governments whose international forfeiture assistance laws have not yet been tested in court. Such foreign countries have expressed concern that if they repatriate assets (usually drug proceeds on deposit in local bank accounts) for forfeiture in the United States, and their assistance is later successfully challenged in court, the foreign jurisdiction or other entity in question will be left to pay damages while the United States confiscates the property in question.

It should be emphasized that this amendment to Section 524(c)(1) does not create an obligation to pay, but simply vests the Attorney General with the discretion to commit the Fund to return property to a cooperating foreign jurisdiction in the event of an adverse foreign judgment. This discretion, however, is not unfettered. The United States is limited in the amount it can transfer to the forfeited property or proceeds plus interest earned on the funds, to the extent that the property and interest have not already been disbursed to the government in sharing or awards. The statute does not authorize other types of payments such as damages and attorneys fees. Furthermore, there is a window of liability to make clear that the foreign government or entity must vigorously defend any action brought against it if it wants the return of the monies. In addition, because the time the Fund is at risk is limited to five years from the time that a final United States forfeiture judgment ~~is entered~~ against the property, exposure is not open-ended.

Subsection (f) amends redesignated section 524(c)(7)(E) to provide guidance regarding excess surplus funds remaining in the Fund at the end of this and future fiscal years.

Subsection (g) amends section 524(c)(1)(E) to apply not only to remission and mitigation but also to any other authority given to the Attorney General by statute. This provision, in addition to the amendment to 28 U.S.C. § 524(c)(8) in subsection (b) clarifies the statutory authority to restore forfeited property to qualified victims from the Department of Justice Assets Forfeiture Fund. That provision applies, of course, only to property forfeited in a given case and does not permit restitution from the Fund generally.

#### Section 411 Clarification of 21 U.S.C. § 877

Section 877 of 21 U.S.C. provides that "(a)ll final determinations, findings, and conclusions of the Attorney General under this subchapter shall be final... except that any person aggrieved by a final decision of the Attorney General may obtain review of the decision in the United States Court of Appeals for

the District of Columbia or the circuit in which his principal place of business is located upon petition filed with the court... ." One court has found that the "express and unambiguous terms" of Section 877 provided the court of appeals with jurisdiction to review on direct appeal a denial of a petition for remission or mitigation of the forfeiture of property by an agency. Scarabin v. DEA, 925 F.2d 100, 100-01 (5th Cir. 1991). This decision was recently upheld in Clubb v. FBI, No. 93-4912 (5th Cir. Feb. 28, 1994) (unpublished).

The decision in Scarabin is contrary to the statutory language and legislative history of Section 877 which show that Congress intended judicial review only for those decisions of the Attorney General affecting the pharmaceutical and research industries. The amendment clarifies the meaning of Section 877 by excluding the review of decisions of the Attorney General or her designees relating to the seizure, forfeiture, and disposition of forfeited property, including rulings on petitions for remission or mitigation.

#### Section 412 Certificate of Reasonable Cause

This section makes a technical amendment to 28 U.S.C. § 2465 to provide that a certificate of reasonable cause shall be issued in appropriate circumstances whether the property in question was seized or merely arrested pursuant to an arrest warrant in rem. The amendment is necessary in light of the Supreme Court's decision in United States v. James Daniel Good Property, 114 S. Ct. 492 (1993) which explained that the government need not seize real property for forfeiture but may instead post the property with an arrest warrant issued pursuant to the Admiralty Rules and file a lis pendens.

#### Section 413 Conforming Treasury and Justice Funds

This section makes several changes to the statute authorizing the creation of the Treasury Department's Assets Forfeiture Fund to make the administration of the Fund more like the administration of the Justice Assets Forfeiture Fund. It makes one change to the Justice Fund statute for the same purpose.

#### Section 414 Disposition of Property Forfeited Under Customs Laws

This section fills a gap in the current law regarding the authority of the Secretary of the Treasury to dispose of forfeited property in Customs cases by sale or other commercially feasible means. The amendment adds the authority currently available under other statutes, such as 21 U.S.C. § 881(e), to 19 U.S.C. § 1616a. This provision is intended to increase the options available and not to impose a preference for one method of disposal of property over another.

**Section 415      Technical Amendments Relating to Obliterated Motor Vehicle Identification Numbers**

This section contains minor conforming amendments to 18 U.S.C. § 512, the civil forfeiture statute governing motor vehicles and parts with obliterated serial numbers. The amendments cross-reference the new procedural statutes in sections 981-87 and, in particular, the innocent owner defense in section 983.

**Section 416      Fugitive Disentitlement**

This provision authorizes the district court to bar a fugitive from justice from attempting to hide behind his fugitive status while contesting a civil forfeiture action against his property. It reinstates what is commonly known as the fugitive disentitlement doctrine under which "a person who is a fugitive from justice may not use the resources of the civil legal system while disregarding its lawful orders in a related criminal action." United States v. Eng, 951 F.2d 461, 464 (2d Cir. 1991) (applying the doctrine to bar an appellant who was resisting extradition from participating in related civil forfeiture proceedings).

Eng and similar cases in other circuits applied a judicially created rule intended to protect the integrity of the judicial process from abuse by a fugitive in a criminal case. But in Degen v. United States, \_\_\_ S. Ct. \_\_\_, 1996 WL 305720 (1996), the Supreme Court held that as a judge-made rule, the sanction of absolute disentitlement goes too far. In the absence of legislative authority to bar a fugitive from filing a claim, courts must resort to other devices to prevent a fugitive from abusing the discovery rules or otherwise taking advantage of his fugitive status in litigating a civil forfeiture case, such as imposing sanctions for failure to comply with discovery orders.

These devices, however, are not adequate to address the problems that arise when fugitives contest forfeiture actions. Moreover, if a forfeiture action involves a business, perishable property, or any other asset whose value depreciates with time, the government cannot simply stay the civil case until the fugitive is apprehended. In such cases, delay is prejudicial to the government, "for if its forfeiture claims are good, its right to the properties is immediate." Degen, \_\_\_ S. Ct. at \_\_\_. Finally, as the Supreme Court acknowledged, the law should not encourage "the spectacle of a criminal defendant reposing in Switzerland, beyond the reach of our criminal courts, while at the same time mailing papers to the court in a related civil action and expecting them to be honored." Id.

This provision addresses these concerns through legislation, thus imposing the straightforward sanction of disentitlement that judges by themselves are not able to impose without statutory

authorization. Under the proposal, the doctrine would apply in all civil forfeiture cases such as Eng as well as the ancillary proceedings in criminal forfeitures in which fugitive third-parties might otherwise be able to file claims. For the purposes of this provision, a fugitive from justice would be any person who, in order to avoid criminal prosecution, purposely leaves the jurisdiction or decides not to return to it. See 951 F.2d at 464.

#### Section 417 Admissibility of Foreign Records

This section adds a new provision to Title 28 to allow foreign-based records of a regularly conducted activity, obtained pursuant to an official request, to be authenticated and admitted into evidence in a civil proceeding, including civil forfeiture proceedings, notwithstanding the requirements of F.R.Evid. Rules 803(6) and 901(a)(1), by means of a certificate executed by a foreign custodian (or other person familiar with the recordkeeping activities of the institution maintaining the records). This new provision would be the civil analog to 18 U.S.C. § 3505.

To make foreign records of a regularly conducted activity admissible in a civil proceeding under current law, F.R.Evid. Rules 803(6) and 901(a)(1) currently require that a foreign custodian or other qualified witness give testimony, either by appearing at a proceeding, or in a deposition taken abroad and introduced at the proceeding, establishing a record-keeping exception to the hearsay rule (under Rule 803(6)) and authentication (under 901(a)(1)).

There is, however, no means by which we can compel the attendance of a foreign custodian or other qualified foreign witness at a U.S. proceeding to testify. Thus, to adduce the requisite testimony we must (1) rely on the prospective witness' willingness to voluntarily appear (which is very rare and subject to vicissitude) or (2) attempt to obtain a foreign deposition of the witness. The latter process is unduly cumbersome (when measured in terms of the objective, i.e., to make records admissible) and may not be available in many situations, especially under administrative agreements, such as a tax treaty.

By enacting a civil analog to 18 U.S.C. § 3505, which provides for the admissibility of foreign business records in criminal cases, this provision would provide for a streamlined process for making foreign records of a regularly conducted activity admissible without having to either (1) rely on having a foreign witness voluntary travel to the U.S. and appear at a civil proceeding or (2) get involved in the unduly cumbersome process of deposing the witness abroad.

#### Section 418 Amendment to FIRREA Act of 1989

This section extends a provision in the FIRREA Act of 1989 that authorizes the use of grand jury information by government attorneys in civil forfeiture cases.

Under current law, a person in lawful possession of grand jury information concerning a banking law violation may disclose that information to an attorney for the government for use in connection with a civil forfeiture action under 18 U.S.C. § 981(a)(1)(C). This provision makes it possible for the government to use grand jury information to forfeit property involved in a bank fraud violation; it does not permit disclosure to persons outside of the government, nor does it permit government attorneys to use the information for any other purpose.

The limitation to forfeiture under § 981(a)(1)(C) for "banking law" violations, however, is obsolete. Since 1989, subparagraph (C) has been amended to provide for the forfeiture of the proceeds of other financial crimes and thus is no longer limited to banking law violations. Accordingly, the amendment strikes "concerning a banking law violation" so that disclosure under 18 U.S.C. § 3322(a) will be permitted in regard to any forfeiture of proceeds within the scope of § 981(a)(1)(C). The restrictions regarding the persons to whom disclosure may be made and the use that may be made of the disclosed material will remain unchanged.

#### Section 419 Prospective Application

This section provides that the amendments made in this Act to the forfeiture laws are intended to apply prospectively. In the case of the amendments to the customs laws, Admiralty Rules, and other statutes affecting administrative forfeitures and the procedure for filing a claim and cost bond to initiate a judicial civil forfeiture, the new provisions would apply to seizures occurring 60 days after the effective date of the Act. The new trial procedures governing judicial civil forfeitures would apply to cases in which the complaint was filed by the government at least 60 days after the effective date of the Act. Changes to the procedures governing criminal forfeitures would apply to indictments returned on or after the effective date. Finally, changes to the substantive forfeiture statutes, such as those that expand forfeiture to apply to offenses for which forfeiture has not previously been available as a remedy, would apply to offenses occurring on or after the effective date.

**A BILL**

Be it enacted by the Senate and House of Representatives of the United States in Congress assembled,

**SEC. 1. SHORT TITLE.**

This Act may be cited as the Forfeiture Act of 1996.

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**TITLE I -- CIVIL FORFEITURE**

**Subtitle A - Administrative Forfeitures**

**SEC. 101. TIME FOR FILING CLAIM; WAIVER OF COST BOND**

(a) **IN GENERAL.**-- Section 608 of the Tariff Act of 1930 (19 U.S.C. § 1608) is amended to read as follows:

**"SEC. 608. Seizures; Claims; Judicial condemnation.**

"(a) Any person claiming seized property may file a claim with the appropriate customs officer at any time after the seizure, provided that such claim must be filed not later than 30 days after the final publication of notice of seizure. The claim shall be signed by the claimant under penalty of perjury and shall set forth the nature and extent of the claimant's ownership interest in the property and how and when it was acquired.

"(b) Any claim filed pursuant to subsection (a) shall include the posting of a bond to the United States in the sum of \$5,000 or 10 percent of the value of the claimed property, whichever is lower, but not less than \$250, with sureties to be approved by the customs officer with whom the claim is filed. No bond shall be required, however, if the claim is filed in forma pauperis with all supporting information as required by the seizing agency. The Attorney General and the Secretary of the Treasury, with respect to matters within their respective jurisdiction, shall have the authority to waive or reduce the bond requirement in any category of cases where he or she determines that the posting of a bond is not required in the interests of justice.

"(c) Upon the filing of a claim pursuant to this section, the customs officer shall transmit the claim, with a duplicate list and description of the articles seized, to the United States attorney for a district in which a

forfeiture action could be filed pursuant to title 28, United States Code, Section 1355(b), who shall proceed to a condemnation of the merchandise or other property in the manner prescribed in the Supplemental Rules for Certain Admiralty and Maritime Claims."

(b) CONFORMING AMENDMENT.-- Section 609 of the Tariff Act 1930 (19 U.S.C. § 1609) is amended by striking "twenty" and inserting "30".

SEC. 102. JURISDICTION AND VENUE.

(a) TRANSMITTAL TO THE U.S. ATTORNEY.-- Section 610 of the Tariff Act of 1930 (19 U.S.C. § 1610) is amended by striking "the district in which the seizure was made" and inserting "a district in which a forfeiture action could be filed pursuant to title 28, United States Code, Section 1355(b)".

(b) ADMIRALTY RULES.-- The Supplemental Rules for Certain Admiralty and Maritime Claims are amended --

(1) in Rule E(3), by inserting the following at the end of paragraph (a): "This provision shall not apply in forfeiture cases governed by 28 U.S.C. § 1355 or any other statute providing for service of process outside of the district."; and

(2) in Rule C(2), by inserting the following after "that it is within the district or will be during the pendency of the action.": "If the property is located outside of the district, the complaint shall state the statutory basis for the court's exercise of jurisdiction over the property".

**SEC. 103. JUDICIAL REVIEW OF ADMINISTRATIVE FORFEITURES.**

Section 609 of the Tariff Act of 1930 (19 U.S.C. § 1609) is amended by adding the following new subsection:

"(d) Where no timely claim to the seized property is filed, and a declaration of forfeiture is entered pursuant to this section by the seizing agency, the declaration shall be final and not subject to judicial review under any other provision of law except as follows: If a claimant, upon the filing of an action to set aside a declaration of forfeiture under this section, establishes by a preponderance of the evidence 1) that the seizing agency failed to comply with the notice requirements of Section 607, and 2) that the claimant had no other notice of the forfeiture proceeding within the period for filing a claim, the district court shall order that the declaration of forfeiture be set aside pending the filing of a claim and posting of a bond and the transmittal of the claim to the United States Attorney in accordance with Section 608. An action to set aside a declaration of forfeiture under this section must be filed within 2 years of the last date of publication of notice of the forfeiture of the property."

**SEC. 104. JUDICIAL FORFEITURE OF REAL PROPERTY**

Section 610 of the Tariff Act of 1930 (19 U.S.C. 1610) is amended by adding at the end the following sentence.

"Notwithstanding any other provision of law, all forfeitures of real property and interests in real property shall proceed as judicial forfeitures as provided in this section."

**SEC. 105. PRESERVATION OF ARRESTED REAL PROPERTY**

Rule E of the Supplemental Rules for Certain Admiralty and Maritime Claims is amended by adding the following new subsection:

"(10) Preservation of Property. Whenever property is attached or arrested pursuant to the provisions of Rule E(4)(b) that permit the marshal or other person having the warrant to execute the process without taking actual possession of the property, and the owner or occupant of the property is thereby permitted to remain in possession, the court, on the motion of any party or on its own motion, shall enter any order necessary to ~~preserve~~ the value of the property, its contents, and any income derived therefrom, and to prevent the destruction, removal or diminution in value of such property, contents and income."

**SEC. 106. AMENDMENT TO FEDERAL TORT CLAIMS ACT EXCEPTIONS**

Section 2680(c) of title 28, United States Code, is amended to read as follows:

"(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any law enforcement officer performing any official law enforcement function, except that the provisions of this chapter and

section 1346(b) of this title shall apply to any claim based on the negligent destruction, injury, or loss of goods, merchandise, or other property while in the possession of any law enforcement agency if the property was seized for the purpose of forfeiture and no forfeiture proceedings are pending against the property.

SEC. 107. PRE-JUDGMENT INTEREST.

(a) IN GENERAL.-- Section 2465 of title 28, United States Code, is amended by --

- (1) designating the present matter as subsection (a); and
- (2) inserting the following new subsection:

"(b) Interest. Upon entry of judgment for the claimant in any proceeding to condemn or forfeit property seized or arrested under any Act of Congress, the United States shall be liable for post-judgment interest as set forth in section 1961 of this title. The United States shall not be liable for pre-judgment interest, except that in cases involving currency or other negotiable instruments, the United States shall disgorge to the claimant any funds representing interest actually paid to the United States from the date of seizure or arrest of the property that resulted from the investment of the property in an interest-bearing account or instrument. The United States shall not be required to disgorge the value of any intangible benefits nor make any other payments to the claimant not specifically authorized by this subsection."

(b) EFFECTIVE DATE.-- The amendment made by subsection (a) shall apply to any judgment entered after the date of enactment of this Act.

**Subtitle B - Judicial Forfeitures**

**SEC. 121. TRIAL PROCEDURE FOR CIVIL FORFEITURE**

(a) IN GENERAL.-- Chapter 46 of title 18, United States Code, is amended by inserting the following new section:

**"§ 987. Judicial forfeiture proceedings**

"(a) Complaint. The Attorney General may file a civil forfeiture complaint in the manner set forth in the Supplemental Rules for Certain Admiralty and Maritime Claims. In cases where the applicable law authorizes the institution of civil and criminal forfeiture proceedings in connection with an offense, the Attorney General shall have the discretion to determine whether to file a civil complaint under this section, a criminal complaint, indictment or information including a forfeiture count in accordance with the applicable criminal forfeiture statute, or both civil and criminal actions. Where a civil complaint and a related criminal complaint, indictment or information are pending at the same time, they shall be considered a single, unified proceeding for purposes of the Double Jeopardy Clause of the Fifth Amendment.

"(b) Time for filing complaint. (1) If property is seized and a claim is filed pursuant to section 608 of the Tariff Act of 1930 (19 U.S.C. § 1608), or if the seizure is



referred to the Attorney General pursuant to section 610 (19 U.S.C. § 1610), the Attorney General shall determine as soon as practicable whether a forfeiture action should be instituted.

"(2) If the Attorney General determines not to institute a forfeiture action, he or she shall so advise the seizing agency. A decision not to institute a forfeiture action shall not preclude the seizing agency from transferring or returning the seized property to a state or local law enforcement authority for appropriate forfeiture action in accordance with state law. Nor shall a decision not to institute a forfeiture action imply that the action of the seizing agency in seizing the property was in any way improper.

"(3) If the Attorney General determines that a forfeiture action should be instituted, he or she shall institute such action as soon as practicable, taking into account the status of any criminal investigation to which the forfeiture action may be related.

"(c) Claim and answer. A claim and answer to a civil forfeiture complaint shall be filed in accordance with Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims and shall set forth the nature and extent of the claimant's ownership interest in the property, the time and circumstances of the claimant's acquisition of the interest in the property, and any additional facts support-

ing the claimant's standing to file a claim challenging the forfeiture action.

"(d) **Standing.** The claimant shall have the burden of establishing standing to file the claim by virtue of an ownership interest, as defined in section 983(c) of this title, in the specific property subject to forfeiture. The assertion in the claim regarding the nature and extent of the claimant's ownership interest in the property shall be sufficient to establish standing unless the government, at or prior to trial, files a motion to dismiss the claim for lack of standing. Upon the filing of such motion by the government, the court shall conduct a hearing, in the manner provided in Rule 43(e), Federal Rules of Civil Procedure, and shall determine pre-trial whether the claimant has established, by a preponderance of ~~the~~ evidence, that he or she has the requisite ownership interest in the property to challenge the forfeiture action. If the court determines that a claimant lacks standing, it shall dismiss the claim with prejudice and enter a final judgment as to that claimant.

"(e) **Burden of proof.** At trial in a civil forfeiture case, the government shall have the initial burden of proving that the property is subject to forfeiture by a preponderance of the evidence. If the government proves that the property is subject to forfeiture, the claimant shall have the burden of proving by a preponderance of the evidence

that he or she has an interest in the property that is not forfeitable under section 983 of this title. If the government's theory of forfeiture is that the property facilitated the commission of a criminal offense, the government must establish that there was a substantial connection between the property and the offense.

"(f) **Affirmative defenses.** The claimant shall set forth all affirmative defenses, including constitutional defenses, in his or her answer, as provided in Rule 8, Fed.R.Civ.P., and shall comply with discovery requests regarding such defenses in advance of trial. However, the claimant shall not be required to adduce any evidence in support of any affirmative defense at trial until the court has determined, pursuant to Rule 50, Fed.R.Civ.P., that there is a legally sufficient evidentiary basis for a reasonable finder of fact, based on all of the admissible evidence and any adverse inferences that might apply, to find that the property was subject to forfeiture.

"(g) **Motion to suppress seized evidence.** At any time after a claim and answer are filed, a claimant with standing to contest the seizure of the property may move to suppress such property in accordance with the normal rules regarding the suppression of evidence. If the claimant prevails on such motion, the property shall not be admitted into evidence as to that claimant at the forfeiture trial. However, a finding that property should be suppressed shall not bar

the forfeiture of the property based on evidence obtained independently before or after the seizure.

"(h) Use of hearsay at pre-trial hearings. At any pre-trial hearing under this section, the court may accept and consider hearsay otherwise inadmissible under the Federal Rules of Evidence. The court shall not require the government to reveal the identity of any confidential informant at a pre-trial hearing if there are sufficient indicia of reliability regarding such testimony to allow the statement of such informant to be related by a law enforcement officer.

"(i) Adverse inferences. The assertion by the claimant of any Fifth Amendment privilege against compelled testimony in the course of the forfeiture proceeding, including pre-trial discovery, shall give rise to an adverse inference regarding the matter on which such privilege is asserted. The government may rely on such adverse inference in support of its burden to establish the forfeitability of the property and in response to any affirmative defense. However, the government may not rely solely on such adverse inferences to satisfy its burden of proof.

"(j) Stipulations. Notwithstanding the claimant's offer to stipulate to the forfeitability of the property, the government shall be entitled to present evidence to the finder of fact on that issue before the claimant presents any evidence in support of any affirmative defense.

"(k) Preservation of property subject to forfeiture.

The court, before or after the filing of a forfeiture complaint and on the application of the government, may:

"(1) enter any restraining order or injunction pursuant to section 413(3) of the Controlled Substances Act (21 U.S.C. § 853(e));

"(2) require the execution of satisfactory performance bonds;

"(3) create receiverships;

"(4) appoint conservators, custodians, appraisers, accountants or trustees; or

"(5) take any other action to seize, secure, maintain, or preserve the availability of property subject to forfeiture under this section.

"(l) Release of property to ~~pay~~ criminal defense costs.

"(1) A person charged with a criminal offense may apply for the release of property seized for forfeiture to pay the necessary expenses of the person's criminal defense. Such application shall be filed with the court where the forfeiture proceeding is pending.

"(2) When an application is filed pursuant to paragraph (1), the burden shall first be upon the applicant to establish that he has no access to other assets adequate for the payment of criminal defense counsel, and that the interest in property to be released is not subject to any claim other than the forfeiture. The government shall have an

opportunity to cross-examine the applicant and any witnesses he or she may present on this issue.

"(3) If the court determines that the applicant has met the requirements set forth in paragraph (2), the court shall hold a probable cause hearing at which the applicant shall have the burden of proving the absence of probable cause for the forfeiture of the property. If the court finds that there is no probable cause for the forfeiture, it shall order the release of the assets for which probable cause is lacking. Otherwise, it shall dismiss the application. The court shall not consider any affirmative defenses to the forfeiture at the probable cause hearing.

"(m) **Excessive Fines.** At the conclusion of the trial and following the entry of a verdict of forfeiture, the claimant may petition the court to determine whether the Excessive Fines Clause of the Eighth Amendment applies, and if so, whether forfeiture is excessive. The claimant shall have the burden of establishing that a forfeiture is excessive by a preponderance of the evidence at a hearing conducted in the manner provided in Rule 43(e), Federal Rules of Civil Procedure, by the Court without a jury. If the court determines that the forfeiture is excessive, it shall adjust the forfeiture to the extent necessary to avoid the Constitutional violation.

"(n) **Applicability.** This section shall apply to any judicial forfeiture action brought pursuant to this title,

the Controlled Substances Act, or the Immigration and Naturalization Act of 1952. Section 615 of the Tariff Act of 1930 (19 U.S.C. § 1615) shall not apply to forfeitures under this section, nor shall this section apply to forfeitures under the customs laws.

"(o) Abatement. A civil forfeiture action or judgment under this or any other provision of federal law shall not abate because of the death of any person."

(b) REBUTTABLE PRESUMPTIONS.-- Section 981 of title 18, United States Code, is amended by adding the following new subsection:

"(k) Rebuttable presumptions. (1) At the trial of an action brought pursuant to subsection (a)(1)(B), there is a presumption, governed by Rule 301 of the Federal Rules of Evidence, that the property is ~~subject~~ to forfeiture if the United States establishes, by a preponderance of the evidence, that such property was acquired during a period of time when the person who acquired the property was engaged in an offense against a foreign nation described in subsection (a)(1)(B) or within a reasonable time after such period, and there was no likely source for such property other than such offense.

"(2) At the trial of an action brought pursuant to subsection (a)(1)(A), there is a presumption, governed by Rule 301 of the Federal Rules of Evidence, that the property was involved in a violation of section 1956 or 1957 of this

title if the United States establishes, by a preponderance of the evidence, two or more of the following factors:

"(A) the property constitutes or is traceable to more than \$10,000 that has been or was intended to be transported, transmitted or transferred to or from a major drug-transit country, a major illicit drug producing country, or a major money laundering country, as those terms are determined pursuant to sections 481(e) and 490(h) of the Foreign Assistance Act of 1961 (22 U.S.C. §§ 2291(e) and 2291j(h));

"(B) the transaction giving rise to the forfeiture occurred in part in a foreign country whose bank secrecy laws have rendered the United States unable to obtain records relating to the transaction by judicial process, treaty or executive agreement;

"(C) a person more than minimally involved in the transaction giving rise to the forfeiture action (i) has been convicted in any State, Federal, or foreign jurisdiction of a felony involving money laundering or the manufacture, importation, sale or distribution of a controlled substance, or (ii) is a fugitive from prosecution for such offense; or

"(D) the transaction giving rise to the forfeiture action was conducted by, to or through a shell corporation not engaged in any legitimate business activity in the United States.



"(3) For the purposes of this paragraph, 'shell corporation' means any corporation that does not conduct any ongoing and significant commercial or manufacturing business or any other form of commercial operation.

"(4) The enumeration of presumptions in this subsection shall not preclude the development of other judicially created presumptions."

(c) CONFORMING AMENDMENT.-- The chapter analysis for chapter 46 of title 18, United States Code, is amended by inserting the following at the appropriate place:

"987. Judicial forfeiture proceedings"

**SEC. 122. TIME FOR FILING CLAIM AND ANSWER.**

Rule C(6) of the Supplemental Rules for Certain Admiralty and Maritime Claims is amended by striking "10 days after the process has been executed" and inserting "~~20~~20 days after the receipt of actual notice of the execution of the process or the final publication of such notice as provided in subsection (4), whichever is earlier,".

**SEC. 123. UNIFORM INNOCENT OWNER DEFENSE.**

(a) IN GENERAL.-- Chapter 46 of title 18, United States Code, is amended by inserting after Section 982 the following new section:

"983. Innocent Owners.

"(a) An innocent owner's interest in property shall not be forfeited in any judicial action under any civil forfei-

ture provision of this title, the Controlled Substances Act, or the Immigration and Naturalization Act of 1952.

"(b) (1) With respect to a property interest in existence at the time the illegal act giving rise to forfeiture took place, a person is an innocent owner if he or she establishes, by a preponderance of the evidence, --

"(A) that he or she did not know that the property was involved in or was being used in the commission of such illegal act, or

"(B) that upon learning that the property was being used in the commission of such illegal act, he or she promptly did all that reasonably could be expected to terminate such use of the property.

A claimant who establishes a lack of knowledge under subparagraph (A) shall be considered an innocent owner unless the government, in rebuttal, establishes the existence of facts and circumstances that should have created a reasonable suspicion that the property was being or would be used for an illegal purpose. In that case, the claimant must establish that in light of such facts and circumstances, he or she did all that reasonably could be expected to prevent the use of the property in the commission of any such illegal act.

"(2) With respect to a property interest acquired after the act giving rise to the forfeiture took place, a person is an innocent owner if he or she establishes, by a prepon-

derance of the evidence, that he or she acquired the property as a bona fide purchaser for value who at the time of the purchase did not know and was reasonably without cause to believe that the property was subject to forfeiture. A purchaser is "reasonably without cause to believe that the property was subject to forfeiture" if, in light of the circumstances, the purchaser did all that reasonably could be expected to ensure that he or she was not acquiring property that was subject to forfeiture.

"(3) Notwithstanding any provision of this section, no person may assert an ownership interest under this section in contraband or other property that it is illegal to possess. In addition, except as set forth in paragraph (2), no person may assert an ownership interest under this section in the illegal proceeds of ~~a~~ criminal act, irrespective of state property law.

"(c) For the purposes of this section --

"(1) an "owner" is a person with an ownership interest in the specific property sought to be forfeited, including but not limited to a lien, mortgage, recorded security device or valid assignment of an ownership interest. An owner does not include: A) a person with only a general unsecured interest in, or claim against, the property or estate of another person; (B) a bailee; (C) a nominee who exercises no dominion or control over the property; or (D) a beneficiary of a constructive trust; and

" (2) a person who willfully blinds himself or herself to a fact shall be considered to have had knowledge of that fact.

" (d) If the court determines, in accordance with this section, that an innocent owner had a partial interest in property otherwise subject to forfeiture, or a joint tenancy or tenancy by the entirety in such property, the court shall enter an appropriate order (1) severing the property; (2) transferring the property to the government with a provision that the government compensate the innocent owner to the extent of his or her ownership interest once a final order of forfeiture has been entered and the property has been reduced to liquid assets, or (3) permitting the innocent owner to retain the property subject to a lien in favor of the government to the extent of the forfeitable interest in the property. To effectuate the purposes of this subsection, a joint tenancy or tenancy by the entireties shall be converted to a tenancy in common by order of the court, irrespective of state law.

" (e) If the person asserting a defense under subsections (b) (1) or (b) (2) is a financial institution, as defined in section 20 of this title, there shall be a presumption, governed by Rule 301 of the Federal Rules of Evidence, that the institution acted "reasonably" if the institution establishes that it followed rigorous and regular internal procedures relating to the approval of any

loan or the acquisition of any property interest in accordance with the standards for due diligence in the lending industry. The presumption shall not apply if the government establishes that the financial institution had notice that the property was subject to forfeiture before it acquired any interest in the property."

(b) STRIKING SUPERSEDED PROVISIONS.-- (1) Section 981(a) of title 18, United States Code, is amended by --

(A) striking subsection (a)(2) and renumbering any subsections added by this Act accordingly; and

(B) striking "Except as provided in paragraph (2), the" and inserting "The".

(2) Sections 511(a)(4), (6) and (7) of the Controlled Substances Act (21 U.S.C. § 881(a)(4), (6) and (7)) are amended by striking ", except that" and all that follows, each time it appears.

(3) Sections 2254(a)(2) and (3) of title 18, United States Code, are amended by striking ", except that" and all that follows, each time it appears.

(c) CONFORMING AMENDMENT.-- The chapter analysis for chapter 46 of title 18, United States Code, is amended by inserting the following at the appropriate place:

"983. Innocent owners."

## SEC. 124. STAY OF CIVIL FORFEITURE CASE

(a) DRUG FORFEITURES.-- Section 511(i) of the Controlled Substances Act (21 U.S.C. § 881(i)) is amended to read as follows:

"(i)(1) Upon the motion of the United States, the court shall stay the civil forfeiture proceeding if it determines that civil discovery or trial could adversely affect the government's ability to conduct a related criminal investigation or the prosecution of a related criminal case.

"(2) Upon the motion of a claimant, the court shall stay the civil forfeiture proceeding with respect to that claimant if it determines that the claimant is the subject of a related criminal investigation or case, that the claimant has standing to assert a claim in the civil forfeiture proceeding, and that continuation of the forfeiture proceeding may infringe upon the claimant's right against self-incrimination in the related investigation or case.

"(3) With respect to the impact of civil discovery described in paragraphs (1) and (2), the court may determine that a stay is unnecessary if a protective order limiting discovery would protect the interest of one party without unfairly limiting the ability of the opposing party to pursue the civil case. In no case, however, shall the court impose a protective order as an alternative to a stay if the effect of such protective order would be to allow one party

to pursue discovery while the other party was substantially unable to do so.

"(4) For the purposes of this subsection, "a related criminal case" and "a related criminal investigation" mean an actual prosecution or investigation in progress at the time the request for the stay is made. In determining whether a criminal case or investigation is "related" to a civil forfeiture proceeding, the court shall consider the degree of similarity between the parties, witnesses, facts and circumstances involved in the two proceedings without requiring an identity with respect to any one or more factors.

"(5) Any presentation to the court under this subsection that involves an on-going criminal investigation shall be made by the government ex parte and under seal.

"(6) Whenever a civil forfeiture proceeding is stayed pursuant to this subsection, the court shall enter any order necessary to preserve the value of the property or to protect the rights of lienholders or other persons with an interest in the property while the stay is in effect.

"(7) A determination by the court that the claimant has standing to request a stay pursuant to paragraph (2) shall apply only to the provisions of this subsection and shall not preclude the government from objecting to the claimant's standing at the time of trial in accordance with Section 987(d) of title 18.

"(8) A stay imposed pursuant to this subsection shall be for a period determined by the court, but for no more than 180 days unless the court determines, at the end of such time period, that there are compelling reasons why the stay should be continued. An order renewing a stay shall be reviewed by the court every 90 days unless the parties agree that such review is unnecessary."

(b) IN GENERAL.-- Section 981(g) of title 18, United States Code, is amended to read as follows:

"(g) (1) Upon the motion of the United States, the court shall stay the civil forfeiture proceeding if it determines that civil discovery or trial could adversely affect the government's ability to conduct a related criminal investigation or the prosecution of a related criminal case.

"(2) Upon the motion of a claimant, the court shall stay the civil forfeiture proceeding with respect to that claimant if it determines that the claimant is the subject of a related criminal investigation or case, that the claimant has standing to assert a claim in the civil forfeiture proceeding, and that continuation of the forfeiture proceeding may infringe upon the claimant's right against self-incrimination in the related investigation or case.

"(3) With respect to the impact of civil discovery described in paragraphs (1) and (2), the court may determine that a stay is unnecessary if a protective order limiting discovery would protect the interest of one party without



unfairly limiting the ability of the opposing party to pursue the civil case. In no case, however, shall the court impose a protective order as an alternative to a stay if the effect of such protective order would be to allow one party to pursue discovery while the other party was substantially unable to do so.

"(4) For the purposes of this subsection, "a related criminal case" and "a related criminal investigation" mean an actual prosecution or investigation in progress at the time the request for the stay is made. In determining whether a criminal case or investigation is "related" to a civil forfeiture proceeding, the court shall consider the degree of similarity between the parties, witnesses, facts and circumstances involved in the two proceedings without requiring an identity with respect ~~to any~~ one or more factors.

"(5) Any presentation to the court under this subsection that involves an on-going criminal investigation shall be made by the government ex parte and under seal.

"(6) Whenever a civil forfeiture proceeding is stayed pursuant to this subsection, the court shall enter any order necessary to preserve the value of the property or to protect the rights of lienholders or other persons with an interest in the property while the stay is in effect.

"(7) A determination by the court that the claimant has standing to request a stay pursuant to paragraph (2) shall

apply only to the provisions of this subsection and shall not preclude the government from objecting to the claimant's standing at the time of trial in accordance with Section 987(d) of this title.

"(8) An order imposing a stay pursuant to this subsection shall expire in 180 days unless the court determines, at the end of such time period, that there are compelling reasons why the stay should be continued. An order renewing a stay shall be reviewed by the court every 90 days unless the parties agree that such review is unnecessary."

(c) GUIDELINES.-- Within 180 days after the effective date of this section, the Attorney General and the Secretary of the Treasury, respectively, shall promulgate guidelines governing the preservation of the value of property subject to forfeiture in a case that has been stayed pursuant to Section 511(i) of the Controlled Substances Act (21 U.S.C. § 881(i)) or Section 981(g) of title 18, United States Code. The guidelines shall take into account the interests of both the government and the claimant in avoiding the depreciation, destruction or dissipation of the property pending conclusion of the forfeiture proceeding.

#### SEC. 125. APPLICATION OF FORFEITURE PROCEDURES

(a) IN GENERAL. -- Chapter 46 of title 18, United States Code is amended by adding the following section:

"988. Application of Forfeiture Procedures.

"(a) Civil Forfeitures. Whenever a statute in this title provides for the civil forfeiture of property without

specifying the procedures governing a judicial forfeiture action, the provisions of this chapter relating to civil forfeitures shall apply.

"(b) Criminal Forfeitures. Whenever a statute in this title provides for the criminal forfeiture of property without specifying the procedures governing such forfeitures, the provisions of this chapter relating to criminal forfeitures shall apply."

(b) CONFORMING AMENDMENT. -- The chapter analysis for Chapter 46, of title 18, United States Code, is amended by adding the following:

"988. Application of Forfeiture Procedures."

Subtitle C - Seizures and Investigations

SEC. 131. SEIZURE WARRANT REQUIREMENT.

(a) IN GENERAL:-- Section 981(b) of title 18, United States Code, is amended to read as follows --

"(b) (1) Any property subject to forfeiture to the United States under this section may be seized by the Attorney General. In addition, in the case of property involved in a violation investigated by the Secretary of the Treasury or the United States Postal Service, the property may also be seized by the Secretary of the Treasury or the Postal Service, respectively.

"(2) Seizures pursuant to this section shall be made pursuant to a warrant obtained in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure, except that a seizure may be made without a warrant if it is made

pursuant to a lawful arrest or search, or if there is probable cause to believe that the property is subject to forfeiture and an exception to the Fourth Amendment warrant requirement would apply.

"(3) Notwithstanding the provisions of Rule 41(a), Federal Rules of Criminal Procedure, a seizure warrant may be issued pursuant to this subsection by a judicial officer in any district in which a forfeiture action against the property may be filed under section 1355(b) of title 28, United States Code, and executed in any district in which the property is found. Any motion for the return of property seized under this section shall be filed in the district in which the seizure warrant was issued.

"(4) In the event of a seizure pursuant to paragraph (2) of this subsection, proceedings under subsection (d) of this section or an applicable criminal forfeiture statute shall be instituted as soon as practicable, taking into account the status of any criminal investigation to which the seizure may be related.

"(5) If any person is arrested or charged in a foreign country in connection with an offense that would give rise to the forfeiture of property in the United States under this section or under the Controlled Substances Act, the Attorney General may apply to any federal judge or magistrate judge for an ex parte order restraining the property subject to forfeiture for not more than 30 days, except that the time may be extended for good cause shown. The application for the restraining order shall set forth the nature and circumstances of the foreign charges and the basis

for belief that the person arrested or charged has property in the United States that would be subject to forfeiture, and shall contain a statement that the restraining order is needed to preserve the availability of property for such time as is necessary to receive evidence from the foreign country or elsewhere in support of probable cause for the seizure of the property under this subsection.

"(6) Any owner of property seized pursuant to this section may obtain release of the property pending resolution of the forfeiture action upon payment of a substitute res in an amount equal to the appraised value of the property, unless the seized property --

- (A) is contraband,
- (B) is evidence of a violation of the law,
- (C) by reason of design or other characteristic, is particularly suited for use in illegal activities, or
- (D) is likely to be used to commit additional criminal acts if returned to the owner.

The substitute res must be in the form of a traveler's check, money order, cashier's check or irrevocable letter of credit made payable to the seizing agency. If such substitute res is provided, the court or in the case of administrative forfeiture, the seizing agency, shall have jurisdiction to proceed with the forfeiture of the substitute res in lieu of the property. If, at the conclusion of the forfeiture proceeding, the property is declared forfeited, the owner shall surrender the property and

recover the substitute res, unless the Attorney General or the seizing agency elects to retain the substitute res in lieu of the property."

(b) DRUG FORFEITURES.-- Section 511(b) of the Controlled Substances Act (21 U.S.C. § 881(b)) is amended to read as follows:

"(b) Any property subject to forfeiture to the United States under this section may be seized by the Attorney General in the manner set forth in Section 981(b) of title 18, United States Code."

"(c) CONFORMING AMENDMENT.-- Section 518(d) of the Controlled Substances Act (21 U.S.C. § 888(d)) is repealed."

**SEC. 132. CIVIL INVESTIGATIVE DEMANDS.**

(a) IN GENERAL.-- Chapter 46 of title 18, United States Code, is amended by adding at the end ~~the~~ following new section:

"985. Civil Investigative Demands.

"(a) For the purpose of conducting an investigation in contemplation of any civil forfeiture proceeding, the Attorney General may --

"(A) administer oaths and affirmations;

"(B) take evidence; and

"(C) by subpoena, summon witnesses and require the production of any books, papers, correspondence, memoranda, or other records which the Attorney General deems relevant or material to the inquiry. Such subpoena may require the attendance of witnesses and the production of any such

records from any place in the United States at any place in the United States designated by the Attorney General.

"(b) Except as provided in this section, the procedures and limitations that apply to civil investigative demands in subsections (g), (h), and (j) of section 1968 of title 18, United States Code, shall apply with respect to civil investigative demands issued under this subsection. Process required by such subsections of section 1968 to be served upon "the custodian" shall be served on the Attorney General. Failure to comply with an order of the court to enforce such demand shall be punishable as civil or criminal contempt.

"(c) In the case of a civil investigative demand for which the return date is less than 5 days after the date of service, no person shall be found ~~in~~ contempt for failure to comply by the return date if such person files a petition under subsection (b) not later than 5 days after the date of service.

"(d) A civil investigative demand may be issued pursuant to this section in furtherance of an investigation directed toward the forfeiture of an asset at any time up to the filing of a civil forfeiture complaint with respect to that asset, except that no demand relating to a given asset may be served upon any person who files a claim to that asset pursuant to title 19, United States Code, § 1608 once such claim is filed. Once a given asset is made the subject

of a civil forfeiture complaint, all further discovery regarding the forfeiture of that asset shall proceed in accordance with the Federal Rules of Civil Procedure. Investigation relating to the forfeiture of assets not subject to a claim or to a forfeiture complaint may proceed pursuant to this section at any time.

"(e) In this section, "Attorney General" means any attorney for the government employed by the Department of Justice as defined by Rule 54(c) of the Federal Rules of Criminal Procedure, and shall not include an attorney, agent or other employee of any agency of the Department."

(b) CONFORMING AMENDMENT.-- The chapter analysis for chapter 46 of title 18, United States Code is amended by adding the following at the appropriate place:

"985. Civil investigative demands."

(c) OBSTRUCTION OF CIVIL INVESTIGATIVE DEMAND.-- Section 1505 of title 18, United States Code, is amended by inserting "section 985 of this title or" before "the Anti-trust Civil Process Act".

(d) RIGHT TO FINANCIAL PRIVACY ACT AMENDMENT.--Section 1120(b)(1)(A) of the Right to Financial Privacy Act (12 U.S.C. § 3420(b)(1)(A)) is amended by inserting "or civil investigative demand" after "a grand jury subpoena".

(e) FAIR CREDIT REPORTING ACT AMENDMENT.--Paragraph (1) of section 604 of the Fair Credit Reporting Act (15 U.S.C. § 1681b)



is amended by striking "or" and inserting ", or a civil investigative demand" after "grand jury".

**SEC. 133. ACCESS TO RECORDS IN BANK SECRECY JURISDICTIONS**

Section 986 of title 18, United States Code, is amended by adding the following new subsection:

**"Access to records located abroad**

"(d) In any civil forfeiture case, or in any ancillary proceeding in any criminal forfeiture case governed by Section 1963(1) of this title or Section 413(n) of the Controlled Substances Act (21 U.S.C. § 853(n)), where --

"(1) financial records located in a foreign country may be material (A) to any claim or to the ability of the government to respond to such claim, or (B) in a civil forfeiture case, to the government's ability to establish the forfeitability ~~of~~ the property; and

"(2) it is within the capacity of the claimant to waive his or her rights under such secrecy laws, or to obtain the records him- or herself, so that the records can be made available,

the refusal of the claimant to provide the records in response to a discovery request or take the action necessary otherwise to make the records available shall result in the dismissal of the claim with prejudice. This subsection shall not affect the claimant's rights to refuse production on the basis of any privilege guaranteed by the Constitution or federal laws of the United States."

**SEC. 134. ACCESS TO OTHER RECORDS.**

Section 6103(i)(1) of the Internal Revenue Code (26 U.S.C. § 6103(i)(1)) is amended --

(1) in subparagraph (A)(i) by inserting "or related civil forfeiture" after "enforcement of a specifically designated Federal criminal statute"; and

(2) in subparagraph (B)(iii) by inserting "or civil forfeiture investigation or proceeding" after "Federal criminal investigation or proceeding".

**SEC. 135. CURRENCY FORFEITURES.**

Section 511 of the Controlled Substances Act (21 U.S.C. 881) is amended by inserting the following new subsection:

**"Currency Forfeitures**

"(m) At the trial of an action brought pursuant to subsection (a)(6), if the government establishes by a preponderance of the evidence that the property subject to forfeiture --

"(1) is currency or other monetary instruments that were found in close proximity to a measurable quantity of any controlled substance; or

"(2) is currency in excess of \$10,000 that was being transported at an airport or other port of entry, on an interstate highway, or on the coastal waters of the United States, and the person in possession of the currency disclaims knowledge or ownership of the property, or offers an

explanation for his or her possession of the currency that is false,

there shall be a presumption, governed by Rule 301 of the Federal Rules of Evidence, that the currency is the proceeds of a violation of the Controlled Substances Act. As provided in Rule 301 of the Federal Rules of Evidence, the burden of proof shall at all times be on the United States to establish that the property is subject to forfeiture."

#### TITLE II - CRIMINAL FORFEITURES

##### SEC. 201. STANDARD OF PROOF FOR CRIMINAL FORFEITURE.

(a) IN GENERAL.-- Section 982 of title 18, United States Code, is amended by adding at the end the following new subsection:

"(c) In any forfeiture action under this section, the party bearing the burden of proof shall be required to prove the matter at issue by a preponderance of the evidence."

(b) RICO FORFEITURES.-- Section 1963 of title 18, United States Code, is amended by adding at the end the following new subsection:

"(o) In any forfeiture action under this section, the party bearing the burden of proof shall be required to prove the matter at issue by a preponderance of the evidence."

(c) DRUG FORFEITURES.-- Section 413 of the Controlled Substances Act (21 U.S.C. 853) is amended by adding the following new subsection:

"(r) In any forfeiture action under this section, the party bearing the burden of proof shall be required to prove the matter at issue by a preponderance of the evidence."

**SEC. 202. NON-ABATEMENT OF FORFEITURE WHEN DEFENDANT DIES PENDING APPEAL.**

(a) RICO FORFEITURE.-- Section 1963 of title 18, United States Code, is amended by adding at the end thereof the following new subsection:

"(p) An order of forfeiture under this section shall not abate by reason of the death thereafter of any or all of the defendants or petitioners or potential petitioners."

(b) DRUG FORFEITURE.-- Section 413 of the Controlled Substances Act (21 U.S.C. 853) is amended by adding at the end thereof the following new subsection:

**Non-abatement of forfeiture order**

"(q) An order of forfeiture under this section shall not abate by reason of the death thereafter of any or all of the defendants or petitioners or potential petitioners."

**SEC. 203. REPATRIATION OF PROPERTY PLACED BEYOND THE JURISDICTION OF THE COURT**

Section 413(p) of the Controlled Substances Act (21 U.S.C. § 853(p)) and Section 1963(m) of title 18, United States Code, are each amended by inserting the following at the end:

"In the case of property described in paragraph (3), the court may, in addition, order the defendant to return the property to the jurisdiction of the court so that it may be

seized and forfeited. Pursuant to its authority to enter a pre-trial restraining order under this section, including its authority to restrain any property forfeitable as substitute assets, the court may also order the defendant to repatriate any property subject to forfeiture pending trial, and to deposit that property in the registry of the court, or with the United States Marshals Service or the Secretary of the Treasury, in an interest-bearing account. Failure to comply with an order under this subsection shall be punishable as a civil or criminal contempt of court, and may also result in an enhancement of the sentence for the offense giving rise to the forfeiture under the obstruction of justice provision of Section 3C1.1 of the United States Sentencing Guidelines."

**SEC. 204. MOTION AND DISCOVERY PROCEDURES FOR ANCILLARY HEARINGS.**

(a) IN GENERAL.-- Section 1963(l)(4) of title 18, United States Code, and Section 413(n)(4) of the Controlled Substances Act (21 U.S.C. § 853(n)(4)) are each amended by designating the present matter as sub-paragraph (A), and by inserting the following new sub-paragraphs:

"(B) Before conducting a hearing, the court may entertain a motion to dismiss the petition for lack of standing, for failure to state a claim upon which relief could be granted under this section, or for any other ground. For the purposes of such motion, all facts set forth in the petition shall be assumed to be true.

(C) If a motion referred to in subparagraph (B) is denied, or if no such motion is made, the court may, in its discretion, permit the parties to conduct discovery in accordance with the Federal Rules of Civil Procedure to the extent that the court determines such discovery to be necessary or desirable to resolve factual issues before the hearing. At the conclusion of such discovery, either party may seek to have the court dispose of the petition on a motion for summary judgment in the manner described in Rule 56 of the Federal Rules of Civil Procedure.

"(D) Any order disposing of a petition pursuant to a motion or pursuant to a hearing on the merits of the claim shall be appealable in accordance with the Federal Rules of Appellate Procedure applicable to civil cases. However, where multiple petitions are filed ~~in the~~ same case, an order dismissing or granting fewer than all of the petitions shall not be appealable until all petitions are resolved, unless the court expressly determines that there is no just reason for delay and directs the entry of final judgment with respect to one or more but fewer than all of the petitions.

"(E) The district court shall retain jurisdiction over a petition filed pursuant to this subsection notwithstanding any appeal filed by the defendant in the criminal case."

(b) INTERVENTION BY THE DEFENDANT.-- Section 1963(1) of title 18, United States Code, and Section 413(n) of the Con-

trolled Substances Act (21 U.S.C. 853(n)) are each amended by adding a new paragraph (8) as follows:

"(8) If the defendant has filed a timely appeal from a conviction under this section and the appeal is pending, any person filing a petition under this subsection shall serve a copy of the petition upon the defendant, and the defendant shall have a right to intervene in the ancillary proceeding with respect to the petition in accordance with Rule 24 of the Federal Rules of Civil Procedure solely for the purpose of contesting the petitioner's alleged interest in the property ordered forfeited. The defendant shall have 20 days from the date of service of the petition to intervene. If the defendant does not intervene within such time period, he or she shall have waived the right to challenge in any forum any adjudication of the petitioner's interest in the property pursuant to this subsection, regardless of the outcome of the appeal. Whether or not the defendant intervenes in the proceedings pursuant to this subsection, the hearing provided for in this subsection shall be limited to an adjudication of the validity of the petitioner's legal right, title or interest in the property ordered forfeited, and shall not provide a forum to re-litigate the forfeitability of the property."

(c) IN PERSONAM JUDGMENTS.-- Section 1963(1)(1) of title 18, United States Code, and Section 413(n)(1) of the Controlled Sub-

stances Act (21 U.S.C. 853(n)(1)) are each amended by adding the following sentence at the end:

"To the extent that the order of forfeiture includes only an in personam money judgment against the defendant, no proceeding under this subsection shall be necessary."

**SEC. 205. PRE-TRIAL RESTRAINT OF SUBSTITUTE ASSETS.**

(a) IN GENERAL. -- Section 413(e)(1) of the Controlled Substances Act (21 U.S.C. 853(e)(1)) is amended by striking "(a)" and inserting "(a) or (p)".

(b) RICO. -- Section 1963(d)(1) of title 18, United States Code, is amended by striking "(a)" and inserting "(a) or (m)".

**SEC. 206. DEFENSES APPLICABLE TO ANCILLARY PROCEEDINGS IN CRIMINAL FORFEITURE CASES.**

(a) IN GENERAL.-- Section 413(n)(6) of the Controlled Substances Act (21 U.S.C. 853(n)(6)) ~~is~~ amended by striking subparagraphs (A) and (B) and the dash that precedes them, and inserting "the petitioner is an innocent owner of the property as defined in section 983 of title 18, United States Code,".

(b) RICO.-- Section 1963(1) of title 18, United States Code, is amended by striking subparagraphs (A) and (B) and inserting "the petitioner is an innocent owner of the property as defined in section 983 of this title,".

**SEC. 207. UNIFORM PROCEDURES FOR CRIMINAL FORFEITURE**

Section 982(b)(1) of title 18, United States Code, is amended to read as follows:



"(b) (1) The forfeiture of property under this section, including any seizure and disposition of the property and any related administrative or judicial proceeding, shall be governed by the provisions of section 413 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 853), except for subsection 413(d) which shall not apply to forfeitures under this section."

**SEC. 208. CRIMINAL SEIZURE WARRANTS**

(a) IN GENERAL.-- Section 513(f) of the Controlled Substances Act (21 U.S.C. 853(f)) is amended to read as follows:

"(f) Property subject to forfeiture under this section may be seized pursuant to Section 981(b) of title 18, United States Code."

(b) RICO.-- Section 1963 of title 18, United States Code, is amended by adding the following new subsection:

"(n) Property subject to forfeiture under this section may be seized pursuant to Section 981(b) of this title."

**SEC. 209. FORFEITABLE PROPERTY TRANSFERRED TO THIRD PARTIES.**

Sections 1963(c) of title 18, United States Code, and section 413(c) of the Controlled Substances Act (21 U.S.C.

853(c)) are each amended by designating the present matter as paragraph (1) and adding the following new paragraph:

"(2) If, as provided in paragraph (1), property transferred to a transferee is ordered forfeited and the transferee fails to establish that he is a bona fide purchaser, but the transferee is unable, due to the transferee's act or

omission, to turn the property over to the United States, the transferee shall owe the United States a sum of money up to the value of the property transferred by the defendant, plus interest from the time of the transfer. Once the ancillary proceedings regarding the transferee's claim to be a bona fide purchaser are concluded, the district court that issued the order of forfeiture shall issue a judgment in favor of the United States and against the transferee for the amount of money to which the United States is entitled."

SEC. 210. RIGHT OF THIRD PARTIES TO CONTEST FORFEITURE OF SUBSTITUTE ASSETS

(a) IN GENERAL.-- Section 413(c) of the Controlled Substances Act (21 U.S.C. 853(c)), as amended by this Act, is further amended by --

(1) inserting the following after ~~the~~ first sentence:

"All right, title and interest in property described in subsection (p) of this section vests in the United States at the time an indictment, information or bill of particulars describing the property as substitute assets is filed."; and

(2) by striking "Any such property that is subsequently transferred to a person other than the defendant" and inserting "Any property that is transferred to a person other than the defendant after the United States' interest in the property has vested pursuant to this subsection".

(b) RICO.-- Section 1963(c) of title 18, United States Code, as amended by this Act, is further amended by --

(1) inserting the following after the first sentence:

"All right, title and interest in property described in subsection (m) of this section vests in the United States at the time an indictment, information or bill of particulars describing the property as substitute assets is filed."; and

(2) by striking "Any such property that is subsequently transferred to a person other than the defendant" and inserting "Any property that is transferred to a person other than the defendant after the United States' interest in the property has vested pursuant to this subsection".

(c) CONFORMING AMENDMENTS.-- Section 1963(1)(6) of title 18, United States Code, and section 413(n)(6) of the Controlled Substances Act (21 U.S.C. 853(n)(6)) are each amended by adding at the end the following sentence:

"In the case of substitute assets, ~~the~~ petitioner must show that his interest in the property existed at the time the property vested in the United States pursuant to subsection (c), or that he subsequently acquired his interest in the property as a bona fide purchaser for value as provided in this subsection."

**SEC. 211. HEARINGS ON PRE-TRIAL RESTRAINING ORDERS; ASSETS NEEDED TO PAY ATTORNEY'S FEES.**

(a) RESTRAINING ORDERS.-- Section 413(e) of the Controlled Substances Act (21 U.S.C. 853(e)) is amended --

(1) in paragraph (3), by adding the following after the period: "The court shall issue any protective order necessary to prevent the premature disclosure of any ongoing law enforcement

operation or investigation or the identity of any witness at the hearing. In addition, in any case involving an ongoing investigation, the court shall permit the presentation of evidence in camera or under seal. Rule 65, Federal Rules of Civil Procedure, shall not apply to restraining orders issued under this subsection."; and

(2) by adding the following new paragraph:

"(4) (A) When property is restrained pre-trial subject to paragraph (1) (A), the court may, at the request of the defendant, hold a pre-trial hearing to determine whether the restraining order should be vacated or modified with respect to some or all of the restrained property because --

"(i) it restrains property that would not be subject to forfeiture even if all of the facts set forth in the indictment were established as true; ———

"(ii) it causes a substantial hardship to the moving party and less intrusive means exist to preserve the subject property for forfeiture; or

"(iii) the defendant establishes that he or she has no assets, other than the restrained property, available to exercise his or her constitutional right to retain counsel, and there is no probable cause to believe that the restrained property is subject to forfeiture.

"(B) If the defendant files a motion under subparagraph (A) (iii), the court shall require the defendant to establish that he has no access to other assets adequate for the

payment of criminal defense counsel before conducting any probable cause inquiry. The government shall have an opportunity to cross-examine the defendant and any witnesses he or she may present on this issue. If the court determines that the defendant has established that he has no access to other assets, it shall hold a hearing to determine whether there is probable cause for the forfeiture of the defendant's property. If the court determines that no probable cause exists for the forfeiture of an asset, it shall modify the restraining order to the extent necessary to permit the defendant to use that asset to retain counsel.

"(C) In any hearing under this paragraph where probable cause is at issue, the court shall limit its inquiry to the existence of probable cause for the forfeiture, and shall neither entertain challenges to the validity of the indictment, nor require the government to produce additional evidence regarding the facts of the case to support the grand jury's finding of probable cause regarding the criminal offense giving rise to the forfeiture. In all cases, the party requesting the modification of the restraining order shall bear the burden of proof.

"(D) A person other than the defendant who has a legal interest in the restrained property may move to modify or vacate the restraining order for the reasons stated in subparagraph (A) (ii). In accordance with subsection (k), however, such person may not object to a restraining order

on grounds that may be asserted only in the ancillary hearing pursuant to subsection (n).

"(E) If the property is restrained is subject to forfeiture as substitute assets, the court may exempt from the restraining order assets needed to pay attorneys fees, other necessary cost of living expenses, and expenses of maintaining the restrained assets".

(b) RICO.-- Section 1963(d) of title 18, United States Code, is amended --

(1) in paragraph (3), by adding the following after the period: "The court shall issue any protective order necessary to prevent the premature disclosure of any ongoing law enforcement operation or investigation or the identity of any witness at the hearing. In addition, in any case involving an ongoing investigation, the court shall permit the presentation of evidence in camera or under seal. Rule 65, Federal Rules of Civil Procedure, shall not apply to restraining orders issued under this subsection."; and

(2) by adding the following new paragraph:

"(4) (A) When property is restrained pre-trial subject to paragraph (1) (A), the court may, at the request of the defendant, hold a pre-trial hearing to determine whether the restraining order should be vacated or modified with respect to some or all of the restrained property because --

"(i) it restrains property that would not be subject to forfeiture even if all of the facts set forth in the indictment were established as true;

"(ii) it causes a substantial hardship to the moving party and less intrusive means exist to preserve the subject property for forfeiture; or

"(iii) the defendant establishes that he or she has no assets, other than the restrained property, available to exercise his or her constitutional right to retain counsel, and there is no probable cause to believe that the restrained property is subject to forfeiture.

"(B) If the defendant files a motion under subparagraph (A) (iii), the court shall require the defendant to establish that he has no access to other assets adequate for the payment of criminal defense counsel ~~before~~ conducting any probable cause inquiry. The government shall have an opportunity to cross-examine the defendant and any witnesses he or she may present on this issue. If the court determines that the defendant has established that he has no access to other assets, it shall hold a hearing to determine whether there is probable cause for the forfeiture of the defendant's property. If the court determines that no probable cause exists for the forfeiture of an asset, it shall modify the restraining order to the extent necessary to permit the defendant to use that asset to retain counsel.

"(C) In any hearing under this paragraph where probable cause is at issue, the court shall limit its inquiry to the existence of probable cause for the forfeiture, and shall neither entertain challenges to the validity of the indictment, nor require the government to produce additional evidence regarding the facts of the case to support the grand jury's finding of probable cause regarding the criminal offense giving rise to the forfeiture. In all cases, the party requesting the modification of the restraining order shall bear the burden of proof.

"(D) A person other than the defendant who has a legal interest in the restrained property may move to modify or vacate the restraining order for the reasons stated in subparagraph (A) (ii). In accordance with subsection (i), however, such person may not object to a restraining order on grounds that may be asserted only in the ancillary hearing pursuant to subsection (l).

"(E) If the property is restrained is subject to forfeiture as substitute assets, the court may exempt from the restraining order assets needed to pay attorneys fees, other necessary cost of living expenses, and expenses of maintaining the restrained assets".

(c) CONFORMING AMENDMENT.-- Section 1345(b) of title 18, United States Code, is amended by striking the last sentence and inserting the following: "In preparation for such hearing, the court may authorize the parties to conduct discovery pursuant to



Rule 16, Federal Rules of Criminal Procedure; however, where a restraining order or injunction is sought pre-indictment, the court shall issue any protective order necessary to prevent the premature disclosure of any ongoing law enforcement operation or investigation or the identity of any witness. In addition, in any case involving an ongoing investigation, the court shall permit the presentation of evidence in camera or under seal. Rule 65, Federal Rules of Civil Procedure, shall not apply to restraining orders issued under this subsection."

**SEC. 212. AVAILABILITY OF CRIMINAL FORFEITURE**

Section 2461 of title 28, United States Code, is amended by adding the following subsection:

"(c) Whenever a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged in an indictment or information with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the government may include the forfeiture in the indictment or information in accordance with Rule 7 of the Federal Rules of Criminal Procedure, and upon conviction, the court shall order the forfeiture of the property in accordance with the procedures set forth in section 982 of title 18, United States Code."

**SEC. 213. APPEALS IN CRIMINAL FORFEITURE CASES.**

(a) PRE-TRIAL DISMISSAL OF FORFEITURE COUNT.-- Section 3731 of title 18, United States Code, is amended in the first unnumbered paragraph by inserting ", or dismissing a forfeiture count

in whole or in part," after "order of a district court dismissing an indictment or information".

(b) REVIEW OF A SENTENCE.-- Section 3742 of title 18, United States Code, is amended by inserting the following new subsection:

"(i) Forfeiture orders.-- The government may file a notice of appeal in the district court of any decision, judgment, or order of a district court denying a forfeiture in whole or in part, or mitigating a forfeiture for constitutional reasons, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

**SEC. 214. DISCOVERY PROCEDURE FOR LOCATING FORFEITED ASSETS.**

Section 1963(k) of title 18, United States Code, and Section 413(m) of the Controlled Substances Act (21 U.S.C. 853(m)) are each amended by --

(1) adding the following at the end before the period:

"to the extent that the provisions of the Rule are consistent with the purposes for which discovery is conducted under this subsection"; and

2) adding the following additional sentence:

"Because this subsection applies only to matters occurring after the defendant has been convicted and his property has been declared forfeited, the provisions of Rule 15 requiring the

consent of the defendant and the presence of the defendant at the deposition shall not apply."

**SEC. 215. SCOPE OF CRIMINAL FORFEITURE**

Section 413 of the Controlled Substances Act (21 U.S.C. 853) is amended by adding the following new subsection:

"(t) To avoid the necessity of filing parallel civil forfeiture proceedings to adjudicate the interests of third parties who do not qualify as innocent owners of property subject to forfeiture under this section, the interests of third parties may be forfeited under this section, provided that the defendant has at least a partial interest in the forfeited property and the defendant's interest is forfeited. To adjudicate the third party's interest, the ancillary proceeding described in subsection (n) shall be an in rem proceeding in which the third party shall first have the burden of establishing standing pursuant to subsection (n)(2), after which the government shall have the burden of establishing the forfeitability of the third party's interest, and the third party shall have the burden of establishing an innocent owner defense under subsection (n)(6)."

**TITLE III -- PROPERTY SUBJECT TO FORFEITURE**

**SEC. 301. FORFEITURE OF PROCEEDS OF FEDERAL OFFENSES.**

(a) FINDINGS. Congress finds that --

Whereas, no person who commits a criminal offense has any right to retain the proceeds of that offense; and

Whereas, the forfeiture of the proceeds of a criminal offense deprives a criminal of the benefits of the crime and puts

the criminal in the position he or she was in before the commission of the offense, and

Whereas, the forfeiture of criminal proceeds deprives the criminal of property that could be used to commit additional criminal offenses, and

Whereas, the forfeiture of criminal proceeds may facilitate the restoration of property to the victims of crime, and

Whereas, forfeiture of criminal proceeds can offset law enforcement expenses,

The forfeiture of criminal proceeds shall be considered remedial and not punitive in nature.

(b) CIVIL FORFEITURE.-- Section 981(a) (1) of title 18, United States Code, is amended --

(1) in sub-paragraph (C) by striking "of section 215" and all that follows up to the period and inserting "of any offense in this title or a conspiracy to commit such offense"; and

(2) by striking sub-paragraphs (D), (E) and (F).

(c) CRIMINAL FORFEITURE.-- Section 982(a) of title 18, United States Code, is amended --

(1) in paragraph (2), by striking "violate --" and subparagraphs (A) and (B) and inserting "violate any offense in this title, "; and

(2) by striking paragraphs (3), (4) and (5).

**SEC. 302. UNIFORM DEFINITION OF "PROCEEDS"**

(a) CIVIL FORFEITURE.-- Section 981(a) of title 18, United States Code, is amended --

(1) in paragraph (1), by striking "gross receipts" and "gross proceeds" wherever those terms appear and inserting "proceeds"; and

(2) by adding a new paragraph (3) as follows:

"(3) In this section, "proceeds" means any and all property of any kind obtained, directly or indirectly, at any time as the result of the commission of the offense giving rise to forfeiture, and any property traceable thereto. "Proceeds" is not limited to the net gain or profit realized from the commission of the offense."

(b) CRIMINAL FORFEITURE.-- Section 982 of title 18, United States Code, is amended --

(1) in subsection (a), by striking "~~gross receipts~~" and "gross proceeds" wherever those terms appear and inserting "proceeds"; and

(2) by adding the following new paragraph to subsection (b):

"(3) In this section, "proceeds" means any and all property of any kind obtained, directly or indirectly, at any time as the result of the commission of the offense giving rise to forfeiture, and any property traceable thereto. Where the offense involves as an element a scheme, a conspiracy, or a pattern of criminal activity, "proceeds" includes any and all property obtained from the entire course of conduct constituting such scheme, conspiracy or

pattern. "Proceeds" is not limited to the net gain or profit realized from the commission of the offense."

(c) CONTROLLED SUBSTANCES.-- (1) Section 511 of the Controlled Substances Act (21 U.S.C. 881) is amended by adding the following new subsection:

"(k) In this section, "proceeds" means any and all property of any kind obtained, directly or indirectly, at any time as the result of the commission of the offense giving rise to forfeiture, and any property traceable thereto. "Proceeds" is not limited to the net gain or profit realized from the commission of the offense."

(2) Section 413 of the Controlled Substances Act (21 U.S.C. 853) is amended by adding the following new subsection:

**"Definition of proceeds.**

"(s) In this section, "proceeds" means any and all property of any kind obtained at any time, directly or indirectly, as the result of the commission of the offense giving rise to forfeiture, and any property traceable thereto. Where the offense involves as an element a scheme, a conspiracy, or a pattern of criminal activity, "proceeds" includes any and all property obtained from the entire course of conduct constituting such scheme, conspiracy or pattern. "Proceeds" is not limited to the net gain or profit realized from the commission of the offense."

(d) RICO.-- Subsection 1963(a) of title 18, United States Code, is amended by adding the following at the end:

"In this section, "proceeds" means any and all property obtained from the entire pattern of racketeering activity or unlawful debt collection and is not limited to net profits."

**SEC. 303. FORFEITURE OF FIREARMS USED IN CRIMES OF VIOLENCE AND FELONIES**

(a) CIVIL FORFEITURE.--Section 981(a)(1) of title 18, United States Code, is amended by inserting after subparagraph (C) the following:

"(D) Any firearm (as defined in Section 921(a)(3) of this title) used or intended to be used to commit or to facilitate the commission of any crime of violence (as defined in Section 16 of this title) or any felony under federal law."

(b) CRIMINAL FORFEITURE.-- (1) Section 982(a) of title 18, United States Code, is amended by inserting after subparagraph (2) the following:

"(3) The court, in imposing a sentence on a person convicted of any crime of violence (as defined in Section 16 of this title) or any felony under federal law, shall order that the person forfeit to the United States any firearm (as defined in Section 921(a)(3) of this title) used or intended to be used to commit or to facilitate the commission of the offense."

(2) Section 3665 of title 18, United States Code, is amended by adding the following new paragraph at the end:

"For the purposes of this section, the procedures governing the forfeiture of a firearm under section 982(a)(3) of this title shall apply."

(c) DISPOSAL OF FORFEITED PROPERTY.--Section 981(c) of title 18, United States Code, is amended by adding at the end the following sentence:

"Any firearm forfeited pursuant to subsection (a)(1)(D) or section 982(a)(3) of this title shall be disposed of by the seizing agency in accordance with law."

(d) AUTHORITY TO FORFEIT PROPERTY UNDER SECTION 924(d).--Section 924(d) of title 18, United States Code, is amended by adding the following new paragraph:

"(4) Whenever any firearm is subject to forfeiture under this section because it was involved in or used in a violation of subsection (c), the Secretary of the Treasury shall have the authority to seize and forfeit, in accordance with the procedures of the applicable forfeiture statute, any property otherwise forfeitable under the laws of the United States that was involved in or derived from the crime of violence or drug trafficking crime described in subsection (c) in which the forfeited firearm was used or carried."

SEC. 304. FORFEITURE OF PROCEEDS TRACEABLE TO FACILITATING PROPERTY IN DRUG CASES.



(a) CONVEYANCES.-- Section 511(a)(4) of the Controlled Substances Act (21 U.S.C. 881(a)(4)) is amended--

(1) by inserting ", and any property traceable to such conveyances" after "property described in paragraph (1), (2), or (9)";

(2) in subparagraph (A) by inserting ", and no property traceable to such conveyance," before "shall be forfeited"; and

(3) in subparagraphs (B) and (C) by inserting "and no property traceable to such conveyance" before "shall be forfeited".

(b) REAL PROPERTY.-- Section 511(a)(7) of the Controlled Substances Act (21 U.S.C. 881(a)(7)) is amended by inserting ", and any property traceable to such property" after "one year's imprisonment".

(c) NEGOTIABLE INSTRUMENTS AND SECURITIES.--Section 511(a)(6) of the Controlled Substances Act (21 U.S.C. 881(a)(6)) is amended by inserting ", and any property traceable to such property" after "this subchapter" the second time it appears.

**SEC. 305. FORFEITURE FOR ALIEN SMUGGLING.**

(a) CIVIL FORFEITURE.-- Section 274(b) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1324(b)) is amended -

(1) by amending paragraphs (1) and (2) to read as follows:

"(b) SEIZURE AND FORFEITURE. (1) The following property shall be subject to seizure and forfeiture:

"(A) any conveyance, including any vessel, vehicle, or aircraft, which has been or is being used in the commission of a violation of subsection (a); and

"(B) any property, real or personal, (i) that constitutes, or is derived from or is traceable to the proceeds obtained directly or indirectly from the commission of a violation of subsection (a), or (ii) that is used to facilitate, or is intended to be used to facilitate, the commission of a violation of subparagraph (a) (1) (A).

"(2) Any property subject to forfeiture to the United States under this section may be seized by the Attorney General in the manner set forth in Section 981(b) of title 18,, United States Code."; and

(2) in paragraphs (4) and (5) by striking "a conveyance" and "conveyance" each place ~~the~~ phrase or word appears and inserting "property".

(b) CRIMINAL FORFEITURE.-- Section 274 of the Immigration and Nationality Act of 1952 (8 U.S.C. 1324) is further amended by redesignating subsection (c) to be subsection (d) and inserting the following new subsection (c) --

"(c) Criminal forfeiture

"(1) Any person convicted of a violation of subsection (a) shall forfeit to the United States, irrespective of any provision of State law --

"(A) any conveyance, including any vessel, vehicle, or aircraft used in the commission of a violation of subsection (a); and

"(B) any property real or personal, (i) that constitutes, or is derived from or is traceable to the proceeds obtained directly or indirectly from the commission of a violation of subsection (a), or (ii) that is used to facilitate, or is intended to be used to facilitate, the commission of a violation of subparagraph (a)(1)(A).

"The court, in imposing sentence on such person, shall order that the person forfeit to the United States all property described in this subsection.

"(2) The criminal forfeiture of property under this subsection, including any seizure and disposition of the property and any related administrative or judicial proceeding, shall be governed by the provisions of section 413 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 853), except for subsection 413(d) which shall not apply to forfeitures under this subsection."

**SEC. 306. FORFEITURE OF PROCEEDS OF CERTAIN FOREIGN CRIMES.**

Section 981(a)(1)(B) of title 18, United States Code, is amended by --

(1) inserting "(i)" after "against a foreign nation involving"; and

(2) inserting "(ii) murder, kidnapping, robbery, or extortion, (iii) fraud, or any scheme or attempt to defraud, by or

against a foreign bank (as defined in paragraph 7 of section 1(b) of the International Banking Act (12 U.S.C. 3101(7))); or (iv) money laundering, tax evasion, public corruption, smuggling, entry of goods falsely classified, entry of goods by means of false statements, or export control violations" after "Controlled Substances Act)".

**SEC. 307. FORFEITURE OF PROPERTY USED TO FACILITATE FOREIGN DRUG CRIMES.**

Section 981(a)(1)(B) of title 18, United States Code, is amended by inserting ", or any property used to facilitate an offense described in subparagraph (i)" at the end before the period.

**SEC. 308. FORFEITURE FOR VIOLATIONS OF SECTION 6050I AND 1960**

(a) Sections 981(a)(1)(A) and 982(a)(1) of title 18, United States Code, are amended by inserting "~~or~~ of section 6050I of the Internal Revenue Code of 1986 (26 U.S.C. 6050I)" after "of title 31".

(b) Section 981(a)(1)(A) of title 18, United States Code, is amended by striking "or 1957" and inserting ", 1957 or 1960".

**SEC. 309. CRIMINAL FORFEITURE FOR MONEY LAUNDERING CONSPIRACIES**

Section 982(a)(1) of title 18, United States Code, is amended by inserting ", or a conspiracy to commit any such offense" after "of this title".

**SEC. 310. SEIZURE OF VEHICLES WITH CONCEALED COMPARTMENTS USED FOR SMUGGLING.**

(a) IN GENERAL.-- Section 3 of the Anti-Smuggling Act of 1935 (19 U.S.C. 1703) is amended --

(1) by amending the title of such section to read as follows:

"Sec. 1703. Seizure and forfeiture vessels, vehicles and other conveyances";

(2) by amending the title of subsection (a) to read as follows:

"(a) Vessels, vehicles and other conveyances subject to seizure and forfeiture";

(3) by amending the title of subsection (b) to read as follows:

"(b) Vessels, vehicles and other conveyances defined";

(4) by inserting ", vehicle and other conveyance" after the word "vessel" everywhere it appears in the text of subsections (a) and (b); and

(5) by amending subsection (c) to read as follows:

"(c) Acts constituting prima facie evidence of vessel, vehicle or other conveyance engaged in smuggling

"For the purposes of this section, prima facie evidence that a conveyance is being, or has been, or is attempted to be employed in smuggling or to defraud the revenue of the United States shall be --

"(1) in the case of a vessel, the fact that a vessel has become subject to pursuit as provided in section 1581 of this title, or is a hovering vessel, or

that a vessel fails, at any place within the customs waters of the United States or with a customs-enforcement area, to display lights as required by law.

"(2) in the case of a vehicle or other conveyance, the fact that a vehicle or other conveyance has any compartment or equipment that is built or fitted out for smuggling."

(b) CONFORMING AMENDMENT.-- The table of sections for Chapter 5 of title 19, United States Code, is amended by striking the items relating to section 1703 and inserting in lieu thereof the following:

"1703. Seizure and forfeiture of vessels, vehicles and other conveyances.

"(a) Vessels, vehicles and other conveyances subject to seizure and forfeiture.

"(b) 'Vessels, vehicles and other conveyances' defined.

"(c) Acts constituting prima facie evidence of vessel, vehicle or other conveyance engaged in smuggling."

**SEC. 311. FORFEITURE OF INSTRUMENTALITIES OF TERRORISM, TELEMAR-  
KETING FRAUD, AND OTHER OFFENSES.**

(a) CIVIL FORFEITURE.--Section 981(a)(1) of title 18, United States Code, is amended by adding the following sub-paragraphs:

"(E)(i) Any computer, photostatic reproduction machine, electronic communications device or other material, article,

apparatus, device or thing made, possessed, fitted, used or intended to be used on a continuing basis to commit a violation of sections 513, 1028 through 1032, and 1341, 1343 and 1344 of this title, or a conspiracy to commit such offense, and any property traceable to such property.

"(ii) Any conveyance used on two or more occasions to transport the instrumentalities used in the commission of a violation of sections 1028 and 1029 of this title, or a conspiracy to commit such offense, and any property traceable to such conveyance.

"(F) Any conveyance, chemicals, laboratory equipment, or other material, article, apparatus, device or thing made, possessed, fitted, used or intended to be used to commit an offense punishable under Chapter 113B of this title (relating to terrorism), or a violation of the Explosives Control Act, 18 U.S.C. 841-48, or the National Firearms Act (26 U.S.C. Chapter 53), or a conspiracy to commit any such offense, and any property traceable to such property."

(b) CRIMINAL FORFEITURE.--Section 982(a) of title 18, United States Code, is amended by inserting the following new paragraph:

"(4) (A) The court, in imposing a sentence on a person convicted of a violation of sections 513, 1028 through 1032, and 1341, 1343 and 1344 of this title, or a conspiracy to commit such offense, shall order the person to forfeit to the United States any computer, photostatic reproduction machine, electronic communications device or other material,

article, apparatus, device or thing made, possessed, fitted, used or intended to be used to commit such offense, and any property traceable to such property.

"(B) The court, in imposing a sentence on a person convicted of a violation of sections 1028 or 1029 of this title, or a conspiracy to commit such offense, shall order the person to forfeit to the United States any conveyance used on two or more occasions to transport the instrumentalities used to commit such offense, and any property traceable to such conveyance.

"(5) The court, in imposing a sentence on a person convicted of an offense punishable under Chapter 113B of this title (relating to terrorism), or a violation of the Explosives Control Act, 18 U.S.C. 841-48, or the National Firearms Act (26 U.S.C. Chapter 53), or a conspiracy to commit any such offense, shall order the person to forfeit to the United States any conveyance, chemicals, laboratory equipment, or other material, article, apparatus, device or thing made, possessed, fitted, used or intended to be used to commit such offense, and any property traceable to such property."

**SEC. 312. FORFEITURE OF VEHICLES USED FOR GUN RUNNING**

(a) CIVIL FORFEITURE.--Section 981(a)(1) of title 18, United States Code, is amended by adding the following sub-paragraph:



"(G) (i) Any conveyance used or intended to be used to commit a gun running offense, or conspiracy to commit such offense, and any property traceable to such property.

(ii) For the purposes of this section, a gun running offense is a violation of any of the following sections of this title involving five or more firearms: section 922(a) (1) (A) (engaging in a firearms business without a license); section 922(a) (3) (transporting a firearm across state lines); section 922(a) (5) (transferring a firearm to a non-licensed person in another state); section 922(a) (6) (making false statements in connection with the purchase of a firearm); section 922(j) (receiving stolen firearms); section 922(k) (receiving a firearm with obliterated serial numbers); and section 922(u) (stealing firearms from federal firearms licensees).

(b) CRIMINAL FORFEITURE.--Section 982(a) of title 18, United States Code, is amended by inserting the following new paragraph:

"(6) The court, in imposing a sentence on a person convicted of a gun running offense, as defined in Section 981(a) (1) (G), or a conspiracy to commit such offense, shall order the person to forfeit to the United States any conveyance used or intended to be used to commit such offense, and any property traceable to such conveyance."

**SEC. 313. FORFEITURE OF CRIMINAL PROCEEDS TRANSPORTED IN INTER-  
STATE COMMERCE**

Section 1952 of title 18, United States Code, is amended by adding the following subsection:

"(d) (1) Any property involved in a violation of subsection (a) (1) or a conspiracy to commit such violation, or any property traceable to such property, is subject to forfeiture to the United States in accordance with the procedures set forth in section 981 of this title.

"(2) The court, in imposing sentence on a person convicted of an offense in violation of subsection (a) (1) or a conspiracy to commit such offense, shall order that the person forfeit to the United States any property involved in such offense, or any property traceable to such property, in accordance with the procedures set forth in section 982 of this title."

**SEC. 314. FORFEITURES OF PROCEEDS OF FEDERAL FOOD, DRUG, AND  
COSMETIC ACT VIOLATIONS**

Chapter 9 of title 21, United States Code, is amended by adding the following two new sections:--

"Sec. 311. **CIVIL FORFEITURE OF PROCEEDS OF FEDERAL FOOD,  
DRUG, AND COSMETIC ACT VIOLATIONS**

"(a) Any property, real or personal, that constitutes, or is derived from or is traceable to the proceeds obtained directly or indirectly from a criminal violation of, or a conspiracy to commit a criminal violation of, a provision of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301-

395) shall be subject to judicial forfeiture to the United States.

"(b) The provisions of chapter 46 of title 18, United States Code, relating to civil forfeitures shall extend to a seizure or forfeiture under this section, insofar as applicable and not inconsistent with the provisions hereof, except that such duties as are imposed upon the Secretary of the Treasury under chapter 46 shall be performed with respect to seizures and forfeitures under this section by such officers, agents, or other persons as may be authorized or designated for that purpose by the Secretary of Health and Human Services.

"Sec. 312. **CRIMINAL FORFEITURE OF PROCEEDS OF  
FEDERAL FOOD, DRUG, AND COSMETIC ACT  
VIOLATIONS**

"(a) Any person convicted of a violation of, or a conspiracy to violate, a provision of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301-395) shall forfeit to the United States, irrespective of any provision of State law, any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation. The court, in imposing sentence on such person, shall order that the person forfeit to the United States all property described in this subsection.

"(b) Property subject to forfeiture under this section, any seizure and disposition thereof, and any administrative or judicial proceeding in relation thereto, shall be gov-

erned by the provisions of section 413 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C.

853), except for subsection 413(d) which shall not apply to forfeitures under this section."

**SEC. 315. SUMMARY DESTRUCTION OF EXPLOSIVES SUBJECT TO FORFEITURE**

Section 844(c) of title 18, United States Code, is amended -

(1) by inserting "(1)" after "(c)"; and

(2) by adding at the end the following new paragraphs:

"(2) Notwithstanding paragraph (1), in the case of the seizure of any explosive materials for any offense for which the materials would be subject to forfeiture in which it would be impracticable or unsafe to remove the materials to a place of storage or would be unsafe to store them, the seizing officer may destroy the explosive materials, forthwith. Any destruction under this ~~paragraph~~ shall be in the presence of at least one credible witness. The seizing officer shall make a report of the seizure and take samples as the Secretary may by regulation prescribe.

"(3) Within 90 days after any destruction made pursuant to paragraph (2), the owner of (including any person having an interest in) the property so destroyed may make application to the Secretary for reimbursement of the value of the property. If the claimant establishes to the satisfaction of the Secretary that the claimant was an innocent owner as described in 18 U.S.C. 983, the Secretary shall make an allowance to the claimant not exceeding the value of the

property destroyed. The Secretary's determination of the fair market value of the property shall be final."

**SEC. 316. ARCHEOLOGICAL RESOURCES PROTECTION ACT**

Section 8(b) of the Archeological Resources Protection Act of 1979 (16 U.S.C. 470gg(b)) is amended by --

(1) inserting "all proceeds derived directly or indirectly from such violation or any property traceable thereto," before "and all vehicles" in the unnumbered paragraph;

2) inserting "proceeds," before "vehicles" in paragraph (3);  
and

3) inserting the following at the end of the subsection:

"If a forfeiture count is included within an indictment in accordance with the Federal Rules of Criminal Procedure, and the defendant is convicted of the offense giving rise to the forfeiture, the forfeiture may be ordered as part of the criminal sentence in accordance with the procedures for criminal forfeitures in Chapter 46 of title 18, United States Code. Otherwise, the forfeiture shall be civil in nature in accordance with the procedures for civil forfeiture in said Chapter 46 of title 18."

**TITLE IV - MISCELLANEOUS FORFEITURE AMENDMENTS**

**SEC. 401. USE OF FORFEITED FUNDS TO PAY RESTITUTION TO CRIME**

**VICTIMS AND REGULATORY AGENCIES**

(a) CIVIL FORFEITURE.-- Section 981(e) of title 18, United States Code, is amended --

(1) by amending subsection (e) (6) to read as follows:

"(6) as restoration to any victim of the offense giving rise to the forfeiture, including, in the case of a money laundering offense, any offense constituting the underlying specified unlawful activity; or";

(2) in subsections (e) (3), (4) and (5), by striking "in the case of property referred to in subsection (a) (1) (C)" and inserting "in the case of property forfeited in connection with an offense resulting in a pecuniary loss to a financial institution or regulatory agency"; and

(3) in subsection (e) (7), by striking "in the case of property referred to in subsection (a) (1) (D)" and inserting "in the case of property forfeited in connection with an offense relating to the sale of assets acquired or held by any Federal financial institution or regulatory agency, or person appointed by such agency, as receiver, conservator or liquidating agent for a financial institution".

(b) CRIMINAL FORFEITURE.-- Section 982(b) of title 18, United States Code, is amended by adding the following new paragraph:

"(4) The provision relating to restitution in section 413(i) shall be construed to authorize the Attorney General to restore forfeited property, on such terms and conditions as he or she may determine, to any victim of an offense for which forfeiture is ordered under this section, or any victim of any offense that was part of the same scheme,

conspiracy, or pattern of criminal activity, including, in the case of a money laundering offense, any offense constituting the underlying specified unlawful activity. The Attorney General shall consider the restoration of forfeited property to victims to be the first priority in the distribution of forfeited property under this section after the costs of the investigation and forfeiture have been satisfied."

**SEC. 402. ENFORCEMENT OF FOREIGN FORFEITURE JUDGMENT**

(a) IN GENERAL.-- Chapter 163 of Title 28, United States Code, is amended by inserting the following new section:

"2466. Enforcement of foreign forfeiture judgment.

"(a) Definitions. As used in this section --

"(1) "Foreign nation" shall mean a country that has become a party to the United Nations ~~Convention~~ Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (hereafter "the United Nations Convention") or a foreign jurisdiction with which the United States has a treaty or other formal international agreement in effect providing for mutual forfeiture assistance.

"(2) "Value based confiscation judgment" shall mean a final order of a foreign nation compelling a defendant, as a consequence of his or her criminal conviction for an offense described in Article 3, Paragraph 1, of the United Nations Convention, to pay a sum of money representing the proceeds

of such offense, or property the value of which corresponds to such proceeds.

"(b) Review by Attorney General. A foreign nation seeking to have its value based confiscation judgment registered and enforced by a United States district court under this section must first submit a request to the Attorney General or his or her designee. Such request shall include:

"(1) a summary of the facts of the case and a description of the criminal proceeding which resulted in the value-based confiscation judgment;

"(2) certified copies of the judgment of conviction and value-based confiscation judgment;

"(3) an affidavit or sworn declaration establishing that the defendant received notice of the proceedings in sufficient time to enable him or her to defend against the charges that the value-based confiscation judgment rendered is in force and is not subject to appeal;

"(4) an affidavit or sworn declaration that all reasonable efforts have been undertaken to enforce the value-based confiscation judgment against the defendant's property, if any, in the foreign country; and

"(5) such additional information and evidence as may be required by the Attorney General or his or her designee.

The Attorney General or his or her designee, in consultation with the Secretary of State or his or her designee, shall determine whether to certify the request, and such decision shall be final



and not subject to either judicial review or review under the Administrative Procedures Act, 5 U.S.C. 551 et seq.

"(c) **Jurisdiction and Venue.** Where the Attorney General or his or her designee certifies a request under paragraph (b), the foreign nation may file a civil proceeding in United States district court seeking to enforce the foreign value based confiscation judgment as if the judgment had been entered by a court in the United States. In such a proceeding, the foreign nation shall be the plaintiff and the person against whom the value-based confiscation judgment was entered shall be the defendant. Venue shall lie in the district court for the District of Columbia or in any other district in which the defendant or the property that may be the basis for satisfaction of a judgment under this section may be found. The district court shall have personal jurisdiction over a defendant residing outside of the United States if the defendant is served with process in accordance with Rule 4 of the Federal Rules of Civil Procedure.

"(d) **Entry and Enforcement of Judgment.** (1) Except as provided in paragraph (2), the district court shall enter such orders as may be necessary to enforce the value-based confiscation judgment on behalf of the foreign nation where it finds that all of the following requirements have been met:

"(A) the value-based confiscation judgment was rendered under a system which provides impartial tribunals or procedures compatible with the requirements of due process of law;

"(B) the foreign court had personal jurisdiction over the defendant;

"(C) the foreign court had jurisdiction over the subject matter;

"(D) the defendant in the proceedings in the foreign court received notice of the proceedings in sufficient time to enable him or her to defend; and

"(E) the judgment was not obtained by fraud.

Process to enforce a judgment under this section will be in accordance with Rule 69(a) of the Federal Rules of Civil Procedure.

"(e) Finality of Foreign Findings. Upon a finding by the district court that the conditions set forth in subsection (d) have been satisfied, the court shall be bound by the findings of facts insofar as they are stated in the ~~foreign~~ judgment of conviction and value-based confiscation judgment.

"(f) Currency Conversion. Insofar as a value based confiscation judgment requires the payment of a sum of money, the rate of exchange in effect at time when the suit to enforce is filed by the foreign nation shall be used in calculating the amount stated in the judgment submitted for registration."

(b) CONFORMING AMENDMENT.-- The chapter analysis for Chapter 163, Title 28, United States Code, is amended by inserting the following at the end:

"2466. Enforcement of foreign forfeiture judgment"

SEC. 403. MINOR AND TECHNICAL AMENDMENTS RELATING TO 1992 FORFEITURE AMENDMENTS.

(a) CRIMINAL FORFEITURE.-- Section 982(b) of title 18, United States Code, is amended in subsection (b)(2), by striking "The substitution" and inserting "With respect to a forfeiture under subsection (a)(1), the substitution".

(b) FUNGIBLE PROPERTY.-- Section 984 of title 18, United States Code, is amended --

(1) by striking subsection (a) and redesignating the remaining subsections as (a), (b), and (c), respectively;

(2) by amending subsection (b) (as redesignated) to read as follows:

"(b) The provisions of this section may be invoked only if the action for forfeiture was commenced by a seizure or an arrest in rem within two years of the offense that is the basis for the forfeiture.";

(3) by amending subsection (c)(1) (as redesignated) to read as follows:

"(c)(1) Subsection (a) shall not apply to an action against funds held by a financial institution in an interbank account unless the account holder knowingly engaged in the offense that is the basis for the forfeiture.";

(4) by adding the following new paragraph to subsection (c) (as redesignated):

"(3) As used in this subsection, a "financial institution" includes a foreign bank, as defined in paragraph 7 of section 1(b) of the International Banking Act of 1978."; and  
 (5) by adding the following new subsection:

"(d) Nothing in this section is intended to limit the ability of the government to forfeit property under any statute where the property involved in the offense giving rise to the forfeiture or property traceable thereto is available for forfeiture."

(c) SUBPOENAS FOR BANK RECORDS.-- Section 986(a) of title 18, United States Code, is amended by --

(1) striking "section 1956, 1957 or 1960 of this title, section 5322 or 5324 of title 31, United States Code" and inserting "section 981 of this title"; and

(2) striking the last sentence. \_\_\_\_\_

(d) ORDER OF FORFEITURE.-- Section 3554 of title 18, United States Code, is amended --

(1) by striking "an offense described in section 1962 of this title or in title II or III of the Comprehensive Drug Abuse Prevention and Control Act of 1970" and inserting "an offense for which criminal forfeiture is authorized"; and

(2) by inserting "pursuant to Rule 32, Federal Rules of Criminal Procedure," after "shall order,".

(e) CMIR OFFENSES.-- Section 5324(b) of title 31, United States Code, is amended --

(1) in paragraph (1). by inserting "or attempt to fail to file" after "fail to file", the first time it appears; and

(2) in paragraph (2), by inserting ", attempt to file," after "file", the first time it appears.

(f) CIVIL MONEY LAUNDERING ENFORCEMENT.-- Section 1956(b) of title 18, United States Code, is amended --

(1) by redesignating the present matter as paragraph (1), and the present paragraphs (1) and (2) as sub-paragraphs (A) and (B), respectively; and

(2) by inserting the following new paragraphs:

"(2) For purposes of adjudicating an action filed or enforcing a penalty ordered under this section, the district courts shall have jurisdiction over any foreign person, including any financial institution registered in a foreign country, that commits an offense under subsection (a) involving a financial transaction that occurs in whole or in part in the United States, provided that service of process upon such foreign person is made under the Federal Rules of Civil Procedure or the laws of the country where the foreign person is found.

"(3) The court may issue a pre-trial restraining order or take any other action necessary to ensure that any bank account or other property held by the defendant in the United States is available to satisfy a judgment under this section."

**SEC. 404. CIVIL FORFEITURE OF COINS AND CURRENCY IN CONFISCATED GAMBLING DEVICES**

Section 7 of Public Law 81-906 (15 U.S.C. 1177) is amended--

(1) by inserting "Any coin or currency contained in any gambling device at the time of its seizure pursuant to the preceding sentence shall also be seized and forfeited to the United States. " after the first sentence; and

(2) in the last sentence, by inserting ", coins, or currency" after "gambling devices".

**SEC. 405. DRUG PARAPHERNALIA TECHNICAL AMENDMENTS**

(a) Section 511(a)(10) of the Controlled Substances Act (21 U.S.C. 881(a)(10)) is amended by striking "857 of this title" and inserting "422 of this subchapter (21 U.S.C. 863)".

(b) Section 422 of the Controlled Substances Act (21 U.S.C. 863) is amended:

(1) by deleting subsection (c); and

(2) by redesignating subsections (d), (e) and (f) to be subsections (c), (d) and (e).

**SEC. 406. AUTHORIZATION TO SHARE FORFEITED PROPERTY WITH COOPERATING FOREIGN GOVERNMENTS.**

(a) IN GENERAL.-- Section 981(i)(1) of title 18, United States Code, is amended by striking "this chapter" and inserting "any provision of federal law".

(b) CONFORMING AMENDMENT.-- Section 511(e)(1) of the Controlled Substances Act is amended by striking "; or" and all of sub-paragraph (E) and inserting a period.

**SEC. 407. FORFEITURE OF COUNTERFEIT PARAPHERNALIA**

Section 492 of title 18, United States Code, is amended --

(1) by striking the third and fourth undesignated paragraphs;

(2) by designating the remaining paragraphs as subsections (a) and (b);

(3) by adding the following new subsections:

"(c) For the purposes of this section, the provisions of the customs laws relating to the seizure, summary and judicial forfeiture, condemnation of property for violation of the customs laws, the disposition of such property or the proceeds from the sale of such property, the remission or mitigation of such forfeitures, and the compromise of claims (19 U.S.C. 1602 et seq.), insofar as they are applicable and not inconsistent with the provisions of this section, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under this section, except that the duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this section by such officers, agents, or other persons as may be authorized

or designated for that purpose by the Secretary of the Treasury.

"(d) All seizures and civil judicial forfeitures pursuant to subsection (a) shall be governed by the procedures set forth in chapter 46 of this title pertaining to civil forfeitures. The Attorney General shall have sole responsibility for disposing of petitions for remission or mitigation with respect to property involved in a judicial forfeiture proceeding.

"(e) A court in sentencing a person for a violation of this chapter or of sections 331-33, 335, 336, 642 or 1720 of this title, shall order the person to forfeit the property described in subsection (a) in accordance with the procedures set forth in section 982 of this title."; and

(4) in subsection (b), as so designated by this section, by striking "fined not more than \$100" and inserting "fined under this title".

**SEC. 408. CLOSING OF LOOPHOLE TO DEFEAT CRIMINAL FORFEITURE THROUGH BANKRUPTCY.**

(a) RICO.-- Section 1963(a) of title 18, United States Code, is amended by inserting ", or of any bankruptcy proceeding instituted after or in contemplation of a prosecution under this chapter" after "shall forfeit to the United States, irrespective of any provision of State law";

(b) CONTROLLED SUBSTANCES.-- Section 413(a) of the Controlled Substances Act (21 U.S.C. 853(a)) is amended by inserting ",



or of any bankruptcy proceeding instituted after or in contemplation of a prosecution of such violation" after "shall forfeit to the United States, irrespective of any provision of State law".

**SEC. 409. STATUTE OF LIMITATIONS FOR CIVIL FORFEITURE ACTIONS**

(a) **IN GENERAL.**-- Section 621 of the Tariff Act of 1930 (19 U.S.C. 1621) is amended by inserting ", or in the case of forfeiture, within five years after the time when the involvement of the property in the alleged offense was discovered" after "within five years after the time when the alleged offense was discovered".

(b) **FIRREA CASES.**-- Section 981(a) of title 18, United States Code, is amended by adding at the end a new paragraph, as follows:

"(4) An action seeking the forfeiture of property described in subparagraph (a)(1)(C) arising out of an offense affecting a financial institution or the conservator or receiver of a financial institution may be commenced not later than ten years after the discovery of the involvement of the property in the act giving rise to the forfeiture. This paragraph shall apply to any forfeiture action not barred by the expiration of the limitation period provided by Section 621 of the Tariff Act of 1930 (19 U.S.C. Sec. 1621) at the time this paragraph became effective."

**SEC. 410. ASSETS FORFEITURE FUND AND PROPERTY DISPOSITION**

(a) **TECHNICAL AMENDMENTS.**--Section 524 of title 28, United States Code, is amended --

(1) in paragraph (c) (1) by striking "and" at the end of subparagraph (H), by striking the second subparagraph (I) that begins with "after all reimbursements" and ends with "correctional institutions", and by inserting "and" following the semicolon at the end of the remaining subparagraph (I);

(2) in paragraph (c) (3), by deleting "(F)" and inserting "(G)";

(3) in subparagraph (c) (4) (C) by deleting "(g) (4) (A) (ii)";

(4) in subparagraph (c) (8) (A), by striking "(A) (iv), (B), (C), (F), (G), and (H)" and inserting "(A) (ii), (B), (C), (F) and (G)";

(5) in subparagraph (c) (8) (E), by deleting "103-121" and inserting "103-317"; and

(6) by repealing paragraph (c) (6), and renumbering paragraphs (c) (7) through (c) (11) as paragraphs (c) (6) through (c) (10).

(b) DISPOSAL OF FORFEITED PROPERTY.-- Section 524(c) (8), of title 28, United States Code, as redesignated by this Section, is amended to read as follows:

" (8) Following the completion of procedures for the forfeiture of property pursuant to any law enforced or administered by the Department, the Attorney General, under such terms and conditions as the Attorney General shall specify, is authorized to:

"(A) destroy the property if it is unsuitable for public use or sale, or uneconomical to market;

"(B) transfer the property to any lienholder (including taxing authorities) or mortgagee in lieu of the compromise and payment of a valid lien or mortgage against the property;

"(C) disburse all or part of an amount forfeited as restoration to any victim of the offense giving rise to the forfeiture, or any other offense that was part of the same scheme, conspiracy, or pattern of criminal activity, including, in the case of a money laundering offense, any offense constituting the underlying specified unlawful activity, in accordance with the relevant forfeiture statute;

"(D) dispose of the property by public sale or any other commercially feasible means; or request the General Services Administration to take custody of the property and to dispose of it in accordance with law;

"(E) place the property into official use or transfer the property to any other federal agency for official use;

"(F) transfer the property to foreign governments pursuant to title 18, United States Code, section 981(i);

"(G) transfer the property, or the net proceeds of sale of the property, to State or local law enforcement agencies that participated directly in any of the acts that led to the seizure or forfeiture of the property,

in accordance with title 18, United States Code, section 981(e); section 511(e)(3) of the Controlled Substances Act (21 U.S.C. 881(e)(3)); or any other provision of law pertaining to the equitable sharing of forfeited property;

"(H) transfer real or personal property that is uneconomical to store, maintain, or market to a State or local government agency for use to support drug abuse treatment, drug and crime prevention and education, housing, job skills, and other community-based public health and safety programs, upon agreement by the recipient government to accept liability for the compromise or settlement of any mortgages, liens, petitions or other claims against the property;

"(I) make any other disposition authorized by law; and

"(J) warrant clear title to any subsequent purchaser or transferee of such property.

"The Attorney General shall make due provision for the property rights of innocent persons in disposing of forfeited property. Election of the method of disposition is solely within the discretion of the Attorney General. Final orders of judgment for damages arising from any warranty of title by the Attorney General shall be satisfied pursuant to title 31, United States Code, section 1304 in the same manner and to the same extent as other judgments for damag-

es. A decision by the Attorney General pursuant to this subsection shall not be subject to review."

(c) DEPOSIT FROM SETTLEMENT IN LIEU OF FORFEITURE.--

Section 524(c)(4)(A) of title 28, United States Code, is amended by inserting ", or from any settlement in lieu of forfeiture," before "under any law".

(d) DEPOSITS INTO THE FUND.-- Section 524(c)(4)(B) of title 28, United States Code, is amended by inserting ", and all amounts representing reimbursement or recovery of costs paid by the Fund" immediately prior to the semi-colon.

(e) PAYMENT OF FOREIGN JUDGMENTS.-- Section 524(c)(1) of title 28, United States Code, is amended by inserting the following new subparagraph (J) immediately following subparagraph (I):

"(J) at the discretion of the Attorney General, payments to return forfeited property repatriated to the United States by a foreign government or others acting at the direction of a foreign government, and interest earned on such property, subject to the following conditions:

"(i) a final foreign judgment entered against a foreign government or those acting at its direction, which foreign judgment was based on the measures, such as seizure and repatriation of property, that resulted in deposit of the funds into the Fund;

"(ii) such foreign judgment was entered and presented to the Attorney General within five years of the

date that the property was repatriated to the United States;

"(iii) the foreign government or those acting at its direction vigorously defended its actions under its own laws; and

"(iv) the amount of the disbursement does not exceed the amount of funds deposited to the Fund, plus interest earned on such funds pursuant to 28 U.S.C.

524(c) (5), less any awards and equitable shares paid by the Fund to the foreign government or those acting at its direction in connection with a particular case."

(f) EXCESS SURPLUS FUNDS.-- Section 524(c) (7) (E) of title 28, United States Code, as redesignated by this Section, is amended by inserting ", and on September 30 of each fiscal year thereafter," after "September 30, 1994".

(g) REMISSION AND MITIGATION.-- Section 524(c) (1) (E) of title 28, United States Code, is amended to read as follows:

"(E) disbursements authorized in connection with remission or mitigation procedures or other actions pursuant to the Attorney General's statutory authority relating to property forfeited under any law enforced or administered by the Department of Justice;"

**SEC. 411. CLARIFICATION OF 21 U.S.C. 877**

Section 507 of the Controlled Substances Act (21 U.S.C. 877) is amended to add at the end the following sentence:

"This section does not apply to any findings, conclusions, rulings, decisions, or declarations of the Attorney General, or any designee of the Attorney General, relating to the seizure, forfeiture, or disposition of forfeited property brought under this subchapter."

**SEC. 412. CERTIFICATE OF REASONABLE CAUSE**

Section 2465 of title 28, United States Code, is amended --

(1) by striking "property seized" and inserting "property seized or arrested" and

(2) by striking "seizure" each time it appears and inserting "seizure or arrest".

**SEC. 413. CONFORMING TREASURY AND JUSTICE FUNDS**

(a) Section 9703(c) of title 31, United States Code, is amended by striking "subsection (g) (2)" and inserting "subsection (g) (1)" and by deleting "in excess of \$10,000,000 for a fiscal year."

(b) Section 9703(g) of title 31, United States Code, is amended--

(1) in paragraph (1), by striking "subsection (a) (1)" and inserting "subsections (a) (1) and (c)"; and

(2) in paragraph (2), by striking "subsections (a) (2) and (c)" and inserting "subsection (a) (2)".

**(c) DEPOSIT FROM SETTLEMENT IN LIEU OF FORFEITURE.--**

Section 9703(d) of title 31, United States Code, is amended by inserting "or from any settlement in lieu of forfeiture," before "under any law" each time it appears.

(d) Subsection 524(c)(7) of title 28, United States Code, is amended by adding the following sentence to the end thereof:

"Amounts transferred by the Secretary of Treasury pursuant to section 9703 of title 31, or by the Postmaster General pursuant to section 2003 of title 39, shall be available to the Attorney General for federal law enforcement and criminal prosecution purposes of the Department of Justice."

**SEC. 414. DISPOSITION OF PROPERTY FORFEITED UNDER CUSTOMS LAWS.**

Section 616A of the Tariff Act of 1930 (19 U.S.C. 1616a) is amended --

(1) by adding the following new paragraph to subsection (c):

"(4) Whenever property is civilly or criminally forfeited by or for the United States Customs Service, the Secretary of the Treasury may dispose of the property in accordance with law, including --

"(A) by selling the property through any commercially feasible means, provided that the property is not required to be destroyed by law and is not harmful to the public; or

"(B) by requesting the General Services Administration to take custody of the property and to dispose of it in accordance with law."; and

(2) by amending the title of the section to read as follows: "Retention, transfer, or disposition of forfeited property".

**SEC. 415. TECHNICAL AMENDMENTS RELATING TO OBLITERATED MOTOR VEHICLES IDENTIFICATION NUMBERS.**

Section 512 of title 18, United States Code, is amended --



(1) in subsection (b), by inserting "and the provisions of chapter 46 of this title relating to civil judicial forfeitures" before "shall apply"; and

(2) in subsection (a)(1), by striking "does not know" and all that follows up to the semi-colon and inserting "is an innocent owner as defined in section 983 of this title".

**SEC. 416. FUGITIVE DISENTITLEMENT**

(a) IN GENERAL.-- Chapter 163 of title 28, United States Code, is amended by inserting the following new section:

**2468. Fugitive disentitlement**

"Any a person who, in order to avoid criminal prosecution, purposely leaves the jurisdiction of the United States, declines to enter or re-enter the United States to submit to its jurisdiction, or otherwise evades the jurisdiction of the court where a criminal case is pending, may not use the resources of the courts of the United States in furtherance of a claim in any related civil forfeiture action or a claim in third-party proceedings in any related criminal forfeiture action."

(b) CONFORMING AMENDMENT.-- The chapter analysis for chapter 163 of title 28, United States Code, is amended by inserting the following at the end:

"2468. Fugitive disentitlement"

**SEC. 417. ADMISSIBILITY OF FOREIGN BUSINESS RECORDS**

(a) IN GENERAL.-- Chapter 163 of title 28, United States Code, is amended by adding at the end the following new section:

**2469. Foreign Records**

"(a) In a civil proceeding in a court of the United States, including civil forfeiture proceedings and proceedings in the United States Claims Court and the United States Tax Court, a foreign record of regularly conducted activity, or copy of such record, obtained pursuant to an official request, shall not be excluded as evidence by the hearsay rule if a foreign certification, also obtained pursuant to the same official request or subsequent official request that adequately identifies such foreign record, attests that--

"(1) such record was made, at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters;

"(2) such record was kept in the course of a regularly conducted business activity;

"(3) the business activity made such a record as a regular practice; and

"(4) if such record is not the original, such record is a duplicate of the original;

unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

"(b) A foreign certification under this section shall authenticate such record or duplicate.

"(c) As soon as practicable after a responsive pleading has been filed, a party intending to offer in evidence under this section a foreign record of regularly conducted activity shall

provide written notice of that intention to each other party. A motion opposing admission in evidence of such record shall be made by the opposing party and determined by the court before trial. Failure by a party to file such motion before trial shall constitute a waiver of objection to such record or duplicate, but the court for cause shown may grant relief from the waiver.

"(d) As used in this section, the term--

"(1) "foreign record of regularly conducted activity" means a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, maintained in a foreign country;

"(2) "foreign certification" means a written declaration made and signed in a foreign country by the custodian of a record of regularly conducted activity or another qualified person, that if falsely made, would subject the maker to criminal penalty under the law of that country;

"(3) "business" includes business, institution, association, profession, occupation, and calling of every kind whether or not conducted for profit; and

"(4) "official request" means a letter rogatory, a request under an agreement, treaty or convention, or any other request for information or evidence made by a court of the United States or an authority of the United States having law enforcement responsibility, to a court or other authority of a foreign country."

(b) CONFORMING AMENDMENT.-- T e chapter analysis for chapter 163 of title 28, United States Code, is amended by inserting the following at the end:

"2469. Foreign Records"

**SEC. 418. AMENDMENT TO FINANCIAL INSTITUTIONS REFORM AND RECOVERY  
ACT OF 1989**

Section 3322(a) of title 18, United States Code, is amended by striking "concerning a banking law violation".

**SEC. 419. PROSPECTIVE APPLICATION**

(a) **IN GENERAL.**-- Unless otherwise specified in this section or in another provision of this Act, all amendments in this Act shall apply to forfeiture proceedings commenced on or after the effective date of this Act.

(b) **ADMINISTRATIVE FORFEITURES.**-- All amendments in this Act relating to seizures and administrative forfeitures shall apply to seizures and forfeitures occurring on or after the sixtieth day after the effective date of this Act.

(c) **CIVIL JUDICIAL FORFEITURES.**-- All amendments in this Act relating to the judicial procedures applicable once a civil forfeiture complaint is filed by the government shall apply to all cases in which the forfeiture complaint is filed on or after the sixtieth day after the effective date of this Act.

(d) **CRIMINAL FORFEITURE.**-- All amendments in this Act relating to the procedures applicable in criminal forfeiture cases shall apply to cases in which the indictment or information is filed on or after the effective date of this Act.

(e) **SUBSTANTIVE LAW.**-- All amendments in this Act expanding substantive forfeiture law to make property subject to civil or criminal forfeiture which was not previously subject to forfeiture shall apply to offenses occurring on or after the effective date of this Act.

Mr. CASSELLA. Thank you, Mr. Chairman.

My name is Stefan Cassella. I am Deputy Chief of the Asset Forfeiture and Money Laundering Section of the Department of Justice.

Mr. Chairman, I would like to summarize my testimony by making three points: that asset forfeiture has become an essential tool of Federal law enforcement, that we support legislation that would ensure that this essential tool operates fairly, and that we also need legislation to make forfeiture even more effective as a weapon in the war on crime.

Forfeiture has been part of Federal law for over 200 years. It started as tool against pirate ships and whiskey stills and is now used as a weapon against crimes ranging from gambling, to child pornography, to bank fraud, to narcotics.

Civil forfeiture is particularly important because it allows us to reach assets that cannot be reached any other way, like the bank accounts of the leaders of the Colombian drug cartels, or airplanes used to smuggle drugs, or crack houses from which drugs are dispensed to our children on the way to school.

Since 1991 we have averaged nearly half a billion dollars a year in deposits into the Justice Assets Forfeiture Fund. That is half a billion dollars that drug dealers couldn't use to buy and smuggle more drugs, to bribe public officials, to invest in our infrastructure, or to live a life of luxury financed by the suffering and exploitation of children and the destruction of our cities.

Moreover, that money is used to support the operation of law enforcement itself. About half of the money that we forfeit is shared with State and local law enforcement agencies.

There is poetic justice in this, Mr. Chairman. Forfeiture not only lets us take the profit out of crime; it provides support for the law enforcement agencies who catch the criminals and put them in jail.

Asset forfeiture is an essential law enforcement tool, but like any such tool, it must have one essential component; it must be fair. No system, no program, no tool of law enforcement however effective at fighting crime can survive for long if the public thinks that it violates the basic principles of fairness and due process that lie at the core of the American system of justice.

The procedures we use today are sound, but they are the ones that were developed under the Customs laws a century ago. They have never been updated. While they may have been adequate when we were forfeiting pirate ships and whiskey stills, when we forfeit peoples' houses, cars, businesses and bank accounts, a higher standard is required.

We have spent a great deal of time over the past several years working to produce a comprehensive and balanced set of forfeiture reforms. We wanted to produce a bill that enhances the due process rights of property owners while preserving the ability of law enforcement to use forfeiture to take the profit out of crime. We think we have done that.

The bill we submitted to Congress last week incorporates all the 13 principles for forfeiture reform that were endorsed by the American Bar Association earlier this year, and it includes the key reforms that you have proposed in H.R. 1916.

For example, we think the burden of proof in a civil forfeiture case should be on the government not on the property owner. We think the statutes should be amended to give property owners ample time to file claims, and we think that the interests of innocent owners should be protected.

The Supreme Court held this term that the Constitution does not prohibit the Government from forfeiting property of an innocent person. Maybe so, but Congress by statute can provide more protection than the Constitution requires, and we think it should.

There are many other provisions of our bill in the same vein, but let me turn to my third point. It is well to revise the forfeiture laws to ensure that they work fairly, and this we fully support. But there is also much to be done to enhance forfeiture as a tool of law enforcement.

With respect to our ability to forfeit the proceeds of crime, forfeiture laws are very much a hit-or-miss proposition. We can forfeit the proceeds of bank fraud, but not the proceeds of consumer fraud. We can forfeit proceeds in a drug case, but not money paid to a hit man in a murder for-hire case.

As the ABA recognized in its 13 principles, no one should have the right to retain the proceeds of crime, so we propose that the proceeds of all crimes in the Federal criminal code be subject to forfeiture.

Also, the law must be clear that proceeds means gross proceeds, not net profit. Last month a Federal judge in Chicago held that when we forfeit drug money from a heroin dealer, we must give the dealer credit for the cost of the heroin. That is wrong.

Drug dealers should not be allowed to deduct the cost of doing business any more than a terrorist should be allowed to deduct the cost of the truck he uses to blow up a Federal building or barracks housing American soldiers.

The forfeiture laws also need to be strengthened to enable us to deal more effectively with crimes and criminals that do not respect international borders. And we need to clarify our authority to restore forfeited property to victims. Every year, we use the forfeiture laws, Mr. Chairman, to restore property to victims in cases where there are victims. We can do that in some cases, but not in others. Correction of this oversight is long overdue.

Mr. Chairman, in these and many other ways the asset forfeiture laws can be greatly improved. Under our balanced proposal, the forfeiture laws of the United States will be tough but fair, tough but fair, which is exactly what the American people have the right to expect.

Thank you, Mr. Chairman.

Mr. HYDE. Thank you, Mr. Cassella.

[The prepared statement of Mr. Cassella follows:]

**PREPARED STATEMENT OF STEFAN D. CASSELLA, DEPUTY CHIEF, ASSET FORFEITURE  
AND MONEY LAUNDERING SECTION, DEPARTMENT OF JUSTICE**

Mr. Chairman and Members of the Committee, I appreciate the opportunity appear before you today on behalf of the Department of Justice to comment on legislation revising the asset forfeiture laws. Mr. Chairman and Congressman Conyers, the Department of Justice particularly appreciates your leadership and longstanding interest concerning asset forfeiture. The Department of Justice welcomes the opportunity to work with you on this important issue.

**The Importance of Forfeiture**

Forfeiture has been part of federal law for 200 years. The First Congress, in 1789, passed forfeiture statutes under the Customs laws that were used to confiscate pirate ships, smuggled goods and other contraband. Forfeiture played an important role during the Civil War (Arlington Cemetery sits on land forfeited from the family of General Robert E. Lee), and in this Century, it was part of the enforcement of the alcohol laws during Prohibition.

In the last decade, forfeiture has become an essential part of many areas of federal law enforcement from gambling to child pornography to bank fraud to narcotics. It is no exaggeration to say that the use of forfeiture in these areas has given us the strongest and most effective new law enforcement tool that we have seen in the last 25 years. It allows us to take the profit out of crime and to remove the instrumentalities of crime from circulation.

**Civil and Criminal Forfeiture**

As the Committee is aware, there are two types of forfeiture statutes: civil forfeiture statutes that authorize the government to proceed directly against property derived from or used to commit a criminal offense; and criminal forfeiture statutes that allow the court in a criminal case to order the forfeiture of the convicted defendant's interest in such property as part of his sentence. We use both kinds of forfeiture statutes, but civil forfeiture is particularly important because it allows us to reach assets that cannot be reached any other way.

For example, we recently forfeited a ranch in Montana owned by one of the leaders of the Colombian drug cartel. As long as a cartel leader remains a fugitive, you can't prosecute him, and if you can't prosecute someone you can't do criminal forfeiture as part of his sentence. But through civil forfeiture we can reach property traceable to the proceeds of crime, or used to facilitate the commission of the crime, even if the criminal remains abroad.



Likewise, we can seize airplanes used to smuggle drugs, and vessels used to smuggle illegal aliens. Criminal forfeiture doesn't help us there because while we can prosecute the pilot of the plane or the captain of the ship, he isn't the owner of the property. Again, only the defendant's property can be forfeited in a criminal case. A plane used to smuggle drugs is likely registered to a shell corporation in Panama; if all we could do is prosecute the pilot, we would have to return the plane to its owner. But with civil forfeiture, we can take that plane out of circulation so it can't be used again for illegal purposes.

The same is true for an apartment building that the tenants have turned into a crack house, with the landlord's knowledge and consent, or a farm that a farmer has allowed drug dealers to use as a landing strip. You can prosecute the tenants or the smugglers but not shut down the crack house or the landing strip because the defendants don't own the property. With civil forfeiture, however, we can forfeit the property if the owner knew about the illegal activity and allowed his property to be used to commit it.

#### The Assets Forfeiture Fund

The Department of Justice Assets Forfeiture Fund is a mechanism to hold the proceeds of Department of Justice forfeitures and to fund certain forfeiture-related expenses and law enforcement activities. Since 1991 we have averaged nearly half a billion dollars a year in deposits into this fund. The statistics for the period from FY92 through FY96 are as follows (in millions):

<u>FY92</u>	<u>FY93</u>	<u>FY94</u>	<u>FY95</u>	<u>FY96</u>
\$531.0	\$555.7	\$549.9	\$487.5	\$325.0

(the figure for FY96 is a projection based on current receipts).

These figures, which do not include additional sums that were confiscated from defendants and returned to victims, lienholders, and other innocent third parties under the forfeiture laws, represent hundreds of millions of dollars that criminals do not have to enjoy or to use to perpetuate criminal activities. It is money that drug dealers don't have to buy and smuggle more drugs, or live a life of luxury financed by the suffering and exploitation of children and destruction of our cities. It's money that pornographers don't have to maintain warehouses of obscene materials, and money that gamblers don't have to finance racketeering enterprises.

Moreover, that money is used to support the operation of law enforcement itself. About half of the money forfeited by the DOJ is shared with state and local law enforcement. For the period

from FY92 through FY96, the figures for equitable sharing with state and local law enforcement agencies are as follows (in millions):

<u>FY92</u>	<u>FY93</u>	<u>FY94</u>	<u>FY95</u>	<u>FY96</u>
\$246.6	\$224.5	\$228.9	\$228.7	\$175

(the figure for FY96 is a projection based on current estimates.)

#### Uses of Funds by Local Law Enforcement

Thus, our forfeiture laws not only let us take the profit out of crime; they provide support for the law enforcement agencies who catch the criminals and bring them to justice.

State and local law enforcement agencies are permitted to apply the funds received through the equitable sharing program to any legitimate law enforcement purpose. In addition, they are authorized to pass up to 15 per cent of the federal funds on to community-based organizations that assist the law enforcement agencies in their crime control mission through treatment and prevention of drug abuse. The following are some recent examples of the ways in which forfeited funds have been applied under this program:

- **Lake Careco Road, Cobb County, Georgia** -- A 35-acre undeveloped wooded property was forfeited from defendant who grew marijuana for distribution. In response to a community group, the property was transferred to the Georgia Sheriffs' Youth Homes, Inc., for use as a nature preserve and camping facility for organizations involved in youth education.
- **United Neighbors Against Drugs, Philadelphia, Pennsylvania** -- This property was transferred to a non-profit organization, which uses the property as a safe haven where social services, GED classes, and drug counselling are held.
- **NY State Police Forensic Investigation Center** -- A state-of-the-art forensic facility that will serve the entire law enforcement community of the state of New York. The total cost of \$25 million will be paid out of assets forfeited from drug traffickers under the asset forfeiture statutes.
- **NY State Police Mobile Forensic Investigation Response Vehicle** -- A motor home, valued at \$100,000 forfeited from drug dealers, has been converted into a specially equipped forensic investigation response vehicle. It

will serve as an on-the-scene command post and mobile forensic office.

- **Fayetteville, North Carolina** -- The Fayetteville Police Department has one of the finest training facilities in the southeastern United States. It was financed entirely with funds acquired through asset forfeiture.

### Restitution

I mentioned that forfeited property is often restored to victims. Indeed, the recovery of property and the return of that property to victims is one of the most important uses of the forfeiture laws. Let me give you a few examples of how we use the forfeiture laws to do that.

- **BCCI:** In 1991, one of the largest scandals ever to hit the financial industry occurred when the Bank of Credit and Commerce International was found to have perpetrated a worldwide Ponzi scheme that resulted in the failure of banks and losses to depositors in 72 countries. Through the forfeiture laws, we have recovered nearly \$800 million, virtually all of which has been, or will be, distributed to the victims of the fraud.<sup>1</sup>
- **Artemis:** In N.Y. this month we seized a First Century Roman statue that was stolen some years ago from a convent in Italy and was shipped to the United States for sale through Sotheby's auction house. The statue was forfeited and will be returned to its owners in Italy.
- Earlier this year, we remitted \$103,980 to automobile insurance companies in Virginia that were defrauded in an insurance fraud case; we returned \$84,118 to financial institutions in Texas that were defrauded in a credit card scheme; we restored \$231,667 to a pension fund in Pennsylvania that was the victim of organized crime; and we paid \$1.6 million to consumers who were the victims of a Pyramid scheme in Pennsylvania.

A summary of the recent cases in which restitution was awarded to victims is attached to our testimony. These cases illustrate how the forfeiture laws have come to provide an indispensable tool for restoring to crime victims what they have lost through criminal activity.

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<sup>1</sup> The BCCI money is being distributed through a Worldwide Victims Fund managed by court-appointed liquidators. In addition, forfeited funds will be used to reimburse the Federal Deposit Insurance Fund which suffered losses when one of the banks controlled by BCCI failed.

Tough but Fair

As these statistics and examples illustrate, asset forfeiture has become an essential and effective law enforcement tool, but like any law enforcement tool it must have one essential component -- it must be fair: it must recognize the due process rights of all citizens and it must protect the rights of innocent property owners. We believe that any abuses of forfeiture can effectively be addressed by revision of forfeiture procedures, through legislation and internal policy.

As I mentioned, the forfeiture laws evolved at a time when they were used primarily to forfeit things that had no legitimate purpose, like pirate ships, contraband goods and whisky stills. Over the years, the use and scope of forfeiture has greatly expanded, but it has never updated the procedures that govern them. In fact, the procedures that govern civil forfeitures today are the same as those that were devised decades ago for other purposes under the Admiralty Laws. It may be that those procedures were adequate when the object of the forfeiture was contraband or something else with no legitimate purpose, but when we move to the forfeiture of peoples' houses, cars, businesses and bank accounts, we need to ensure that the forfeiture is as fair as possible.

I would like to call the Committee's attention to a comprehensive forfeiture reform bill that the Department of Justice has recently transmitted to the Speaker of the House. The bill contains a balanced set of proposals that, like H.R. 1916, addresses the need to revise the forfeiture laws to protect the rights of Americans while at the same time taking into account the need to enhance the effectiveness of this valuable tool. It is the product of work over the past several years with the Treasury Department and state and local law enforcement agencies to produce a comprehensive set of revisions to the forfeiture laws that will ensure that when we apply the forfeiture laws in the modern context, our citizens are afforded appropriate procedural protections. Drafted by career prosecutors and agents at the Justice and Treasury Departments, the bill embodies all 13 of the principles of forfeiture reform that were endorsed earlier this year by the American Bar Association (ABA), and it incorporates almost all of the provisions of H.R. 1916 in some form.

Burden of Proof

We think the burden of proof in a civil forfeiture case should be on the government, not on the property owner. The ancient allocation of the burden of proof, which is found in Section 615 of the Tariff Act of 1930 (19 U.S.C. § 1615), may make abundant sense under the Customs laws, but it is not appropriate when dealing with the kind of property the Department

of Justice forfeits under the modern forfeiture statutes. So we are proposing that in civil forfeiture cases the government be required to prove, by a preponderance of the evidence, that a crime was committed and that the property in question was derived from or used to commit that crime.

We propose use the "preponderance of the evidence" standard. Preponderance of the evidence is the standard used in virtually all civil enforcement actions, including civil actions against money launderers (18 U.S.C. § 1956(b)), suits under the False Claims Act, and injunctions against on-going fraud (18 U.S.C. § 1345). The same standard should apply in civil forfeiture cases. Indeed, if the "clear and convincing standard" were applied, there would be cases where the government proved by a preponderance of the evidence that money was the proceeds of criminal activity, and yet it was returned to the criminal instead of being restored to the victims.

Beyond that, we would make the shifting of the burden of proof part of a comprehensive procedural statute that lays out the manner in which a civil forfeiture case would be handled by the district court. There is no such statute today; instead, the procedures are governed by case law and miscellaneous provisions of the Customs laws and the Admiralty Rules. The comprehensive procedural statute would provide much needed clarity and simplicity to the forfeiture laws.

#### Time

The forfeiture statutes should be amended to give property owners ample time to file claims contesting the forfeiture of property. Everyone should be guaranteed his day in court; no one should be denied a hearing because the time for filing a claim was so short that by the time he received notice of the proceeding, the time to contest it had passed.

Under current law, a claim contesting an administrative forfeiture must be filed not later than 20 days from the date of first publication of notice of forfeiture. See 19 U.S.C. § 1608. In contrast, the criminal forfeiture statutes give claimants 30 days from the final date of publication of the notice of forfeiture to file a claim. See e.g. 18 U.S.C. § 1963(1)(2). This procedure represents a reasonable compromise between the property owner's interest in having a fair opportunity to file a claim in a forfeiture proceeding and the government's interest in expediting the forfeiture process and avoiding unnecessary storage and maintenance costs in the vast majority of forfeiture cases in which no claims are ever filed. Accordingly, we propose amending § 1608 to replace the 20-day rule with the 30-day rule that governs the filing of claims in criminal forfeiture cases. This goes beyond the provision in § 5 of H.R. 1916 which would

give the claimant 30 days from the first publication of the notice.

The time for filing a claim in a civil judicial forfeiture proceeding should be extended. Current law requires the claimant to file the claim within 10 days of the service of the arrest warrant in rem on the property. Because the claimant frequently has no notice of the arrest of the property, starting the 10-day period from the date of the arrest can impose a hardship. We would therefore amend Rule C of the Admiralty Rules to start the time period for filing a claim from the date of the receipt of actual notice of the arrest, or the last date of publication of the arrest pursuant to Rule C(4), whichever is earlier, and to extend the time from 10 days to 20 days. This provides greater protection than § 3 of H.R. 1916 which amends Rule C(6) to extend the period for filing a claim to 30 days from the date of the arrest of the property.

### Innocent Owners

The interests of innocent owners should be protected. The Supreme Court held this Term that the Constitution does not prohibit the government from forfeiting the property of an innocent person. See Bennis v. Michigan, 116 S. Ct. \_\_\_\_, 1996 WL 88269 (Mar. 4, 1996). That case was correctly decided as a matter of constitutional law, but Congress, by statute, can provide more protection than the Constitution requires, and we think it should do so.

Since 1984, Congress has included innocent owner provisions in the most commonly used civil forfeiture statutes. See 21 U.S.C. § 881(a)(4), (6), (7); 18 U.S.C. § 981(a)(2). Moreover, the Department of Justice, as a matter of policy, does not seek to forfeit property belonging to innocent owners.

Nevertheless, the law in this area remains confused. The innocent owner provisions in the drug and money laundering statutes are inconsistent with each other, and many forfeiture statutes contain no innocent owner provision. For example, § 881(a)(4) (forfeiture of vehicles used to transport drugs), protects an owner whose property was used without his "knowledge, consent or willful blindness." Sections 881(a)(6) (drug proceeds) and 881(a)(7) (real property facilitating drug offenses), on the other hand, contain no willful blindness requirement; they protect those who demonstrate lack of "knowledge or consent." And 18 U.S.C. § 981(a)(2) (property involved in money laundering), requires only a showing of lack of "knowledge." The forfeiture statute for gambling offenses, 18 U.S.C. § 1955(d), contains no innocent owner defense at all.

The courts also differ as to what these defenses mean. The Ninth Circuit interprets "knowledge or consent" to mean that a

person must prove that he or she did not have knowledge of the criminal offense and did not consent to that offense. See United States v. One Parcel of Land, 902 F.2d 1443, 1445 (9th Cir. 1990) ("knowledge" and "consent" are conjunctive terms, and claimant must prove lack of both). Thus, in the Ninth Circuit, a wife who knows that her husband is using her property to commit a criminal offense cannot defeat the forfeiture of that property even if she did not consent to the illegal use. But the Second, Third and Eleventh Circuits hold that a person who has knowledge that his property is being used for an illegal purpose may nevertheless avoid forfeiture if he shows that he did not consent to that use of his property. See United States v. 141st Street Corp., 911 F.2d 870, 877-78 (2nd Cir. 1990) (landlord who knew building was being used for drug trafficking had opportunity to show he did not consent to such use), cert. denied, 111 S. Ct. 1017 (1991); United States v. Parcel of Real Property Known as 6109 Grubb Road, 886 F.2d 618, 626 (3rd Cir. 1989) (wife who knew of husband's use of residence for drug trafficking had opportunity to show she did not consent to such use); United States v. One Parcel of Real Estate at 1012 Germantown Road, 963 F.2d 1496 (11th Cir. 1992).

The rule is entirely different for money laundering and bank fraud cases. Because § 981(a)(2) lacks a "consent" requirement and contains only a "lack of knowledge" requirement, there is no burden on the claimant to show that he or she took any steps at all to avoid the illegal activity. Lack of knowledge alone is sufficient. United States v. Real Property 874 Gartel Drive, \_\_\_ F.3d \_\_\_, 1996 WL 125533 (9th Cir. Mar. 22, 1996) (per curiam) (because § 981(a)(2) does not contain a consent prong, "all reasonable steps" test does not apply); United States v. \$705,270.00 in U.S. Currency, 820 F. Supp. 1398, 1402 (S.D. Fla. 1993); United States v. Eleven Vehicles, 836 F. Supp. 1147, 1160 n.16 (E.D. Pa. 1993); but see United States v. All Monies, 754 F. Supp. 1467, 1478 (D. Haw. 1991) (claimant must prove "that he did not know of the illegal activity, did not willfully blind himself from the illegal activity, and did all that reasonably could be expected to prevent the illegal use" of his property); United States v. All Funds Presently on Deposit at American Express Bank, 832 F. Supp. 542 (E.D.N.Y. 1993) (same).

The courts are also divided with respect to the application of the innocent owner defense to property acquired after the crime giving rise to the forfeiture occurred. In the Eleventh Circuit, a person who acquires property knowing that it was used to commit an illegal act is not an innocent owner. United States v. One Parcel of Real Estate Located at 6640 SW 48th Street, 41 F.3d 1448 (11th Cir. 1995) (lawyer who acquires interest in forfeitable property as his fee is not an innocent owner). But in the Third Circuit, the rule is the opposite: a person who knowingly acquires forfeitable property is considered an innocent owner because he could not have consented to the illegal use of

the property before he owned it. See United States v. One 1973 Rolls Royce, 43 F.3d 794 (3d Cir. 1994).

In the Rolls Royce case, the court said that if its decision left the innocent owner statute in "a mess," the problem "originated in Congress when it failed to draft a statute that takes into account the substantial differences between those owners who own the property during the improper use and some of those who acquire it afterwards." The court concluded, "Congress should redraft the statute if it desires a different result." 43 F.3d at 820.

In United States v. A Parcel of Land (92 Buena Vista Ave.), 113 S. Ct. 1126 (1993), the Supreme Court identified another loophole in the statute as it applies to persons who acquire the property after it is used to commit an illegal act. Because, unlike its criminal forfeiture counterpart, 21 U.S.C. § 853(n)(6)(B), the civil statute does not limit the innocent owner defense to persons who purchase the property in good faith, it applies to innocent donees. Justice Kennedy, in a dissenting opinion, noted that this allows drug dealers to shield their property from forfeiture through transfers to relatives or other innocent persons. The ruling, Justice Kennedy said, "rips out the most effective enforcement provisions in all of the drug forfeiture laws," 113 S. Ct. at 1146, and "leaves the forfeiture scheme that is the centerpiece of the Nation's drug enforcement laws in quite a mess." 113 S. Ct. at 1145 (Kennedy, J. dissenting). Justice Stevens, however, writing for the plurality, said that the Court was bound by the statutory language enacted by Congress. "That a statutory provision contains 'puzzling' language, or seems unwise, is not an appropriate reason for simply ignoring the text." 113 S. Ct. at 1135, n.20.

Finally, there is widespread confusion among the courts with respect to the standard that should be used to determine if a person had "knowledge" of or "consented" to the illegal use of his or her property. Some courts equate "knowledge" with "willful blindness" so that a person who willfully blinds himself to the illegal use of his property is considered to have had knowledge of the illegal act. See Rolls Royce, supra. But other courts allow a person to show lack of knowledge by showing a lack of actual knowledge. See United States v. Lots 12, 13, 14 and 15, 869 F.2d 942, 946-47 (6th Cir. 1989). Most courts focus on the "consent" prong of the defense, and hold that the property owner must "take every reasonable step, and do all that reasonably can be done, to prevent the illegal activity" in order to be considered an innocent owner. See United States v. 141st Street Corp., 911 F.2d 870 (2d Cir. 1990); United States v. One Parcel of Real Estate at 1012 Germantown Road, 963 F.2d 1496 (11th Cir. 1992); United States v. One Parcel of Property (755 Forest Road), 985 F.2d 70 (2d Cir. 1993); United States v. 5.382



Acres, 871 F. Supp. 880 (W.D. Va. 1994) ("Property owners are required to meet a significant burden in proving lack of consent for they must remain accountable for the use of their property: Unless an owner with knowledge can prove every action, reasonable under the circumstances, was taken to curtail drug-related activity, consent is inferred and the property is subject to forfeiture.").

To remedy the inconsistencies in the statutes, and to ensure that innocent owners are protected under all forfeiture statutes in the federal criminal code, we propose a Uniform Innocent Owner Defense to be codified at 18 U.S.C. § 983.<sup>2</sup> It applies to all civil forfeitures in titles 8, 18 and 21 and it may be incorporated into other forfeiture statutes as Congress may see fit. Thus, there will no longer be civil forfeiture provisions lacking statutory protection for innocent owners.

We would separately deal with property owned at the time of the illegal offense, and property acquired afterward. In the first category, property owners will be able to defeat forfeiture by showing either 1) that they lacked knowledge of the offense, or 2) that upon learning of the illegal use of the property, they "did all that reasonably could be expected to terminate such use of the property." Thus, as the majority of courts now hold, under the second defense a spouse could defeat forfeiture of her property, even if she knew that it was being used illegally, by showing that she did everything that a reasonable person in her circumstances would have done to prevent the illegal use. (This provision is included in § 8 of H.R. 1916, but only for drug forfeitures.)

Under the first defense, a showing of a lack of knowledge would be a complete defense to forfeiture. But to show lack of knowledge, the owner would have to show that he was not willfully blind to the illegal use of the property. This means that if the government establishes the existence of facts and circumstances that should have created a reasonable suspicion that the property was being or would be used for an illegal purpose, the owner would have to show that he did all that reasonably could be expected in light of such circumstances to prevent the illegal use of the property. See United States v. Property Titled in the Names of Ponce, 751 F. Supp. 1436, 1440 n.3 (D. Haw. 1990) (claimant must show that he did not consent in advance to illegal

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<sup>2</sup> For a detailed discussion of all of these issues, and a legislative proposal similar to the one in this bill, see Franze, "Note: Casualties of War?: Drugs, Civil Forfeiture, and the Plight of the 'Innocent Owner,'" *The Notre Dame Law Review*, Vol. 70, Issue 2 (1994) 369-413. See also Cassella, "Forfeiture Reform: A View from the Justice Department," *Journal of Legislation, Notre Dame Law School*, 21:2 (1995).

use of his property even if he proves that he did not actually know whether such illegal use ever occurred).

We propose a different formulation of the innocent owner defense in cases involving property acquired after the offense giving rise to the forfeiture. This is necessarily so, because in such cases, the critical issue concerns what the property owner knew or should have known at the time he acquired the property, not what he knew when the crime occurred. 6640 SW 48th Street, supra. So, in the case of after-acquired property, a person would be considered an innocent owner if he establishes that he acquired the property as a bona fide purchaser for value who at the time of the purchase did not know and was reasonably without cause to believe that the property was subject to forfeiture. This means that a purchaser is an innocent owner if in light of the circumstances surrounding the purchase he did all that a person would be expected to do to ensure that he was not acquiring property that was subject to forfeiture.

This provision will be of particular importance in cases involving the acquisition of drug dollars on the black market in South America. In such cases, wealthy persons assist in the laundering of the drug money by purchasing U.S. dollars, or dollar-denominated instruments and sending the money to the United States while maintaining ignorance of its source. See United States v. All Monies, 754 F. Supp. 1467 (D. Haw. 1991); United States v. Funds Seized From Account Number 20548408 at Baybank, N.A., 1995 WL 381659 (D. Mass. Jun. 16, 1995). The new statute would put the burden on such individuals to show that they took all reasonable steps to ensure that they were not acquiring drug proceeds.

Limiting the innocent owner defense to "purchasers" in this circumstance tracks the language of the criminal innocent owner defense, 21 U.S.C. § 853(n)(6)(B), and eliminates the problem identified by Justice Kennedy in 92 Buena Vista.

We also see the need to address a number of other concerns that have arisen in the courts under the current law. First, we would make clear that under no circumstances may a person other than a bona fide purchaser be considered an innocent owner of criminal proceeds. This avoids a situation that arises in community property states when a spouse claims title to her husband's drug proceeds as marital property.

We would also define "owner" to include lienholders and others with secured interests in the subject property, but to exclude, consistent with the prevailing view under current law, general creditors, bailees, nominees and beneficiaries of constructive trusts. See e.g. United States v. One 1990 Chevrolet Corvette, 37 F.3d 421 (8th Cir. 1994) (titled owner lacks standing to contest forfeiture of property over which she

exercised no dominion or control); United States v. BCCI Holdings (Luxembourg) S.A., 46 F.3d 1185 (D.C. Cir. 1995) (general creditors and beneficiaries of constructive trusts lack sufficient interest in the property to contest forfeiture); United States v. \$3,000 in Cash, 906 F. Supp. 1061 (E.D. Va. 1995) (person who voluntarily transfers his property to another is no longer the "owner" and therefore lacks standing to contest the forfeiture).

We propose to resolve a split in the courts regarding the disposition of property jointly owned by a guilty person and an innocent spouse, business partner or co-tenant. The district court would be given three alternatives: sever the property; liquidate the property and order the return a portion of the proceeds to the innocent party; or allow the innocent party to remain in possession of the property, subject to a lien in favor of the government to the extent of the guilty party's interest.

Finally, we propose a rebuttable presumption relating to innocent owner defenses raised by financial institutions that hold liens, mortgages or other secured interests in forfeitable property. Representatives of the financial community suggested that there be a presumption that the institution acted reasonably in acquiring a property interest, or in attempting to curtail the illegal use of property in which it already held an interest, if the institution establishes that it acted in accordance with rigorous internal standards adopted to ensure the exercise of due diligence in making loans and acquiring property interests, and did not have actual notice that the property was subject to forfeiture before acquiring its interest. The government could rebut the presumption by establishing the existence of facts and circumstances that should have put the institution on notice that its ordinary procedures were inadequate.

#### Other Protections for Property Owners

Property owners should be protected in still other ways. We agree with § 2 of H.R. 1916 that the Federal Tort Claims Act, 28 U.S.C. § 2860(c), should be amended to allow property owners to recover damages to their property caused by the negligence of government agents. We also would allow claimants to seek a stay of civil forfeiture cases to avoid having to choose between waiving their 5th Amendment right against self-incrimination in a related criminal case and failing to testify in defense of a civil forfeiture action. And we would create a statutory right to a pre-trial hearing on whether seized or restrained property could be used to pay attorneys fees in a criminal case.

We would also require that all forfeitures of real property proceed judicially; that there be a judicial proceeding to determine if the notice given of an administrative forfeiture afforded the property owner sufficient due process; that the

government pay pre- and post-judgment interest to successful claimants; and that all seizures be pursuant to a warrant except where exceptions to the Fourth Amendment warrant requirement apply. In all of these ways, we would provide greater protection for property owners.

#### The Cost Bond Requirement

The "cost bond" should be waived in in forma pauperis cases and in any other category of cases where it is determined to be unnecessary to protect the government against the storage and maintenance expenses that accrue when the government is forced to litigate frivolous claims. In the past fiscal year, agencies of the Department of Justice effected over 30,000 seizures in forfeiture cases, approximately 80 percent of which were unopposed. If the cost bond were completely eliminated, we fear that the federal courts could be inundated with frivolous claims. As long as the cost bond is not required in cases where it would cause a financial hardship, it should be preserved as a disincentive to the filing of such claims and as insurance that the government's storage and maintenance costs will not negate the value of the forfeiture.

#### Use of Property Pending Forfeiture Proceedings

The seizure of property derived from or used to commit a criminal offense is often necessary to prevent its use in future criminal activity. It may cause a hardship for a person who uses his truck to transport drugs to do without the truck, if he also uses it to get to work, but the alternative is to allow drug dealers the unfettered use of their property for months or years while forfeiture proceedings wind their way through the courts. Thus, we believe that the government should not be required to return seized property to a claimant, pending forfeiture, if the claimant established that the deprivation of the property caused him a hardship.

Moreover, criminals have a poor track record when it comes to preserving property in top condition so that the government can recover its full value when it is ultimately forfeited. The fact is that in the overwhelming majority of cases, property seized from criminals would disappear or be destroyed long before any forfeiture action became final.

We recognize the importance of avoiding hardship to innocent property owners. For this reason, we require approval by the Department of Justice before any business is restrained or forfeited. Moreover, we currently require that all forfeitures of real property, including business property, be handled judicially, not administratively. Beyond that, we propose allowing a property owner to post substitute property in order to recover the use of his seized property pending trial. We believe

that these alternatives protect the interests of law enforcement while ensuring fairness.

#### Legal Expenses for Claimants

If a property owner successfully challenges a forfeiture action, he may be eligible to recover his legal expenses under the Equal Access to Justice Act (EAJA). See, e.g., United States v. Douglas, 55 F.3d 584 (11th Cir. 1995). We believe this current law provides an appropriate remedy.

Money deposited into the Assets Forfeiture Fund should not be used to pay the cost of appointed counsel in civil forfeiture cases. This would place an enormous financial burden on the Forfeiture Fund. If a significant number of claimants in the 30,000 cases per year investigated by the Justice law enforcement agencies that resulted in seizures filed claims and sought court-appointed counsel, there would be little money left to apply to law enforcement purposes. That is especially so since in civil in rem forfeitures, in contrast to criminal cases, there is often more than one person whose property rights are affected, and thus there will often be more than one person asserting a right to court-appointed counsel. And it would be even worse if the disincentive to filing frivolous claims that is provided by the cost bond requirement were removed.

#### Proposals Specifically Designed to Benefit Law Enforcement

It is important to ensure that the forfeiture laws operate fairly, that they guarantee all citizens access to the courts and that they protect the rights of innocent owners. But it is equally important that the laws operate effectively; that criminals are now allowed to exploit loopholes and ambiguities in the law to immunize their property from forfeiture. There must be a balance in forfeiture legislation.

#### Proceeds of Crime

With respect to our ability to confiscate the proceeds of crime, the forfeiture laws are very much a "hit or miss" proposition. We can forfeit the proceeds of bank fraud, but not the proceeds of consumer fraud; we can forfeit the vessel used to smuggle illegal aliens, but not the money paid to the smuggler; we can forfeit proceeds in a drug case, but not money paid to a "hit man" in a murder-for-hire case, or to a terrorist, or to a corrupt public official. As the ABA recognized in its 13 principles of forfeiture reform, no one should have the right to retain the proceeds of crime. Thus, like the ABA, we propose that proceeds of all federal crimes enforced by the Department of Justice be subject to forfeiture.

Also, the law must be clear as to what "proceeds" means. It must make clear that it means "gross proceeds," not net profit. Last month, a federal judge in Chicago held that when we forfeit drug money from a heroin dealer, we must give the dealer credit for the cost of the heroin. United States v. McCarroll, 1996 U.S. Dist. LEXIS 8975 (N.D. Ill. 1996). That is wrong. Drug dealers and other criminals should not be allowed to deduct the cost of doing business.

### International Crimes

The forfeiture laws also need to be strengthened to enable us to deal more effectively with crimes and criminals who do not respect international borders. A fugitive who refuses to appear in court to answer criminal charges should not have access to the same court to oppose the forfeiture of property used to commit the same offense. In the past, we have relied on a judge-made rule, the "fugitive disentitlement doctrine," to bar fugitives from hiding behind their fugitive status while contesting the civil forfeiture of their property. This Term, the Supreme Court said such a rule cannot be created by judges; it is up to Congress to pass legislation to this effect. Degen v. United States, \_\_\_ S. Ct. \_\_\_, 1996 WL 305720 (1996). Therefore, we have included a codification of the fugitive disentitlement doctrine in our bill.

When a person is arrested abroad, there must be a procedure for immediately freezing his assets in the United States to prevent them from being moved electronically overseas. Persons arrested in the United States should not be able to conceal their ill-gotten gains behind bank secrecy laws in foreign jurisdictions. Courts should be authorized to compel criminal defendants to repatriate their property so that it can be used to compensate victims, and they should be made to turn over records of financial transactions that would lead to the discovery of their assets. By enacting our proposals in all of these areas, Congress can do much to strengthen our ability combat international economic crime.

### Criminal Forfeiture

The law should also make it easier for the government to use criminal forfeiture when it is appropriate to do so. Congress has enacted 8 criminal forfeiture statutes and 156 civil forfeiture statutes. Thus, in well over 100 cases, civil forfeiture is the only available remedy. As I mentioned, criminal forfeiture often isn't a viable option because it is limited to the property of the defendant that was involved in the particular offense for which the defendant was convicted. But in those instances where the property belongs to a criminal who is being prosecuted, and the property was involved in the offense on which the prosecution is based, the remedy of criminal forfeiture

should be available. Accordingly, we have proposed that for every offense for which civil forfeiture is authorized, prosecutors should be able to do a criminal forfeiture instead, if the facts of the case permit.

Moreover, the procedures governing criminal forfeiture need to be revised to remove loopholes and ambiguities. For example, on light of the Supreme Court's recent decision in Libretti v. United States, \_\_\_ U.S. \_\_\_, 116 S. Ct. 356 (1995), which held that criminal forfeiture is part of the defendant's sentence, not a substantive element of the offense, it is clear that the burden of proof for criminal forfeiture is preponderance of the evidence. All but one of the federal appellate courts that have addressed the issue have so held. See United States v. Myers, 21 F.3d 826 (8th Cir. 1994); United States v. Voight, \_\_\_ F.3d \_\_\_, 1996 WL 380609 (3rd Cir. Jul. 9, 1996); United States v. Smith, 966 F.2d 1045, 1050-53 (6th Cir. 1992); United States v. Bieri, 21 F.3d 819 (8th Cir. 1994); United States v. Elgersma, 971 F.2d 690 (11th Cir. 1992); United States v. Ben-Hur, 20 F.3d 313 (7th Cir. 1994); United States v. Tanner, 61 F.3d 231 (4th Cir. 1995); United States v. Herrero, 893 F.2d 1512, 1541-42 (7th Cir.), cert. denied, 110 S. Ct. 2623 (1990); United States v. Hernandez-Escarsega, 886 F.2d 1560, 1576-77 (9th Cir. 1989), cert. denied, 110 S. Ct. 3237 (1990); United States v. Sandini, 816 F.2d 869, 875-76 (3d Cir. 1987); but see United States v. Pelullo, 14 F.3d 881 (3rd Cir. 1994) (applying the reasonable doubt standard for RICO cases only). The majority rule should be codified to end needless litigation over this issue.

Also, the criminal forfeiture statutes should also be revised to permit the pre-trial restraint of substitute assets. In the absence of such authority, criminals who are put on notice by an indictment that the government will seek to forfeit substitute property are currently free to dispose of that property at any time before the conclusion of the criminal case.

### Victims

Finally, as I mentioned earlier, the forfeiture statutes need to be amended to improve our ability to use forfeiture to restore property to victims. Right now, if a forfeiture occurs under a criminal forfeiture statute, the property can be restored to the victims. The same is true for most civil forfeiture statutes enforced by the Treasury Department. But in cases involving civil forfeiture statutes enforced by the Department of Justice, property forfeited civilly cannot be returned to victims. This is simply an anomaly in the law that relates once again to the fact that civil forfeitures originally applied only to victimless crimes. This problem can be easily fixed and should be fixed without delay.

Conclusion

In these ways, the current asset forfeiture laws can be greatly improved. The Department of Justice is committed to ensuring that the forfeiture laws of the United States will be tough but fair, which is exactly what the American people have a right to expect.



**SIGNIFICANT CASES IN WHICH RESTITUTION OF FORFEITED PROPERTY  
WAS AWARDED TO VICTIMS BY THE DEPARTMENT OF JUSTICE**

- Petition for remission of property forfeited in United States v. James Messera and Ron Miceli (Southern District of New York):

The Mason Tenders District Council Pension Fund -- a pension fund for union laborers performing a wide variety of construction-related jobs -- was a victim of the racketeering activities of Ronald Miceli and his co-conspirators, members of the Genovese organized crime family. The racketeers fraudulently induced the Pension Fund to purchase real property at inflated prices and converted Pension Fund assets to their personal use, resulting in losses to the Pension Fund of approximately \$40 million. Property worth \$231,667.31 was forfeited by defendant Miceli pursuant to the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1963. In May 1996, the full amount forfeited was restored to the pension fund.

- Petitions for remission of forfeited property by 11,516 individual petitioners in United States v. Frederick Taft and Jonathan Gregory Giagnocavo (Eastern District of Pennsylvania):

Between June 1991 and February 1992, defendants Taft and Giagnocavo operated a pyramid scheme called the Washington Power Digest (WPD). Through this scheme, the defendants solicited approximately 26,000 subscriptions to a quarterly financial newsletter falsely claimed to have been written by 26 Washington, D.C., attorneys. In return for a \$125 subscription fee, the defendants represented that subscribers could earn substantial sums from WPD's sharing plan. Although the defendants made small payouts to some subscribers in order to give the scheme an air of credibility, the sizeable awards promised were never issued. Indeed, the defendants never intended to pay subscribers the vast sums advertised. In October 1992, the defendants agreed to the forfeiture of \$1,636,129.97 pursuant to 18 U.S.C. § 982. On July 13, 1996, the Department of Justice authorized the distribution of this amount to 11,516 petitioners, compensating them for their total claimed losses, approximately \$10 to \$125 each.

- Petition for remission of forfeited property in United States v. \$2,004,013.18; \$117,045.89; \$553,808.87 (Southern District of Ohio):

Petitioner, the United States Defense Security Assistance Agency (DSAA), administers the Foreign Military Financing Program, which provides financial assistance to selected foreign

countries for the purchase of military equipment. The State of Israel, which receives assistance under this program, was defrauded of approximately \$11 million as a result of a scheme to divert payments made by the Israeli Air Force under a defense contract. DSAA provided reimbursements to Israel for the diverted payments and therefore was a victim of the offense. The United States seized and forfeited \$2,674,868 in currency from three Swiss bank accounts pursuant to 18 U.S.C. § 981. In March 1994, the Department of Justice authorized the distribution of \$2,674,868 in forfeited currency to DSAA.

- Petition for remission of property forfeited in United States v. James Larkin Toler (Northern District of Texas):

Empire Savings and Loan (Empire) was fraudulently induced to lend in excess of \$250 million in connection with a condominium development plan. Empire suffered losses of approximately \$142 million as a result of the defendant's fraud, which contributed to Empire's eventual failure. Petitioner, the Federal Deposit Insurance Corporation (FDIC), in its capacity as the statutory manager of the Federal Savings and Loan Insurance Corporation, and as receiver of Empire, became subrogated to Empire's right to receive restitution from the defendant as a victim of fraud. The United States seized and forfeited \$2,300,000 from the defendant pursuant to 18 U.S.C. § 1963. On June 19, 1996, the Department of Justice granted FDIC's petition seeking the forfeited \$2,300,000 in currency.

- 1300 petitions for remission of property forfeited in United States v. 2171-2173 Bennett Road (Eastern District of Pennsylvania):

Petitioners were 1,300 victims of a consumer fraud scheme in which numerous roofing companies provided customers with "lowball" estimates on roofing work. After the roofing work began, the on-site foreman told customers that their roofs were worse than originally believed and more expensive repairs were required. Currency in the amount of \$745,034.74 was forfeited under 18 U.S.C. §§ 981(a)(1)(A) and (C). On September 8, 1994, the Department of Justice authorized the distribution of the full \$745,034.74 in forfeited currency to the 1,300 victims pursuant to 18 U.S.C. § 981(e)(6).

- Petition for remission of property forfeited in U.S. v. Tzyy-Bin-Chen (Southern District of New York):

The petitioner, Republic Bank of California, N.A. (Republic), was defrauded of approximately \$13 million pursuant to a loan fraud scheme. The defendant obtained the loans from

Republic by falsely representing that the gold coins he was pledging as collateral were authentic but, in fact, they were counterfeit and gold-plated. Pursuant to 18 U.S.C. § 982, the United States seized and forfeited numerous assets from the defendant, valued at \$565,424.38. On May 13, 1996, the Department of Justice authorized the distribution to Republic of the net proceeds of sale of some of the forfeited property, amounting to \$266,013.19, and the remission of other assets worth \$274,624.74. Furthermore, on March 30, 1992, Republic recovered an additional \$34,818.75 through an administrative petition for remission filed with the Federal Bureau of Investigation.

- Petition for remission of property forfeited in United States v. Muhammed Ashraf Hussain; United States v. Atig Hossain Kahn (Eastern District of Virginia):

Seven insurance companies were defrauded of \$200,544.07 as the result of an automobile insurance fraud scheme. The government successfully forfeited two bank accounts owned by the defendants containing a total of \$103,980.24. On May 2, 1996, the Department of Justice remitted this amount to the petitioners.

- Petitions filed in connection with United States v. \$112,000 in United States Currency (Southern District of Texas):

Five financial institutions were defrauded of approximately \$84,000 pursuant to a credit card fraud scheme. Under 18 U.S.C. § 981(a)(1)(C), the government forfeited \$112,000 from bank accounts controlled by the perpetrator of the scheme. On June 3, 1996, the Department of Justice returned \$84,118.85 to the petitioners, representing the petitioners' total losses from the scheme.

- Petition for remission of proceeds of sale of forfeited property in United States v. Cheeseman (Northern District of New York):

Petitioner, Key Bank of New York, was the victim of an extortion scheme executed by a former employee. The forfeited property consisted of the assets contained in the defendant's pension plan and certain shares of stock, all of which were forfeited pursuant to 18 U.S.C. § 982. On January 30, 1996, the Department of Justice returned \$136,488.68 to Key Bank, representing the full net proceeds derived from the sale of the forfeited property.

- Petition for remission of forfeited currency in United States v. Strissel (District of Maryland):

Petitioner, the Annapolis Housing Authority (AHA), was defrauded of an estimated loss amounting to hundreds of thousands of dollars through the defendant's bribery and racketeering activities. In its amended petition, AHA claimed an interest in \$78,000 of the \$157,000 in currency forfeited by the defendant in this case. The currency was forfeited under 18 U.S.C. § 1963. Pursuant to 18 U.S.C. § 1963(g)(1), the Department of Justice on April 22, 1996, authorized the return of the requested \$78,000 to AHA.

- Petition for remission of property forfeited in United States v. Andrzej Smolinski (District of New Jersey):

Bank Polska, a corporation wholly owned by the government of Poland, was defrauded of \$2,000,000 through a money laundering and bank fraud conspiracy. Pursuant to 18 U.S.C. § 982(a), the United States criminally forfeited \$1,161,344.40 from two bank accounts controlled by the conspirators. On April 12, 1996, the Department of Justice granted remission of the full amount of the forfeited currency pursuant to 18 U.S.C. § 982.

- Petition for remission of property forfeited in United States v. Stone (Western District of Virginia):

Petitioner, the United States Services Automobile Association (USAA), was defrauded of approximately \$61,100 through the payment of a fraudulent insurance claim. The United States seized and forfeited \$15,649 in currency under 18 U.S.C. § 982. On June 14, 1994, the Department of Justice distributed the \$15,302.50 to USAA.

- Petition for remission of proceeds of sale of real property forfeited in United States v. 2358 Payne Avenue, Wichita, Kansas (Eastern District of Virginia):

PRC, Inc. (PRC), was the victim of an extortion scheme perpetrated by one of its employees from which it lost a total of \$448,934.81. The above-captioned real property was forfeited from the defendant under 18 U.S.C. § 982. PRC requested remission of the proceeds from the sale of the forfeited real property. On November 16, 1995, the Department of Justice returned to PRC the full amount of the net proceeds obtained from the sale of the forfeited real property, which amounted to \$13,654.37.

Mr. HYDE. Ms. Blanton.

**STATEMENT OF JAN P. BLANTON, DIRECTOR, EXECUTIVE OFFICE FOR ASSET FORFEITURE, DEPARTMENT OF THE TREASURY**

Ms. BLANTON. Good morning, Mr. Chairman.

I am Jan Blanton, the Director of the Department of Treasury's Executive Office for Asset Forfeiture.

I am pleased to appear before you today to offer our perspective on H.R. 1916 and the changes it would bring about in Federal forfeiture. Civil forfeiture has been an authority of Treasury law enforcement that dates back to the very founding of our Republic.

In the last dozen years, however, the Congress has developed and expanded forfeiture to enable all of Federal law enforcement to address the varied manifestations of sophisticated, modern and financially profitable crime. While allowing us to go after the proceeds and instrumentalities of crime, our use of asset forfeiture has now evolved to the point where it strikes at the very core of criminal organizations and has become an essential part of our overall enforcement strategy.

The attractiveness of asset forfeiture and a reason for its growth in the United States is very simple: it takes the profit out of crime. Asset forfeiture is a program that cuts to the heart of most criminal activity, dismantling criminal syndicates in a way that simple incarceration never could.

By relentlessly focusing on the profitability of crime, it is an enforcement tool that keeps pace with evermore well-financed and internationalized criminal groups. It is an enforcement tool with notable interrelated benefits. It pays for its own property management costs and relieves additional burdens that otherwise would fall to our law-abiding citizens and taxpayers. It strengthens law enforcement by rechanneling forfeited value back into this most fundamental societal purpose, to promote cooperation among Federal, State and local police around the country through our ability to equitably share forfeited assets with those who have assisted in our investigations. It allows for victim restitution by permitting us to return the forfeited assets of criminals to those who were once their prey.

Under the Weed and Seed Program, it turns tainted properties back to constructive community use. It even sanctions the donation of forfeited assets to charitable organizations and the transfer of forfeited monies to support our national effort to reduce the demand for illegal drugs.

In just a very few specific examples, the canine and handler teams detecting firearms and explosives for the Bureau of Alcohol, Tobacco and Firearms, the enhanced security presence at this summer's Olympic games in Atlanta, and the antidrug and violence presentations to elementary school children by police officers in California's Orange County would not be as far along as they are were it not for support of the Federal forfeiture programs.

We have arrived at this point through a reflective and measured expansion of forfeiture authorities always guided by the fundamental belief that the strength of Federal forfeiture rests directly upon public confidence in the program's integrity.

While we appreciate the intent of H.R. 1916 to safeguard that integrity, we have significant reservations about how this bill would adversely impact today's Federal forfeiture authorities. The principal provisions of H.R. 1916 would amend several sections of the Tariff Act of 1930, codified in title 19, U.S.C., to place the burden of proof on the United States in a civil forfeiture action, raise the standard of proof from probable cause to clear and convincing in a civil forfeiture action, eliminate the need to file a cost bond to have a claim of interest in property determined in a civil judicial proceeding, provide for appointment of counsel in a civil forfeiture action when a claimant cannot afford that representation, provide for the release of seized property prior to forfeiture if the seizure causes substantial hardship on a claimant, and provide for a cause of action to require the release of property pending the completion of the forfeiture proceeding.

In addition, H.R. 1916 would amend title 18 to provide for the Department of Justice to pay for the compensation awarded by the courts for representation of claimants.

Collectively these provisions of H.R. 1916 present three problems that detract significantly from the bill's intended reform purposes. First, title 19 is a commercial statute designed to facilitate trade, expedite the collections of fines, penalties and import duties, prohibit the introduction of contraband items into the United States, protect intellectual property rights, as well as the public health and safety.

The changes proposed by H.R. 1916 would compromise the ability of the U.S. Customs Service to fulfill these vital responsibilities. Think about the message that the United States would be sending to its trading partners if at our borders Customs officials could no longer seize and retain the sizable quantities of pirated products stolen from the inventiveness and creativity of American workers. Indeed, in those instances where the detention of property serves as an appropriate substitute for a lien, the ability of the Secretary of the Treasury to collect Customs revenues could be impaired.

Second, it is our belief that H.R. 1916 would greatly increase the number of cases on an already crowded docket of the Federal courts. Waiver of the cost bond coupled with the appointment and compensation of counsel could serve to encourage litigation of even the most plainly forfeitable property interests.

Third, H.R. 1916 will make it more difficult for the United States to deprive criminal violators of their ill-gotten proceeds. Generally, it will make it more difficult to detain property at the border. Releasing property pending completion of forfeiture appears contrary to the very aims of current forfeiture law.

As drafted, the provisions of H.R. 1916 may have a substantial impact on the Federal Government's ability to detain dangerous food products, adulterated or unlicensed drugs, child pornography, illegal firearms and unsafe computer products at the border. It would compromise our ability to protect intellectual property rights and endanger a portion of Customs revenues.

Finally, Federal court caseloads and law enforcement's ability to deprive individuals of the proceeds of their illegal activity would be impacted significantly.

We value the recent progress that the Congress and law enforcement have made in the last 12 years in the application of forfeiture authorities. We share the concerns of our colleague at the Department of Justice and of you, Mr. Chairman, that forfeiture law can and should be further refined to better ensure its recognition of basic protections accorded property rights.

We believe, however, that H.R. 1916 is wide off that mark in achieving the appropriate balance between individual property rights and the enforcement of our civil and criminal forfeiture statutes. Alternatively we commend for your consideration the bill presented by the administration last week, the provisions of which have just been highlighted by my associate at the Department of Justice, and most importantly, achieves the requisite balance.

We have worked closely in the crafting of the administration's bill and it contains several sections that broaden and enhance Treasury law enforcement authorities by supporting a common goal of better protecting rights and property. Perhaps because of this imposing power, a power not simply to incarcerate criminals but to take down their organizations, forfeiture today is all too often the subject of negative media coverage.

Where Federal forfeiture is involved, we accept the challenge to right the wrongs that may be done, but such incidents should not obscure the many positive aspects of this formidable law enforcement mechanism.

The Department of Treasury had been entrusted with significant forfeiture authority for over 200 years. We have exercised this authority in the pursuit of various illegal activities that threaten the safety, security and prosperity of the American people. Forfeiture is a legitimate authority bestowed by the citizens of the United States upon Federal law enforcement. Our obligation then and now is to make proper use of it so that we may realize its most fundamental purpose of protecting the law-abiding.

We look forward to bringing Treasury's forfeiture background to bear in working with the committee to strike a desirable, well-balanced reform.

Thank you.

Mr. HYDE. Thank you.

[The prepared statement of Ms. Blanton follows:]

PREPARED STATEMENT OF JAN P. BLANTON, DIRECTOR, EXECUTIVE OFFICE FOR ASSET FORFEITURE, DEPARTMENT OF THE TREASURY

Mr. Chairman, and to all the members of the Committee, good morning. My name is Jan Blanton and I am the Director of the Department of the Treasury's Executive Office for Asset Forfeiture. I am pleased to appear before you today to offer our perspective on H.R. 1916 and the changes it would bring about in federal forfeiture. With your permission, I would like to make a brief opening statement after which I would be glad to answer any questions you or the other members may have.

Civil forfeiture has been an authority of Treasury law enforcement that dates back to the very founding of our Republic. In the last dozen years, however, the Congress has developed and expanded forfeiture to enable all of federal law enforcement to address the many varied manifestations of sophisticated, modern and financially profitable crime. By allowing us to go after the proceeds and instrumentalities of crime, our use of asset forfeiture has now evolved to the point where it strikes at the very core of criminal organizations and has become an essential part of our overall enforcement strategy.

The attractiveness of asset forfeiture and a reason for its growth in the United States is very simple—it takes the profit out of crime. Asset forfeiture is a program that cuts to the heart of most criminal activity, dismantling criminal syndicates in

a way that simple incarceration never could. By relentlessly focusing on the profitability of crime, it is an enforcement tool that keeps pace with evermore well-financed and internationalized criminal groups.

It is an enforcement tool with notable interrelated benefits. It pays for its own property management costs and relieves additional burdens that otherwise would fall to our law abiding citizens and taxpayers. It strengthens law enforcement by rechanneling forfeited value back into this most fundamental societal purpose. It promotes cooperation among federal, state and local police around the country through our ability to equitably share forfeited assets with those who have assisted in our investigations. It allows for victim restitution by permitting us to return the forfeited assets of criminals to those who were once their prey. Under the Weed and Seed Program, it turns tainted properties back to constructive community use. It even sanctions the donation of forfeited assets to charitable organizations and the transfer of forfeited monies to support our national effort to reduce the demand for illegal drugs.

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We have arrived at this point through a reflective and measured expansion of forfeiture authorities, always guided by the fundamental belief that the strength of federal forfeiture rests directly upon public confidence in the program's integrity. While we appreciate the intent of H.R. 1916 to safeguard that integrity, we have significant reservations about how this bill would adversely impact today's federal forfeiture activities.

The principal provisions of H.R. 1916 would amend several sections of the Tariff Act of 1930, codified in Title 19 USC, to:

- place the burden of proof on the United States in a civil forfeiture action;
- raise the standard of proof from probable cause to clear and convincing in a civil forfeiture action;
- eliminate the need to file a cost bond to have a claim of interest in property determined in a civil judicial proceeding;
- provide for appointment of counsel in a civil forfeiture action when a claimant cannot afford that representation;
- provide for the release of seized property prior to forfeiture if the seizure causes substantial hardship on a claimant; and,
- provide for a cause of action to require the release of property pending the completion of the forfeiture proceeding.

In addition, the bill would amend Title 18 to provide for the Department of Justice to pay for the compensation awarded by the courts for representation of claimants.

Collectively, these provisions of H.R. 1916 present three problems that detract significantly from the bill's intended reform purposes.

First, Title 19 is a commercial statute designed to facilitate trade, expedite the collection of fines, penalties and import duties, prohibit the introduction of contraband items into the United States, protect intellectual property rights as well as the public health and safety. The changes proposed by H.R. 1916 would compromise the ability of the United States Customs Service to fulfill these vital responsibilities. Think about the message the United States would be sending to its trading partners if, at our borders, Customs officials could no longer seize and retain the sizable quantities of pirated products that steal from the inventiveness and creativity of American workers. Indeed, in those instances where the detention of property serves as an appropriate substitute for a lien, the ability of the Secretary of the Treasury to collect customs revenues could be impaired.

Second, it is our belief that H.R. 1916 would greatly increase the number of cases on an already crowded docket of the federal courts. Waiver of the cost bond, coupled with the appointment and compensation of counsel, would serve to encourage litigation of even the most plainly forfeitable property interests.

Third, H.R. 1916 will make it more difficult for the United States to deprive criminal violators of their ill-gotten proceeds. Generally, it will make it more difficult to detain property—at the border. Releasing proper pending completion of the forfeiture appears contrary to the very aims of current forfeiture law.

As drafted, the provisions of H.R. 1916 may have a substantial impact on the federal government's ability to detain dangerous food products, adulterated or unlicensed drugs, child pornography, illegal firearms and unsafe consumer products at the border. It would compromise our ability to protect intellectual property rights



and endanger a portion of customs revenues. Finally, federal courts' caseloads and law enforcement's ability to deprive individuals of the proceeds of their illegal activity would be impacted significantly.

We value the reasoned progress that the Congress and law enforcement have made in the last twelve years in the application of forfeiture authorities. We share the concerns of our colleagues at the Department of Justice and of you, Mr. Chairman, that forfeiture law can and should be further refined to better ensure its recognition of basic protections afforded property rights. We believe, however, that H.R. 1916 is wide of the mark in achieving the appropriate balance between individual property rights and the enforcement of our civil and criminal forfeiture statutes. Alternatively, we commend for your consideration the bill presented by the Administration, the provisions of which have just been highlighted by my associate at the Department of Justice and, most importantly, achieve the requisite balance. We have worked closely in the crafting of the Administration's bill and it contains several sections that broaden and enhance Treasury law enforcement authorities while supporting a common goal of better protecting rights to property.

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The Department of the Treasury has been entrusted with significant forfeiture authority for over two hundred years. We have exercised this authority in the pursuit of various illegal activities that threaten the safety, security and prosperity of the American people. Forfeiture is a legitimate authority bestowed by the citizens of the United States upon federal law enforcement. Our obligation, then and now, is to make proper use of it so that it may realize its most fundamental purpose of protecting the law abiding. We look forward to bringing Treasury's forfeiture background to bear in working together with the Committee to strike a desirable well-balanced reform.

Mr. Chairman, this concludes my opening statement. I will be pleased to answer any questions you or the other members of the committee may have at this time. Thank you.

Mr. HYDE. Mr. McMahon.

**STATEMENT OF JAMES W. McMAHON, SUPERINTENDENT, NEW YORK STATE POLICE, ON BEHALF OF THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE**

Mr. McMAHON. Chairman Hyde, and members of the committee, I want to thank you for allowing me to testify on proposed reforms to the Federal asset forfeiture statutes today.

I am here representing the International Association of Chiefs of Police, an organization of over 16,000 police executives, and as Superintendent of the New York State Police, a large full-service enforcement agency.

All too often in law enforcement, we see the criminals who defy our laws flaunt their illicit profits in material ways. They prey on our society, reaping rewards from their drug trade.

The New York State Police, along with county and local agencies view asset seizure as an effective tool to mitigate the spread of illicit narcotics by attacking the core of the narcotics trade, its illicit profits. By bringing this money back to law enforcement, we are able to dedicate it to further our efforts against narcotics and the violence it all too often fuels.

The forfeiture law permits the seizure of the currency and real property of the criminal. This channels millions of dollars back to the law enforcement agencies involved.

In New York State, we have been able to equip our personnel with necessary equipment, such as semiautomatic weapons in an effort to bring our officers more in line with the weaponry, and un-

fortunately, firepower used by the drug traffickers they often have to face daily on the streets of our society.

Most recently, the asset seizures have enabled us to construct a state-of-the-art forensic center, a center capable of the latest technologies and scientific procedures, including DNA, drug-testing serology and other important areas of criminal investigations. The forensic center, a \$25 million building has been paid for by illicit profits from the drug dealers and the violent criminals it will be used to analyze forensic evidence against.

It will be a center that will benefit all of us in law enforcement in New York State, for over 50 percent of the cases handled by our forensic center come from county and local enforcement agencies. In these economic times we would not have been able, without the benefit of seized assets that we seize from the criminals in the drug trade, to build this building.

Asset forfeiture is, without a doubt, a useful tool to law enforcement. We have been able to remove from criminals the proceeds of their illegal activities as well as the instrumentality they have used in committing their crimes.

Most forfeiture cases in which the New York State Police are involved are drug cases. In these cases, simply taking the drugs is not sufficient. The illegal drugs themselves have no use to the law-abiding citizen. Their only purpose is to be sold to drug users. To disrupt the drug organizations, law enforcement needs to remove the profits generated by drug dealing as well as vehicles and real properties used in trafficking and/or acquired with illicit profits.

There have been media stories of alleged abuses. And even some recent court decisions indicating a needs for reform. The IACP and other law enforcement groups have been meeting for more than 2 years with representatives from the Department of Justice to consider where reforms should be made both to adequately protect the rights of property owners and to provide law enforcement agencies with more and better forfeiture tools to combat crime.

What we do not want reforms to do is to make forfeiture under Federal law more complicated, cumbersome, lengthy and costly, nor do we want it to take away from law enforcement the funds it needs to effectively enforce the narcotics laws.

Mr. Chairman, your bill, H.R. 1916, may be a good starting place on asset forfeiture reform. Many of the provisions in the bill State and local law enforcement agencies could and do accept in concept. But they would ask that modifications be made. In a moment I will deal with the actual provisions in H.R. 1916.

I would like to first point out that there is a strong need to address the many inconsistencies and ambiguities that have arisen in the forfeiture law. There is also a need to extend forfeiture into other areas of law such as white-collar crime, terrorism and consumer fraud.

If we are to consider reform, the IACP would prefer not to limit the task. H.R. 1916 is not legislation that States or local law enforcement would object to. An amendment to the Federal Tort Claims Act, similar to that in section 2, would limit the law enforcement exception to tort liability. This would ensure that innocent property owners are afforded a remedy when their property is damaged in the course of a forfeiture action.

Similarly, IACP does not object to the extension of the time period for filing a challenge for a forfeiture contained in section 3. Of more concern is the changing of the burden of proof contained in section 4.

As drafted, the bill would shift the burden of proof to the government and raise the standard of proof to clear and convincing evidence. While law enforcement has been reluctant in the past to shift the burden to the Government from the property owner, after showing a probable cause by the Government we can see how this change would make the entire process appear more fair.

We are troubled, however, by the elevation of the standard and would argue that the proper test should still be the preponderance of the evidence, the traditional civil burden of proof. This seems fair to us in law enforcement, for most forfeitures are civil proceedings.

Mr. HYDE. Let me say I tend to agree with you. I think I have no problem with the burden of proof being less than clear and convincing, but preponderance, and we will make that change.

Mr. MCMAHON. We appreciate that.

Mr. HYDE. You have already won one.

Mr. MCMAHON. I think we have already given two to you, Mr. Chairman.

My last one, under section 6, which deals with the return of assets to property owners during the forfeiture proceedings, commonly referred to as hardship return. The IACP would recommend that this remedy be reserved for circumstances where the property owner can establish likelihood of success on the merits.

With that, Mr. Chairman, I want to thank you on behalf of all of us in law enforcement for the opportunity to be here today.

Mr. HYDE. I thank you.

[The prepared statement of Mr. McMahan follows:]

PREPARED STATEMENT OF JAMES W. MCMAHON, SUPERINTENDENT, NEW YORK STATE POLICE, ON BEHALF OF THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE

Chairman Hyde and members of the Committee. Thank you for inviting me here today to testify on proposed reforms to the Federal Asset Forfeiture Statutes.

First, I want to indicate how useful a tool asset forfeiture is to law enforcement. We have been able to remove from criminals, the proceeds of their illegal activities, as well as the instrumentality they have used in committing their crimes. Most forfeiture cases in which the New York State Police is involved, are drug cases. In these cases, simply taking the drugs is not sufficient. The illegal drugs themselves have no use other than to be sold to users on the streets. The drugs are impure and contaminated, and they can be replaced by the distribution chain. To disrupt the organization, law enforcement needs to remove the cash generated by drug dealing, as well as vehicles and real property used in the trafficking.

There have been media stories of alleged abuses, and even some recent court decisions indicating a need for reform. The IACP and other law enforcement groups have been meeting for more than two years to consider where reforms should be made—both to adequately protect the rights of property owners, and to provide law enforcement agencies with more and better forfeiture tools to combat crime. What we do not want reforms to do, is to make forfeiture under federal law more complicated, cumbersome, lengthy, and costly.

Mr. Chairman, your bill, H.R. 1916, may be a good starting place for the debate on asset forfeiture reform. Many of the provisions in the bill, state and local law enforcement agencies could accept in concept, though not in the form as currently drafted. In a moment, I will deal with the actual provisions in H.R. 1916, but I would like to point out that there is nothing in the bill to address the many inconsistencies and ambiguities that have arisen in the forfeiture law. It also does not extend forfeiture into other areas of the law, such as white collar crime, terrorism,

or consumer fraud. If we are to consider any reform, let's not limit our consideration.

As to H.R. 1916, state and local law enforcement would not object to an amendment to the Federal Torts Claim Act, similar to that contained in Section 2, that would limit the law enforcement exception to tort liability. This would ensure that innocent property owners are afforded a remedy when their property is damaged in the course of a forfeiture action.

Similarly, we do not object to an extension of the time period for filing a challenge for a forfeiture, contained in Section 3. I do not know if the extension to 30 days is necessary, or if some shorter period would be adequate.

Of more concern is the changing of the burden of proof contained in Section 4. As drafted, the bill would shift the burden of proof to the government, and raise the standard of proof to "clear and convincing evidence." While law enforcement has been reluctant in the past to shift the burden to the government from the property owner after a showing of probable cause by the government, we can see how this change would make the entire process appear more fair. We are troubled, however, by the elevation of the standard, and would argue that the proper test should still be the "preponderance of the evidence."

Section 5 of H.R. 1916 would eliminate entirely the cost bond requirement. The cost bond requirement limits the number of challenges to the forfeiture and, thus, limits litigation. While we would be willing to consider a waiver of the bond for an indigent or poor owner, or a reduction of the bond by judicial discretion, elimination of the bond entirely does not seem to be necessary.

Section 6 of the bill would permit owners to retain possession of their property pending forfeiture, where deprivation of the property causes economic hardship without posting any bond. While this might be possible for real property that cannot be removed from a jurisdiction, we would want to be sure an owner was not able to diminish the value of such property, perhaps by use of a bond. Personal property creates a very different problem, because it can, in many instances, easily be physically removed from jurisdiction of the court hearing the forfeiture. In these instances, a bond would seem necessary.

Section 7, Appointing Legal Counsel for Indigents, would divert significant assets to the criminal defense bar. Traditionally, court-appointed (and paid for) counsel have only been used where a person's liberty is in jeopardy.

Finally, Section 8 clarifies the innocent owner defense for drug forfeiture cases only, by permitting a person who is aware that his or her property is being used to commit a crime, to defend against the forfeiture on the ground that he or she did not consent to the illegal use. I believe this would be acceptable as long as the owner did actually take reasonable steps to prevent the illegal use. The whole area of innocent owner defense should be reviewed to be sure all ambiguities are eliminated.

In summary, I repeat, H.R. 1916 is a good beginning for the reconsideration of the asset forfeiture laws, but it is just the beginning. Law enforcement would like other provisions included in any final reform proposal.

I would be happy to answer any questions. Thank you.

Mr. HYDE. Mr. Gekas.

Mr. GEKAS. I thank the Chair.

I direct this to Mr. Cassella of the Department of Justice.

The previous panel had as one of the panelists Mr. Komie, who stated that or alleged that memoranda had been circulated setting forth quotas which establish minimum seizures to be made by Federal offices. In view of your testimony about how much money has been yielded over the years and how much has been shared with local authorities as a result of that, is there such a quota system that would lead to making sure that we reach half a billion dollars a year?

Mr. CASSELLA. Absolutely not. I don't know where Mr. Komie got that idea from. I have been working in this program since 1989. There is no quota system.

Mr. GEKAS. Had you ever heard that allegation before?

Mr. CASSELLA. In 1990, there was a memorandum sent asking law enforcement agencies to get their forfeitures in during that fiscal year so that budget expectations could be met. That was cited

in a Supreme Court case I think called the *United States v. James Daniel Good Property*. That was back in 1990. There has been since then no memoranda, no quota system, no effort whatsoever to try to turn this forfeiture program into a money-making operation. It is not that.

Mr. GEKAS. You say that the court commented on that memorandum?

Mr. CASSELLA. Yes. It was a footnote in a Supreme Court case.

Mr. GEKAS. In what way? Adversely, or critically, or how?

Mr. CASSELLA. They were making the point that it is appropriate for the Court to review the forfeiture laws closely because the Government enjoys some benefit from enforcing the law, some financial benefit, and cited the memoranda in a footnote to make that point.

Mr. GEKAS. Was any subsequent memo circulated to the effect that we should not have quotas?

Mr. CASSELLA. I don't know if it was ever done in a written memorandum, but I speak regularly at forfeiture training conferences for all of our prosecutors and law enforcement agents, and we regularly make the point that this is not to be driven by money, we do not seize property for the purpose of bringing in revenue, and we are not going to have any quota system.

Mr. GEKAS. Thank you.

Ms. Blanton, in your testimony you include a statement that you worry about the implementation of this bill because it would serve to encourage litigation of the most plainly forfeitable property interests. We, too, have always been concerned about a multiplicity of actions flooding the courts in this and other arenas.

Listening to testimony having to do with Mr. Jones, we found that because he was unable to use the process in place to fight that seizure, his lawyer used another forum or another predicate upon which to base the claim, so they were in court anyway. Even if it would be a desired end of all of law enforcement to keep down the number of actions, the failure to include in our law something to give potential relief to an innocent party would breed actions anyway. Am I correct in that assumption?

Ms. BLANTON. Sir, in my testimony, we basically agree; we have no argument. We know that there are reforms needed in civil forfeiture today. What we would like to see, is that those changes are not made to title 19 but to title 18, so that uniform innocent owner provisions apply uniformly across the board and to all civil forfeitures under the Federal Criminal Code, not at title 19.

Mr. GEKAS. I have in front of me the administration's proposal, and in large part at least the summaries indicate that most of the bill at hand that the chairman has produced here—most of those proposals are, in one way or another, endorsed by the administration bill.

I am going to read off a bullet for the Hyde bill, and maybe one of you can answer yes or no, is it included in the administration's proposal?

For instance, it puts the burden of proof on the Government. We agree that that should be a—

Mr. HYDE. With a change in the standard to "preponderance" as against "clear and convincing."

Mr. GEKAS. Yes. Provides fair notice to challenge of forfeiture.

Mr. CASSELLA. That is correct.

If I may, Mr. Gekas, the proposal in the administration's bill would give property owners 30 days from the last publication of notice of the forfeiture, which is actually a little bit longer than the period in H.R. 1916.

Mr. GEKAS. And eliminates the cost of a—cost bond requirement?

Mr. CASSELLA. No, Mr. Gekas. We don't favor the absolute abolition of the cost bond, but we favor a phasing out of the cost bond. I can tell you why, if you want to, later.

Mr. GEKAS. So there is one bullet that has gone astray. Allows for the release of property pending final disposition of a case in certain cases?

Mr. CASSELLA. We have that concept in, in a different form, Mr. Gekas. We propose to allow the property to be released pending trial, if substitute property is submitted or if there is some showing, as Mr. McMahan pointed out, of a likelihood of success on the merits.

Mr. GEKAS. Provides for the appointment of counsel for indigents?

Mr. CASSELLA. No, we don't do that.

Mr. GEKAS. Well, there is another one, Mr. Chairman, that we will look at closely.

Provides a remedy for property damage caused by Government negligence.

Mr. CASSELLA. Yes, we have the Tort Reforms Act proposal in the legislation.

Mr. GEKAS. All right. I say to Mr. McMahan that it would be valuable to us if you would do a side-by-side—well, maybe you already have—between the administration's proposal and the Hyde bill, and whatever stark differences there are that you wish us to address we would be happy to accommodate. Your testimony does cover some of that.

Mr. MCMAHON. Sir, we have been working with Justice and the IACP on their bill, and I think they have already done that, and the ones we have addressed here are the ones of main concern to us.

Mr. GEKAS. I thank you.

And, Mr. Chairman, I yield back the balance of my nontime.

Mr. HYDE. I thank the gentleman.

Let me just say that my staff has been working with Mr. Cassella, the Justice Department, and with the Treasury Department working with the Justice Department, and we are making progress. We are making substantial progress. I expect over the month of August, when we all will be otherwise engaged, the staffs will be engaged in refining their agreements and disagreements, so that at the end of August and the beginning of September, we should have a product that we can expect support from Treasury and Justice and that will do the things we want it to do, which we heard egregious examples this morning that need attention in the law.

And I am pleased and gratified that we are not at odds or at swords' points. There are some differences that will remain and may still exist after our meetings, but I am very encouraged by the

spirit of cooperation that we are getting. And so we are not adversaries at all on this.

Mr. Frank.

Mr. FRANK. Thank you, Mr. Chairman. I am glad we are making progress.

Mr. Cassella, you said "phasing out the bond." Do you mean chronologically or financially? I mean, how are we phasing it out?

Mr. CASSELLA. The problem, Congressman, is that we have to strike a balance.

Mr. FRANK. How are you going to do it?

Mr. CASSELLA. The cost bond serves an important purpose. It discourages the filing of frivolous claims. What we have to do is strike a balance between discouraging frivolous claims and inadvertently discouraging bona fide claims. So we would propose to codify the rule that no cost bond is required for someone who has status as in forma pauperis position. That is number one.

Mr. FRANK. Yes.

Mr. CASSELLA. Second, we would ask the authority for the Attorney General and the Secretary of the Treasury to waive the bond in those circumstances where it isn't needed to protect the Government from maintenance costs and storage costs.

For example, seizure of currency or the seizure of a bank account: There is no need for a cost bond in that situation to protect us from costs, and if we waived it in those circumstances, we could see how many claims are filed, frivolous or otherwise.

The problem, Congressman, is the number of seizures that we do every year. Justice does about 30,000 seizures per year. This is a page from USA Today. It appears every Wednesday, and it lists the seizures for the previous 3 weeks just by the DEA.

Mr. FRANK. How many of them are overturned?

Mr. CASSELLA. Sorry?

Mr. FRANK. Can you give us the numbers, how many of the forfeitures are ultimately successfully challenged?

Mr. CASSELLA. Successfully challenged, very, very few. Eighty percent of them are never even challenged; 80 percent of our forfeitures are administrative forfeitures in which there is no claim filed at all.

Mr. FRANK. Those in which there are challenges, I would be interested in the statistics, how many of the challenges are successful.

Mr. CASSELLA. If we have those statistics, Congressman, we will try to get them for you.

[The information follows:]



U.S. Department of Justice

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Washington, D.C. 20530

The Honorable Henry J. Hyde, Chairman,  
Committee on the Judiciary  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Congressman Hyde:

At a Judiciary Committee hearing on July 22, 1996, on pending asset forfeiture legislation, Congressman Frank asked the Department of Justice witness to provide statistics on the number of forfeiture cases that result in judgments against the United States in a given year. We have reviewed the available statistical sources and have attempted to answer your question as best we can as follows:

In a typical fiscal year, the agencies of the Department of Justice seize property for forfeiture in approximately 35,000 cases. Eighty-five percent of the FBI and DEA cases, and nearly 99 percent of the INS cases are uncontested;<sup>1</sup> thus approximately 2500 Justice cases are referred to the U.S. Attorneys. We do not have comparable statistics for the Treasury Department. The Treasury agencies, however, make ten of thousands of seizures a year and we believe that a similar number of Treasury cases are also referred to the U.S. Attorneys.

Of all cases referred to the U.S. Attorneys, some are declined because they do not meet threshold requirements regarding minimum property value or other criteria, including legal merit, established by the U.S. Attorneys. Others become part of criminal forfeiture cases.<sup>2</sup> In the end, the U.S.

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<sup>1</sup> Over the past ten years, the rate of contested claims in DEA cases ranged from 12 percent to 16 percent and averaged 14.2 percent. FBI statistics are similar. INS considers only 1 percent of its cases "contested" because INS generally attempts to settle cases at the administrative stage before they are referred to the U.S. Attorney.

<sup>2</sup> There is a related arrest or prosecution in 80 percent of the cases in which there is a seizure for forfeiture. But for a variety of reasons -- most having to do with the ability to obtain clear title against third parties -- prosecutors in the past generally filed parallel civil forfeiture cases rather than



Attorneys file between 2,000 and 5,000 civil forfeiture cases a year. The number of filings for the past four years are as follows:

FY	1992	1993	1994	1995
Cases Filed	5083	4399	2941	2193 <sup>3</sup>

Of these cases, many are settled but somewhat more than half result in a judgment for or against the United States. The figures for the past four years are as follows:

Judgm for U.S.	2569	2337	1836	1379
Judgm against	105	85	63	48
Percent adverse	4.90%	3.64%	3.63%	3.48%

Thus, the government prevails in 96 per cent of the cases that go to judgment and in 98 per cent of all cases that are filed, and the number of adverse judgments represents a minute fraction of all cases initiated by seizure.

We hope these statistics are helpful in answering Congressman Frank's question.

Sincerely,

Andrew Foia  
Assistant Attorney General

cc. The Honorable John Conyers, Jr.  
The Honorable Barney Frank

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make the forfeiture part of the criminal indictment. Therefore, the number of cases that resulted in criminal forfeiture was smaller than the number that result in civil forfeiture. The recent trend is toward parity.

<sup>3</sup> The drop in the number of civil filings is due both to the shift to criminal forfeiture and the overall decrease in the number of seizures in the past two years due primarily to uncertainty over the double jeopardy effect of civil forfeiture.

Mr. HYDE. Would the gentleman yield just for a second?

Mr. FRANK. Sure.

Mr. HYDE. Mr. Cassella, we heard some startling testimony from Mr. Jones this morning about the bond and the failure to waive the bond.

Mr. FRANK. That was cash. I mean, that was cash, wasn't it?

Mr. HYDE. Yes.

Mr. CASSELLA. That is right. We are—

Mr. HYDE. Did you have anything to do with that case?

Mr. CASSELLA. No, I certainly did not, Mr. Chairman.

One of the things we are suggesting in our legislation is that we have the authority to waive the bond other than in in forma pauperis situations; that is, to also waive it in cash or currency situations. We don't have that authority today. The law requires us to waive it—there is case law that requires us to waive it for paupers.

Mr. Jones, if I understand from what I heard this morning correctly, filed a financial statement indicating that he was a pauper, and the Government disagreed. They disagreed that his financial statement put him in that status.

Reasonable minds can disagree. The important thing is that there be remedies. And if we can waive the cost bond in some circumstances and thereby not clog the Federal courts with, you know, 30,000 more Federal cases every year, we would like to be able to do it.

Mr. HYDE. Well, due process is costly, I will agree, and time consuming, but it is worthwhile. So we need to find a way to do this.

Mr. CASSELLA. Exactly.

Mr. HYDE. But I thank the gentleman. I didn't mean to interrupt.

Mr. FRANK. I would think people who had a—well, we are getting into the counsel thing.

So your proposal would be to automatically waive it for paupers?

Mr. CASSELLA. Correct.

Mr. FRANK. And the Government would have discretion to waive it where cash was involved or other elements that didn't have a storage cost?

Mr. CASSELLA. That is correct. What we want to find out, Congressman, is, are we correct in our thought that abolishing the cost bond requirement overnight would flood the Federal courts?

Mr. FRANK. Let me ask you: You still—people would still have to hire a lawyer to bring that suit; right?

Mr. CASSELLA. Well, they could also file it pro se. But you mean if somebody wanted to be represented by counsel, he would have to pay for counsel, yes. They have a remedy, of course, Congressman, and that is under the Equal Access to Justice Act. If they prevail, it would be—

Mr. FRANK. If they are small. Under Equal Access to Justice, they have to be a small business.

Mr. CASSELLA. They have to have less than \$2 million in assets.

Mr. FRANK. The next issue then is objecting to appointing counsel where people—I assume that is where they can't afford it. You still object to that? Someone files an in forma pauperis petition, it is granted, and you still wouldn't give them a lawyer?

Mr. CASSELLA. That is right. Taken together with the idea of abolishing the cost bond, the appointment of counsel could become a horrendously expensive proposition. Again, we want to strike a balance. We want to make sure there is a remedy under the Equal Access to Justice Act.

Mr. FRANK. What is the remedy if I can't afford a lawyer?

Mr. CASSELLA. The Equal Access to Justice Act.

The point I was trying to make, Congressman, is that unlike a criminal case where we file an action, the *United States v. John Doe*, John Doe is clearly the defendant.

Mr. FRANK. I understand that. You can take that as understood.

Mr. CASSELLA. Right. But in a civil action, which is an in rem action, anyone could file a claim. If you try to forfeit an airplane, the pilot might file a claim, the owner, his wife, a lienholder.

Mr. FRANK. Well, you can deal with that by allowing the appointment of counsel only for people who had a very colorable claim. I think that is—if you really want to do that, that would not be a problem. I think, frankly, that is a “make wait” argument. That is not really why you want to do it.

What about a narrow right to counsel? I mean, it does seem to me pretty outrageous—you admit we do make some mistakes. And, again, I guess I should go back to one central point. I don't accept the distinction, as you make it, between a civil and criminal situation.

Let me ask: In every case of forfeiture, do we not assume that some crime has been committed? Isn't there a crime that has been committed as a predicate for every forfeiture?

Mr. CASSELLA. There is. There has to be a crime committed before there is a forfeiture. The question is, is it proved?

Mr. FRANK. So the very notion of forfeiture presupposes that there has been a crime committed?

Mr. CASSELLA. Correct.

Mr. FRANK. I think that is important, because I think that helps make it, to me, harder for you to argue that this is purely civil and here is criminal and here is civil. What you are talking about is something which you believe should happen as the consequence of a crime, and obviously it is not the same as being incarcerated, but you have an untenable distinction to treat this as wholly civil. It is civil, triggered, we all agree, by a crime.

And where someone may have falsely been accused of a crime and, as a consequence, had his property seized, like the gentleman on the first panel, and has no money, and you agree he has no money, not to appoint a lawyer and to then put him to the Equal Access to Justice, I think, is a very—I don't understand it, and that is not the balance, that is the Government's convenience, and I think it is inconsistent with what I thought, frankly, to be the views of this administration on social justice and fairness. So that is one I hope we will not accede to.

The next issue I have is—and this one actually kind of bothers me—you said from the public finance standpoint—now, frankly, I don't think it matters whether you have quotas or not; you have something better than quotas, an incentive. I mean, if the agency I work for is going to be substantially enhanced in its budget by

all these successful forfeitures, that is a good incentive. It doesn't mean people are bad people, but that is an obvious incentive.

Mr. CASSELLA, you said in some cases the forfeiture—the proceeds of the forfeiture are given to other agencies, private agencies? Did you say that?

Mr. CASSELLA. Well, the first priority, Mr. Congressman, is to look to see if there are any victims.

Mr. FRANK. I agree that we should do that. That is true.

Mr. CASSELLA. That is what happens first. If there are—once the victims have been compensated, or if there are no victims, then the property is deposited into the Federal Assets Forfeiture Fund. About half of that money is shared with State or local agencies in accordance with what part of the investigation they participated in. If they did half the work, they would get half the money.

Mr. GEKAS. Would the gentleman yield just for a moment?

Mr. FRANK. Yes.

Mr. GEKAS. That is because the law states it is to be divided.

Mr. CASSELLA. That is right.

Mr. GEKAS. We here several years ago passed the legislation and debated that very thoroughly. It isn't that you are feeling kindly towards the local authorities. The law says you have to share it.

Mr. FRANK. No. It is just that we were feeling kindly to the local authorities. Let's give credit where credit is due.

Mr. GEKAS. Right.

Mr. FRANK. Now that we have established ourselves as a fountain of all charity, let's get back to my question. At what point does this get distributed to other organizations?

Mr. CASSELLA. The State or local law enforcement agency is authorized to distribute 15 percent. It can pass through 15 percent of the money that comes from the Federal Government on to community-based organizations.

Mr. FRANK. Does the Federal Government do that? What do we do with our share?

Mr. CASSELLA. Our share gets appropriated out of the fund, and it goes to administer the Federal Forfeiture Program.

Mr. FRANK. Appropriated out by the regular appropriations process?

Mr. CASSELLA. That is my understanding, but I don't—

Mr. FRANK. Ms. Blanton.

Mr. CASSELLA. Sorry.

Mr. FRANK. I was asking Ms. Blanton. She was hitting her switch there.

Ms. BLANTON. Those moneys are used to pay for the cost of storing and maintaining the property.

Mr. FRANK. How do you decide—what if there is any surplus over and above? I mean, storing somebody's money in a bank generally doesn't cost you a lot of money if you have deposited it; might even make you a little money.

Ms. BLANTON. That is true. We pay off third party interests and lien holders, if there are lien holders, such as banks, against seizures of vehicles or other properties. We use the money to—

Mr. FRANK. Is there a surplus?

Ms. BLANTON. There has been at Treasury for the last 2 years, and that money is used for law enforcement purposes at the Treas-

ury Department. I can't speak to Justice as to whether they have had a surplus the last 2 years.

Mr. CASSELLA. We had a surplus in the past, Congressman, and there was a provision in the law—it may still be in effect—that the surplus would go to the Drug Control Policy Director's Office. For the last year—

Mr. FRANK. If I might just—you have answered enough of that. That is, one of the things I think we should do—what the State and local people do, that is a matter for State decisions, but from the standpoint of public finance, it does seem to me that this money should not be dispensed any differently than any other public money. That is, it ought to be subject to the appropriations process.

And you don't want to have an accident because of—for instance, I was a little disturbed to hear that security of the Olympics, Mr. Cassella—maybe it was Ms. Blanton—said security of the Olympics was enhanced because of seizures. See, that seems to me to be nuts.

If we are going to provide security at the Olympics, it ought to be based on an assumption of what kind of security we need, and then we pay for it. The notion we would have less security if we had had fewer seizures makes you want to have a seizure. I mean, that is no way to run a government.

Ms. BLANTON. That statement came from me. About 2 months ago or maybe less. There were more Federal law enforcement officers needed to assist with security at the Olympics. There was no other source of funding in Treasury's appropriation. We did not have any additional funds to provide those monies, and so we used some of the money—

Mr. FRANK. How much?

Ms. BLANTON. I believe it is less than \$2 million.

Mr. FRANK. OK. I think the forfeiture thing is a good thing, but I have got to be honest with you, Ms. Blanton. I think if the people who are in charge of security came to the Speaker and said, "Gee, we are a little short of money here in the greater Atlanta area for the security we need," you probably would have got it. You probably didn't need the seizure thing.

I don't think we ought to be justifying the seizures by arguing that, oh, we need it for this important Government program or that important Government program. We are talking about money taken from private citizens. If they have committed crimes and the money is gotten illegally and it could be used for departments, that is OK, that is not a basis for an appropriation, and I would disagree very much with that kind of argument because that could lead to incentives to do more than should be done, and it is also no way to run a Government.

We don't say, "Gee, this is really an important program, and if we catch enough crooks, we will be able to deal with it." I don't think that is, in fact, how it works. I mean, I think invoking Olympic security probably gives this program more credit than it needs. I believe this Congress would have voted you the money for the Olympic security without that.

Mr. CASSELLA. Congressman, just to make the record clear, the Attorney General does receive an appropriation of the money com-

ing out of the forfeiture fund through the regular appropriations process.

Mr. FRANK. I think that is the way it should be done. At the State and local level, I think it is reasonable to give them the money, and that is a decision to be made at the State level. I would argue for the same thing, but that is for them to decide.

My last point is just, I just want to be clear, on the damage and interest, are we in agreement that where you win back your property, because the Government can't meet the preponderance of the evidence, burden of proof, you are made as whole as it is possible to be made through a combination of interest on cash or damages restored?

Mr. CASSELLA. That is correct, Congressman. We have proposed that the Government be liable for interest, and we have also proposed that the Tort Claims Act be amended so that a person who feels that his property was damaged while in the custody of the Government could have—

Mr. FRANK. What about if my house is taken and I had to go live somewhere else for 2 years and pay rent? The principle ought to be, we are not making it easy for you to get the money back. If you can win in court against the Government, if they took your property inappropriately, that you were, in effect, inappropriately accused, inaccurately accused of a crime, shouldn't we make you as whole as possible?

Mr. CASSELLA. Certainly. The reason I was pausing is because, in general, we don't seize real property, but I don't want to—

Mr. FRANK. That wouldn't be a problem then if we added that?

Mr. CASSELLA. Right. I don't want to argue a hypothetical, but some other example—

Mr. FRANK. It is not hypothetical. You never seize real property? Maybe that was a State case we had.

Mr. CASSELLA. We used to, but since the Supreme Court decided a real property case in about 1993 we have a "post and walk" policy. We post the property, indicate that it is subject to forfeiture, inventory, the contents—we don't seize it.

Mr. FRANK. The people can still live there?

Mr. CASSELLA. The people live there, yes.

Mr. FRANK. OK. Thank you, Mr. Chairman.

Mr. HYDE. Well, I thank the gentleman.

I have a problem with recovery for negligence on the part of the Government to damaging the property while it is in their custody. What about a situation where they deliberately damage the property, as they did this man's sailboat? You can't say it was negligence when they took the axes to it and drilled the holes in it looking for drugs. Do we cover that situation where there is deliberate damage to the property?

Mr. CASSELLA. I don't know whether the language in either of our proposals does, but it should, and we can work to make sure it does.

Mr. HYDE. Would you give us your thinking on that? because you wouldn't—I wouldn't want the Government to escape saying, "Well, we weren't negligent."

Mr. CASSELLA. We did it on purpose.

Mr. HYDE. "We intended to destroy your property."

Ms. BLANTON. Mr. Chairman, since that occurred, Customs Service now has authority to pay in those situations and I think the issue back when that situation was occurring, was no statutory authority to pay.

Mr. FRANK. If I might say, Mr. Chairman, that grew out of a private bill which we had a few years ago, and I think we ultimately passed a statute, Mr. Gekas and I. Ultimately, we had to give them statutory authority over their objection to be able to do that.

Mr. HYDE. My recollection is in this yacht or boat case, the gentleman could not prove negligence because it wasn't negligent; they intended to do what they did.

Ms. BLANTON. They had a warrant, is my understanding, of that case. And when law agents are lawfully executing a warrant to search, so it was not considered negligence.

Mr. HYDE. True. But the problem is, warrants are issued on probable cause and rumors, and the man's boat was ready to sink when they got through it with, and nobody is to blame.

OK. Well, anyway, thank you for your contribution and your continued contribution, because we intend to work with all of you. We want you all to support the eventual product. We may have a little different approach to this, but I am sure you understand—you heard this morning's testimony. No one can be comforted by that, and we want to redress that and prevent that from happening again, without impacting negatively on criminal asset forfeiture.

We all agree—I do, I know Mr. Frank does, I assume he does, and Mr. Gekas—that it is a useful weapon, resource, in the struggle against serious crime. But these abuses have to be eliminated, the possibility of them, so that the integrity of the programs and the Government's integrity is protected. So we all are serious about that, as you are, too.

I thank you very much.

Mr. CASSELLA. Thank you, Mr. Chairman.

Ms. BLANTON. Thank you.

Mr. MCMAHON. Thank you.

Mr. HYDE. We have a final panel. Before they approach the table, we have Terrance G. Reed, who is chairperson of the RICO Forfeiture and Civil Remedies Committee, the Section on Criminal Justice of the ABA; and Mark Kappelhoff, legislative counsel for the ACLU, and E.E. (Bo) Edwards of the National Association of Criminal Defense Lawyers. But we have a bill on the floor. It is scheduled at—we go in at 12, and we are not sure at this moment how soon after 12 the bill will be called. I have to manage the bill. We are going to break.

Mr. FRANK. I have the other half, Mr. Chairman.

Mr. HYDE. You have the other.

Mr. Frank will also be there.

I hate to do this to you, but is 2 p.m. too late to resume? Will that work a hardship on any of you? We will give you time to—is that all right?

Mr. Kappelhoff.

Mr. KAPPELHOFF. Fine.

Mr. FRANK. Mr. Chairman, when you come to Congress the day is shot anyway, so I don't think there's a problem.

Mr. HYDE. All right. Good. Then the committee will stand in recess until 2 p.m.

Thank you.

[Whereupon, at 11:45 a.m., the subcommittee recessed, to reconvene at 2 p.m.]

Mr. HYDE. The Chair is advised that at least one other Member is en route and we have a quorum from this morning so the committee will come to order.

Our final panel consists of Terrance G. Reed, chairperson of the RICO Forfeiture and Civil Remedies Committee of the Section on Criminal Justice of the American Bar Association. He will be followed by Mark Kappelhoff, legislative counsel for the American Civil Liberties Union; and E.E. (Bo) Edwards, from whom we heard earlier, will testify on behalf of the National Association of Criminal Defense Lawyers.

We will commence with Mr. Reed. Thank you for your patience in waiting. I really appreciate it. I know time is something we all treasure, and unfortunately in this process it gets abused sometimes.

**STATEMENT OF TERRANCE G. REED, CHAIRPERSON, RICO, FORFEITURE, AND CIVIL REMEDIES COMMITTEE, SECTION OF CRIMINAL JUSTICE, ON BEHALF OF THE AMERICAN BAR ASSOCIATION**

Mr. REED. Thank you, Mr. Chairman. I am here on behalf of the American Bar Association and it is with great pleasure, too.

I am here today to tell this committee that the American Bar Association supports the chairman's bill, H.R. 1916. We have previously provided a statement to the committee, a written statement, and I will not go over that material again, but will summarize the ABA's position of support.

H.R. 1916 is a very important bill because it for the first time aims at protecting innocent property owners through the creation of fair judicial procedures. The ABA stands solidly in support of this worthy objective.

The ABA has been involved since 1983 in promoting various types of forfeiture reforms, and in February of this year the ABA officially endorsed a statement of principles which was enacted by the house of delegates to urge Congress to engage in a series of reforms of the forfeiture laws. The bill H.R. 1916 fits closely within the objectives of the ABA's statement of principles.

I would like to focus briefly on what may be the most important contribution of the act to the civil forfeiture law, and that is section 4, the section which deals with the standard of proof by which private property becomes confiscated and forfeited to the U.S. Government.

Currently, as the Chair is aware and as was discussed this morning, the standard of proof on the Government is hardly a standard at all. That is the probable cause standard. That has been defined as sufficient evidence and not to be more than a prime facie case. So here under the probable cause standard the Government can civilly forfeit property of private citizens for a far lesser showing than is necessary to convict someone of a crime and on a lesser



showing than is necessary to hold an individual civilly liable in such an action in torts. This is an unfair standard of proof.

The standard of proof that the Government is put to the probable cause standard, is that standard which is sufficient to justify a search. It is also that standard which is sufficient to justify an indictment, which is simply an allegation is not particularly proof of a crime.

Now it is true that the search of a home is not nearly as intrusive as the loss of a home, but that same standard is used for both in the civil forfeiture laws. If the Government can establish through hearsay that a private property owner, the home of a property owner has been in any tangential way associated with criminal activity, they lose the home, notwithstanding the fact that they are not accused of a crime themselves.

Similarly, the probable cause standard is considered sufficient in the Constitution to justify an indictment which is a mere allegation, and every day throughout this country juries are told that an indictment is not evidence of anything. It is not sufficient on its own to justify a conviction or for that matter is not even evidence of a crime. Yet this is the standard by which the Federal Government is held and it is, frankly, far too inadequate a standard.

The probable cause standard is in many ways the root problem in the civil forfeiture laws, a standard so low as to be a siren for the abuse of the civil forfeiture laws. It allows the Federal Government to seize and confiscate homes on the standard of proof necessary solely to justify searches. And as this committee is probably aware, that standard has been reduced somewhat over time.

We find courts authorizing the search of individuals and of homes based on profiles, drug courier profiles, which we heard so much about this morning. That balancing test which is done by courts is a little more understandable when the consequences of fitting a drug courier profile are that you are stopped for a discussion as to whether there is sufficient evidence to go further to detain someone. Here that standard has been held sufficient, satisfying the drug courier profile to justify losing a home. When someone spends 20 or 30 years paying off a mortgage on a house, which is something that is part of the American dream, it should not evaporate with a mere satisfaction in the eyes of a law enforcement official that that person's demeanor fits a drug courier profile.

The other aspect of why the probable cause standard is an invitation to abuse is it allows civil forfeiture of property without use of admissible evidence. Forfeiture can be justified solely based on hearsay, meaning that civil forfeitures are implemented outside of the adversary process, which is what our civil system of justice and criminal system of justice is based upon, where the party making the claim bears the burden of proof. In that respect, the bill H.R. 1916 will work a significant improvement on the current system of civil forfeiture.

There are other provisions of the act which I will not address at this time given the shortness of time, but in summary, the American Bar Association stands solidly behind the bill and would urge that this committee take swift and prompt action on it.

Mr. HYDE. Thank you very much, Mr. Reed.

[The prepared statement of Mr. Reed follows:]

PREPARED STATEMENT OF TERRANCE G. REED, CHAIRPERSON, RICO, FORFEITURE AND CIVIL REMEDIES COMMITTEE, SECTION OF CRIMINAL JUSTICE, ON BEHALF OF THE AMERICAN BAR ASSOCIATION

Mr. Chairman and Members of the Committee, the American Bar Association ("ABA") is pleased to appear before you to express our views on H.R. 1916, the "Civil Asset Forfeiture Reform Act" (the "Act"). My name is Terrance G. Reed, and I have been designated by ABA president Roberta Cooper Ramo to represent the ABA.

I am an attorney in private practice with the law firm of Reed & Hostage, P.C. in Washington, D.C., and I currently serve as the Chair of the RICO, Forfeitures, and Civil Remedies Committee of the ABA's Criminal Justice Section. I have served as the ABA's Advisor to the National Conference of Commissioners on Uniform State Laws ("NCCUSL") from 1990 to 1994, and provided the ABA's input on NCCUSL's successful effort to enact a Uniform Forfeiture Act for the states in 1994. My experience includes representation of property owners, crime victims, and criminal defendants in civil and criminal forfeiture litigation.

Although the ABA has been an advocate of forfeiture law reform for more than a decade, in February 1996 the ABA endorsed a Statement of Principles calling for specific statutory revisions, including several which are contained in H.R. 1916. A copy of this Statement of Principles is attached as Exhibit A. The ABA's adoption of forfeiture reform principles reflects the fact that a consensus has emerged within the legal profession that civil forfeiture laws, while important and useful law enforcement tools, also place considerable power in the hands of the government to take private property, and that measured laws are the best mechanism to insure that these powers are not abused.

As the Supreme Court has repeatedly admonished, "broad forfeiture provisions carry the potential for government abuse and 'can be devastating when used unjustly.'" *Libretti v. United States*, 116 S. Ct. 356, 365 (1995) (quoting *Caplin & Drysdale v. United States*, 491 U.S. 617, 634 (1989)). In summary, the ABA supports the need for civil forfeiture reforms, and it has already endorsed some of the reforms which are codified in H.R. 1916.

#### I. THE ABA ENDORSES THE CURRENT NEED FOR CIVIL FORFEITURE REFORM

In February 1996, the ABA approved a Statement of Principles governing forfeiture laws which endorses the use of the forfeiture laws, especially to confiscate the profits of crime, but also urges a number of procedural reforms, some of which are contained in H.R. 1916, which will make civil forfeitures more fair and just. In some respects, the ABA's Statement of Principles is broader than H.R. 1916, as it addresses the need for other civil forfeiture reforms, as well as reforms of the federal criminal forfeiture laws. Nonetheless, the direction and thrust of the ABA's forfeiture policies are fully consistent with the type of procedural reforms outlined in H.R. 1916, and both represent an effort to balance the utility and benefits of civil forfeiture against the harms and potential abuses which may occur under current federal law.

Hence, while the ABA has not formally endorsed every provision of H.R. 1916, it has supported the call for reform, and has urged Congress to consider remedial legislation in several of the areas covered by H.R. 1916, which will be further addressed below. Especially where, as here, many of the Act's important reforms are long overdue, this Committee should not allow the potential of comprehensive reform to delay the implementation of reforms which enjoy a broad consensus of support.

As the Committee is aware, federal and state law enforcement officials have increasingly turned to civil forfeitures as a means of combating crime. Under federal forfeiture law, however, the government need not establish that the owner of the property is a criminal. Rather, the government can civilly forfeit personal property by merely showing probable cause to believe that the property was used unlawfully by anyone. Because of this low threshold of mere "probable cause," the government can civilly forfeit private property through use of inadmissible hearsay and with evidence that would otherwise only justify an allegation of criminality, not proof of criminality. Indeed, it is estimated that approximately 80% of all property owners who lose property to civil forfeitures have not been charged with a crime. Fishman, *The Agenda Before Congress*, 39 N.Y.L.S. L. Rev. 121, 129 (1994).

The attractiveness of civil forfeitures to law enforcement officials is understandable because current federal law relieves the government of the traditional stringent burdens imposed to secure a criminal forfeiture in a criminal trial. Thus, almost by definition, the civil forfeiture laws permit the government to forfeit the property of owners who are not criminals.

Indeed, the Supreme Court recently emphasized this fact in the case of *Bennis v. Michigan*, 116 S. Ct. 994 (1996), in which the Court held that the Due Process Clause does not prohibit the forfeiture of the property of wholly innocent persons. In so holding, the Supreme Court has highlighted the essential role that Congress must now play in reforming the civil forfeiture laws so as to mitigate the harms they cause innocent citizens. When innocent citizens are the authorized subject of government confiscatory practices, Congress can fairly ask what public policy is being served by such an unjust result. More to the point, when such an unjust result is possible, Congress is appropriately concerned with insuring that the procedures and standards which govern the imposition of civil forfeitures are geared toward preventing, rather than facilitating, such an undesirable outcome. The legislative history of H.R. 1916 indicates that this is one of its objectives, and the ABA is fully in accord with this objective.

The federal civil forfeiture laws date back to the early days of our country, when civil forfeiture was a tool used against piracy and customs violations, and the procedures used to implement civil forfeitures were both limited and harsh. The decision of Congress in 1978 to extend these antiquated and narrowly targeted laws to the modern arsenal of federal law enforcement undoubtedly strengthened the hand of the government, but Congress has not yet attempted to reconcile the broad modern day role of civil forfeiture with its historically limited focus and scant procedural protections for property owners. As a result, some federal courts have voiced concern over the "government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes." *United States v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896, 905 (2nd Cir. 1992).

The provisions of H.R. 1916 offer an important first step toward restoring a balanced use of the civil forfeiture laws. In particular, Congress should abandon the probable cause standard for justifying civil forfeitures, a standard which links federal law to the inquisitorial systems of the distant past, in favor of bringing civil forfeitures into the light of the adversary system of justice, where the government can prevail only with proof, not mere allegations.

The implementation of fair civil forfeiture procedures will not only restore the necessary balance between the government and property owners essential to obtain just results, it will also help restore public confidence that the civil forfeiture laws can and will be fairly deployed to fight crime, and not merely to further fiscal interests. Public skepticism about government motives for civil forfeitures has a long history in this country, dating as far back as the celebrated defense of John Hancock's schooner *Liberty* against British forfeiture claims by Boston attorney John Adams. Especially where, under the federal forfeiture system, the Justice and Treasury Departments are the fiscal beneficiaries of civil forfeitures, the public perception of a fair forfeiture process remains important today. Indeed, the Supreme Court has noted the government's financial stake in the outcome of civil forfeiture proceedings as a reason for providing due process to property owners, *United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 502 (1993), and Congress should follow suit. The ABA recommends that Congress act now to enact such an Act.

## II. H.R. 1916 CONTAINS SEVERAL PROVISIONS ENDORSED IN PRINCIPLE BY THE ABA

The Civil Asset Reform Act is a short act, and it does not purport to address every civil forfeiture issue which has been a source of public or judicial concern. The initial section of the Act identifies its title, the final section indicates its prospective application, and the balance of the Act consists of only seven other sections. Of these seven sections, all but one section deal with procedural issues affecting the process of imposing a civil forfeiture, and all of these sections constitute efforts to make the civil forfeiture process more fair to property owners. Hence, broadly speaking, the Act is fully consistent with present ABA policy in that their mutual focus has been on improving the procedural fairness with which civil forfeiture claims are adjudicated.

The sole substantive provision of the Act is section 8 which simply clarifies the intent of Congress that the innocent owner exemption<sup>1</sup> of 21 U.S.C. 881(a) be con-

<sup>1</sup> While section 8 addresses what is commonly known as the "innocent owner" exemption or defense to civil forfeitures, in reality the exemption does not protect those "innocent of crime" in the sense that the government has failed to prove the property owner's guilt of a crime. As courts have noted, "Defenses to a [civil] forfeiture action are . . . limited, and stand in stark contrast to those available to a criminal defendant." *United States v. One 1985 Mercedes*, 917 F.2d 415, 419 (9th Cir. 1990). The innocent owner exemption merely protects from civil forfeiture those property owners who can sustain their burden of proving that they lacked knowledge

strued broadly to exempt property owners from civil forfeiture who either lack knowledge of the criminal misuse of their property or withhold consent to its unlawful use. Some courts have construed the existing civil forfeiture statutory language in that fashion, *see, e.g., United States v. One 1973 Rolls Royce*, 43 F.3d 794, 816 (3d Cir. 1994); *United States v. 141st St. Corp by Hersh*, 911 F.2d 870, 878 (2d Cir. 1990), although some courts have required property owners to prove that they lacked both knowledge of the offending use and refused consent. *See United States v. Lot 111-B*, 902 F.2d 1443, 1445 (9th Cir. 1990).

Section 8 of the Act would end any remaining judicial confusion on the matter, and would direct courts to exempt from forfeiture the property of those who did not consent to its unlawful use. This result might be justified on the grounds of promoting uniformity in statutory construction alone, but it also serves the dual purpose of affording broader protection of property owners from civil forfeiture. The ABA's Statement of Principles has endorsed more uniform statutory language covering innocent owner defenses, although the ABA has not adopted any particular policy on the proper construction of the existing language of 21 U.S.C. § 881.<sup>2</sup>

The remaining sections of the Act address procedural fairness issues. The most important section, Section 4, would squarely place the burden of proof on the government to justify a civil forfeiture by clear and convincing evidence. This proposal would be a substantial change from the status quo, as the government currently can obtain a civil forfeiture judgment by means of only establishing probable cause to believe that the property was connected with a crime—an evidentiary standard traditionally sufficient only to justify accusations, not a judgment, and one which can be established through wholly inadmissible evidence. *See, e.g., United States v. One 1986 Chevrolet Van*, 927 F.2d 38, 42 (1st Cir. 1991); *United States v. One 1987 Mercedes 560 SEL*, 919 F.2d 327, 331 (5th Cir. 1990).

The ABA has endorsed placing the burden of proof upon the government, and has supported the preponderance of the evidence standard. *See United States v. \$12,390*, 956 F.2d 801, 807 (8th Cir. 1992) (Beam, J., dissenting) (contending that current probable cause standard for civil forfeitures violates due process). The Act's adoption of the higher "clear and convincing" burden of proof is not unprecedented, however, as this standard has been endorsed by the New York legislature, and the Florida Supreme Court has interpreted Florida's constitution as mandating no less a burden of proof. *See N.Y. Civ. Prac. L & R. 1311(3)* (McKinney Supp. 1994); *Department of Law Enforcement v. Real Property*, 588 So.2d 957, 967 (Fl. 1991).

Section 3 would change the current 10 day period provided by the Supplemental Admiralty Rules for property owners to make a forfeiture relief claim to a 30 day period. This small reform will have a broad practical impact, as the current ten day period in which to file claims (or suffer their loss) is a totally inadequate period for claimants to investigate their alternatives, obtain counsel, and file a claim against the federal government. Here again, the Act attempts to improve the procedures available to aggrieved property owners so as to improve the likelihood that forfeiture issues will be resolved on their merits rather than on the basis of technicalities. The ABA has specifically urged Congress to extend the current time period for filing civil forfeiture claims, although it has not endorsed any specific longer time period.

The Act contains three other sections addressing procedural fairness issues. Section 2 amends the Federal Tort Claims Act to make clear that the federal government is financially responsible for property damages caused by the negligent handling of seized property by government officials. Section 5(b) provides that indigent property owners can obtain the services of court-appointed counsel to defend their seized property, at rates provided for indigent criminal defense counsel under the Criminal Justice Act (18 U.S.C. 3600) and taxes the cost of providing this legal representation against the Justice Department's Asset Forfeiture Fund. Finally, Section 6 of the Act would provide federal courts with the discretion to release property

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of, or failed to consent to, the criminal use of their property, regardless of whether the owner is herself guilty of any criminal conduct.

<sup>2</sup>Section 8(b) of the Act is an apparent attempt to codify and extend the "willful blindness" language of the current 21 U.S.C. 881(a)(4)(C), but then confuses matters somewhat by simultaneously defining "consent" as including the failure to take reasonable steps to prevent the proscribed use. The net result of combining these distinct limitations on the "knowledge" defense and the "consent" defense in section 8(b) is to risk a judicial interpretation that a claimant must prove both a lack of willful blindness (to establish the knowledge defense) and due diligence (to establish the consent defense) in order to qualify for any innocent owner exemption. Hence, section 8(b) could easily be used to undermine section 8(a)'s declaration that either knowledge or lack of consent justify civil forfeiture relief. This risk can be avoided by simply separating out section 8(b)'s two definitions, and make clear that the willful blindness definition applies only to the lack of knowledge exemption, and the due diligence requirement applies only to the lack of consent exemption.

seized for civil forfeiture proceedings prior to trial in order to prevent a substantial hardship to the claimant. The ABA does not currently have a formal policy addressing these types of procedural changes.

#### CONCLUSION

The ABA fully supports the need for civil forfeiture reforms, and recommends that Congress take action to make the existing civil forfeiture laws more fair and equitable to property owners. The Civil Asset Forfeiture Reform Act, H.R. 1916, is almost exclusively aimed at the area of current civil forfeiture law most in need of reform—improving the procedures by which innocent property owners are given a chance to protect their property from government confiscation. The Act's general preference for giving American property owners a fair chance to vindicate their property from government confiscation is consistent with existing ABA policy, and, accordingly, the ABA supports enactment of the Act.

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#### EXHIBIT A

#### AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION REPORT TO THE HOUSE OF DELEGATES

#### RECOMMENDATION

**RESOLVED**, That the American Bar Association urges that federal asset forfeiture laws be amended to comply with the attached "Statement of Principles on the Revision of the Federal Asset Forfeiture Laws," dated November 11, 1995.

#### STATEMENT OF PRINCIPLES ON THE REVISION OF THE FEDERAL ASSET FORFEITURE LAWS

(November 11, 1995)

1. *Uniformity and simplicity.* The statutory procedures regarding administrative, civil and criminal forfeiture are mutually inconsistent and unnecessarily complex. In revising these statutes, Congress should simplify the procedures and make them as uniform as possible.

2. *Terms used to describe what is forfeitable.* Likewise, the statutory language describing what property is subject to forfeiture should be amended to avoid use of confusing and inconsistent terms such as "proceeds," "gross receipts" and "gross proceeds" in favor of uniform, well-defined terms.

3. *Innocent owner defense.* Congress should enact a uniform innocent owner defense applicable to all civil and criminal forfeitures.

4. *Forfeiture as a law enforcement tool.* The seizure and forfeiture of the proceeds and instrumentalities of criminal acts is an important and appropriate tool of federal law enforcement. Congress should encourage the continued use of both civil and criminal forfeiture not only to deter and diminish the capacity of the criminal to commit future criminal acts, but to provide a means of restoring criminal proceeds to victims.

5. *Burden of proof.* Civil forfeiture statutes should be amended to provide that the government bears the burden of proof regarding the forfeitability of property at trial. That is, the government should be required to prove, by a preponderance of the evidence, that the crime giving rise to the forfeiture occurred, and that the property bears the required relationship to the offense.

6. *Time limits.* To enhance the ability of property owners to contest forfeiture actions, Congress should extend and make uniform the time limits for filing claims in civil and administrative forfeiture proceedings.

7. *Third party interests in criminal cases.* Congress should amend the provisions of the criminal forfeiture statutes regarding pre-trial restraining orders to provide a mechanism for addressing the interests of third parties in a timely manner that does not unduly interfere with the criminal trial.

8. *Attorneys fees.* The civil and criminal forfeiture statutes should contain a mechanism by which the court may make an early determination as to whether seized or restrained property may be made available to a criminal defendant to pay attorneys fees.

9. *Restraint of substitute assets.* If Congress provides for the pre-trial restraint of substitute assets in criminal cases, it should exempt assets needed to pay attorneys fees, other necessary cost of living expenses, and expenses of maintaining the restrained assets.

10. *Forfeiture of criminal proceeds.* No person has a right to retain the proceeds of a criminal act. Accordingly, Congress should provide for the civil and criminal forfeiture of the proceeds of all criminal offenses, and it should authorize the government to restore forfeited property to the victims of the offense. In particular, this change in the law will eliminate the risk of overuse of the money laundering statutes to forfeit proceeds and restore property.

11. *Scope of criminal forfeiture.* To avoid the necessity of filing and defending successive criminal and civil forfeiture proceedings arising out of the same course of conduct when property is held jointly by defendants and non-defendants, Congress should provide a mechanism for adjudicating the forfeitability of the non-defendants' interests in the forfeited property as part of the ancillary proceeding in criminal cases.

12. *Facilitating property.* When property used to facilitate the commission of a criminal offense is made subject to forfeiture, Congress should enact a standard defining the required nexus between property and the offense.

13. *Availability of criminal forfeiture.* Current law outside of the drug enforcement context requires the government to bring most forfeiture actions as civil actions. The statutes should be amended to give the government the option, in all instances where civil forfeiture is presently authorized, of bringing a criminal forfeiture action as part of the criminal indictment in accordance with the standard rules for criminal forfeiture.

Mr. HYDE. Mr. Kappelhoff.

**STATEMENT OF MARK J. KAPPELHOFF, LEGISLATIVE COUNSEL, ON BEHALF OF THE AMERICAN CIVIL LIBERTIES UNION**

Mr. KAPPELHOFF. Thank you, Mr. Chairman. On behalf of the American Civil Liberties Union, thank you for inviting me to share our comments with you regarding civil asset forfeiture laws and their need for reform.

Imagine for a moment, living in a society where a citizen is presumed to be guilty and innocence must be proven, where you, members of your family, and your property and possessions can be seized almost at the whim of the Government, where you can be punished before having a trial, where the punishment imposed is oftentimes in excess of the nature of the actual offense, and where you are left legally helpless because you do not have the right to an attorney and the court is under no obligation to provide you an attorney.

Surprisingly, that imaginary society actually exists. It is the United States under the civil asset forfeiture laws. Although the parade of horrors I just listed clearly violate some of the bedrock constitutional doctrines upon which our Nation was founded, under the current civil asset forfeiture laws in our country, these abuses are all too commonplace.

Mr. Chairman, it is time to end these abuses by overhauling the civil asset forfeiture system in our country and restore to the American people the fundamental rights and liberties that are enshrined in our Constitution.

I would like to take a moment to commend Chairman Hyde, for your leadership and longstanding commitment to reforming civil asset forfeiture in our country. You began this legislative journey back in 1993 with the assistance of the ACLU and NACDL. We commend your efforts to pursue the reform that is so desperately needed in this area.

I would like to take a moment and describe some of the problems with asset forfeiture and then go into the bill. It is not surprising that civil forfeiture has been especially attractive to law enforce-

ment authorities because success demands very little in the way of proof or connection to actual wrongdoing.

Civil asset forfeiture originally was championed by law enforcement officials as a powerful weapon to fight the war on drugs. Indeed, it was thought of as some form of poetic justice, seizing the assets of major drug traffickers and using these assets to fund legitimate law enforcement initiatives. However, as a result of the ease with which law enforcement authorities are able to secure forfeitures, the use and abuse of forfeiture has soared. Unfortunately in their zeal, law enforcement agencies that have turned civil forfeiture into a nightmare come true for thousands of ordinary people who have minor brushes with the law or who are completely innocent of any wrongdoing. Tragically, scores of innocent citizens and the Constitution have become casualties in this "war."

Probably the most troubling abuse in the forfeiture system regarding the victims involves the victimization of minorities through the use of racially based criteria to unlawfully and disproportionately target and stop African-American and Hispanic travelers. As you heard this morning, Willie Jones, an African-American landscaper, had the misfortune of experiencing this humiliation. He supposedly fit a so-called drug courier profile; that is, an African-American paying for a round-trip airline ticket with cash. Unfortunately, Mr. Jones's plight is not that unusual. There appears to be extensive use of racially based profiles to determine law enforcement targets.

For example, cited in your book in the case *U.S. v. Taylor*, in the Memphis Airport 75 percent of air travelers stopped were black; yet African-Americans amounted to only 4 percent of the flying public. In the Pittsburgh Press, it is reported that with the forfeiture of money and no drugs, 77 percent of those individuals involved were African-Americans, Hispanic, and Asian motorists.

Further abuse is found in what is sometimes described as law enforcement extortion. This involves the practice of offering out of court cash settlements to otherwise innocent or minimally culpable individuals whose property is seized in exchange for return of their property. Debra V. Hill's case illustrates this practice in action. She and her family were guests in a house that police raided. During the raid, the police discovered a small amount of methamphetamine in a box of clothing that did not belong to her. The police confiscated the \$550 in her possession. She was so desperate for the cash that she agreed to forfeit \$250 of this money to the prosecutor in return for the remaining \$300. When the charges against her were dropped, she did not receive the balance of her money.

A final problematic area that needs to be looked into is the lucrative business of asset forfeiture that has created a strong incentive or temptation for law enforcement officials to pursue assets at the expense of pursuing convictions. The extensive use of civil forfeiture by Federal and State law enforcement authorities has led to the confiscation of billions of dollars in drug assets.

All the money and properties seized by State and Federal officials is deposited back into the budgets of the seizing agencies. What was originally seen as a means of forcing criminals to pay for their own apprehension and legitimate law enforcement initiatives has become an incentive for local, State, and Federal officials to

seize property and then to auction justice to the highest bidder. As a result, major drug dealers are allowed to barter their way out of lengthy prison terms by prosecutors who have become intoxicated with the thought of huge sums of money to be obtained from drug forfeiture assets. Conversely, low level drug users with no assets or no information to swap are exposed to the full wrath of the harsh drug laws—mandatory minimums and nonparoleable sentences. These laws were specifically designed for the worst drug offenders. Unfortunately, they have been unleashed upon the least culpable.

Last fall, two investigative reporters from the Boston Globe uncovered the distressing truth about this practice in action in the State of Massachusetts. What they found in reviewing the major drug trafficking cases in which \$10,000 or more was forfeited, 75 percent of the drug dealers ended up charged with either lesser crimes or were allowed to plead to lower sentences. Some even received no time in jail. These statistics indicate that crime in fact may pay. All you need to do is forfeit the right amount of assets to obtain your get-out-of-jail-free card.

But, once again, it seems that the poor actually pay the greatest price under forfeiture laws with their liberty and their property.

To be sure, the abuses discussed clearly make the case for civil asset forfeiture reform. We endorse the provisions of H.R. 1916, but I would like to highlight legislation that we ask to be enacted into law.

The most important provision is shifting the burden of proof to the Government and the fact that they should prove it by a clear and convincing evidence standard. Under current law, the Government is simply required to meet its low standard of proof, probable cause that the property is subject to forfeiture.

The second aspect of H.R. 1916 is the innocent owner defense. This provision specifically provides for the protection of owners from civil forfeiture if they can show that either they had no knowledge of the criminal misuse of their property or that they consented to the illegal activity. The ACLU believes that this provision would provide additional protection for innocent property owners and ensure uniform enforcement of forfeiture laws.

The third aspect and we believe a critical aspect of the legislation is providing for the appointment of counsel for indigent defendants. This provision breathes meaningful life into the entire body of the legislation. Without it individuals are simply left helpless in a complex web of forfeiture laws. Examples this morning that we heard showed exactly why this is critical. Mr. Jones would have had no ability to obtain his assets except for Mr. Edwards' fine work and other individuals that have the same plight.

Since the civil forfeiture system can be as punitive as the criminal system, it is essential that those exposed to either system receive legal counsel to protect their rights and liberties. The ACLU believes that this provision is absolutely essential in order to ensure that individuals can avail themselves of the other reforms contained in H.R. 1916.

I am at a loss to determine why the Government opposes the right to counsel in the legislation. The Department of the Treasury mentioned today they oppose the right to counsel provision. The only common-sense proposal consistent with preserving fundamen-



tal rights and liberties is the right to counsel. It only makes the system fair and will prevent injustices. Could it be that 80 percent of these cases go uncontested and the right to counsel would make this statistic lower, or that the funding for these lawyers comes out of the proceeds that the Government has been seizing?

I would like to quote what Justice Black mentioned in *Gideon v. Wainwright*: "Any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." I believe that provision should be applicable to civil asset forfeiture.

We support H.R. 1916 and urge its adoption. Civil forfeiture as a whole stands outside the doctrines of due process and criminal procedure. Despite the widespread use and misuse of civil forfeiture, it is an arcane legal doctrine which exists merely because of its historical foundation and its fiscal advantage to law enforcement agencies.

While promoted as a civil cause of action, its ramifications are more akin to the harsh punitive aspects associated with the criminal system, without any of the important fundamental constitutional protections for civil rights and liberties. This leaves many citizens unprotected from law enforcement's overzealous and unencumbered use of these laws.

As stated earlier, the ACLU believes that all civil forfeiture schemes should be abandoned. However, we do support H.R. 1916 and other meaningful reform efforts which would mitigate the harshness of civil asset forfeiture and incorporate principles of due process.

We look forward to working with you and your staff in fashioning the appropriate legislation. Thank you.

Mr. HYDE. Thank you, Mr. Kappelhoff.

[The prepared statement of Mr. Kappelhoff follows:]

**PREPARED STATEMENT OF MARK J. KAPPELHOFF, LEGISLATIVE COUNSEL, ON BEHALF  
OF THE AMERICAN CIVIL LIBERTIES UNION**

**INTRODUCTION**

Mr. Chairman and Members of the Judiciary Committee. On behalf of the American Civil Liberties Union, thank you for inviting me to share our comments with you regarding civil asset forfeiture laws and their need for reform.

Imagine for a moment, living in a society where an individual is presumed to be guilty and innocence must be proven, where you, members of your family, and your property and possessions can be seized at the whim of the government, where you can be punished *before* even having a trial, where the punishment imposed is often times in excess of the nature of the actual offense and where you are left legally helpless because you do not have the right to an attorney, cannot afford one in any event, and the court is under no obligation to provide you an attorney.

Surprisingly, this imaginary society actually exists: it is our own – The United States of America. Although the parade of horrors that I just listed clearly violate some of the bedrock constitutional doctrines upon which our nation was founded, under the current civil asset forfeiture laws in our country, these abuses are all too commonplace. Mr. Chairman, it is time to end these abuses by overhauling the civil asset forfeiture system in our country and restore to American citizens the fundamental rights and liberties that are enshrined in our Constitution.

The ACLU believes that all civil forfeiture schemes inherently violate fundamental constitutional rights, including the right not to be deprived of property without due process of law and the right to be free from punishment that is disproportionate to the offense. While we believe

the practice of civil forfeiture should be abandoned, we support meaningful reform efforts which would mitigate its harshness and incorporate equitable provisions and principles of due process. H.R. 1916 addresses many of our concerns and takes an important first step that is long overdue. This bill would reform forfeiture proceedings to provide property owners with some significant procedural protections. It would also make it more difficult for government to confiscate the property of innocent owners – people who were not aware of, or did not consent to, any illicit activity in connection with their property. These reforms are badly needed because innocent property owners, or those who have committed only minor infractions are now subject to draconian punishments and property deprivations with rather limited constitutional or procedural protections. Because of these and other important procedural protections it provides, the ACLU endorses this legislation and urges Congress to pass the Civil Asset Forfeiture Reform Act this year.

I would like to commend Chairman Hyde for his leadership and long standing commitment to reforming civil asset forfeiture in our country. Mr. Chairman, you began this legislative journey, with the support of the American Civil Liberties Union and the National Association of Criminal Defense Lawyers, back in 1993 with the introduction of the H.R. 2417, the “Asset Forfeiture Reform Act of 1993.” You followed this up by making a powerful case for civil asset forfeiture reform in your book<sup>1</sup> in which you documented and exposed many of the abuses within the asset forfeiture system. It is now time to finish the good work you started.

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<sup>1</sup> See Henry J. Hyde, *Fortifying Your Property Rights: Is Your Property Safe From Seizure?* (1995)

### PROBLEMS WITH CIVIL ASSET FORFEITURE

The roots of civil forfeiture can be traced back to medieval England where kings used the procedure to seize the property of disloyal nobles. The American model for civil forfeiture dates back to the eighteenth-century where forfeiture laws were used to combat piracy and customs violations. Under this system, courts permitted the government to seize the offending ship as a civil remedy, rather than requiring criminal prosecution of the owners. These owners were usually not American and difficult to locate for criminal prosecution. Thus, permitting the government to proceed against the vessel under a civil forfeiture action, the government could punish an owner for a crime with minimal evidence and without any of the constitutional protections afforded a criminal defendant.

The modern era of civil asset forfeiture flows from these same archaic legal concepts. It is based on the legal fiction that inanimate objects may be found guilty and condemned. Thereby, the object or property is subject to seizure and forfeiture to the government. Pursuant to this construct, the guilt or innocence of the owner is irrelevant, because the forfeiture action is against the "object" not the "owner." In fact, no criminal arrest or conviction is even necessary to subject property to forfeiture. Government authorities must simply satisfy a requirement of probable cause that the property was used in an illicit activity or was purchased with funds from illicit activity in order to subject the property to forfeiture. As a result, civil forfeiture constitutes a dangerous, collateral weapon for law enforcement agencies where criminal convictions are more difficult to come by

The profound inequity of civil asset forfeiture system is exemplified by the distinction between criminal and civil forfeiture. Criminal forfeiture is imposed in a criminal proceeding directed against an *individual* for his or her alleged misconduct. While a defendant in a criminal

forfeiture prosecution is entitled to all the constitutional and procedural protections associated with the criminal process, a person facing civil forfeiture, on the other hand, receives none of the constitutional safeguards associated with the doctrines of due process and criminal procedure.

The irony and unfairness created under this system is worth illustrating. A major drug trafficker prosecuted under criminal forfeiture statutes is correctly afforded all of the due process and constitutional protections governing the forfeiture of their property. Whereas, an innocent 72 year old grandmother, whose grandson, without her knowledge, allegedly makes a drug sale from her front porch is subject to losing her home and possessions without the benefit of indictment, hearing, trial, or any other constitutional or procedural protection – not even the right to counsel.<sup>2</sup>

Not surprisingly, civil forfeiture has been especially attractive to law enforcement authorities because success demands very little in the way of proof or connection to actual wrong. Civil asset forfeiture originally was championed by law enforcement officials as a powerful weapon to fight the “war on drugs.” Indeed, it was thought of as some form of poetic justice: seizing the assets of major drug traffickers and using these assets to fund legitimate law enforcement initiatives. However, as a result of the ease with which law enforcement authorities are able to secure forfeitures, the use and abuse of forfeiture has skyrocketed. In some localities, it is being used against everything from drugs to drunk driving to prostitution. Unfortunately, in their zeal, law enforcement agencies have turned civil forfeiture into a nightmare come true for thousands of ordinary people who have minor brushes with the law or who are completely innocent of wrongdoing. Tragically, scores of innocent citizens and the Constitution have become casualties in this “war.”

While civil forfeiture proceedings have been held not to require the fundamental protections essential to a criminal proceeding, they are nevertheless penal. Indeed, the Supreme Court has recognized that in certain circumstances civil forfeiture may be punitive in nature and thus regulated by the Excessive Fines Clause of the Eighth Amendment.<sup>3</sup> The legal fiction that surrounds civil asset forfeiture provides no comfort for those individuals who find themselves exposed to the harsh penalties associated with the criminal system without any of the fundamental constitutional and procedural protections inherent to the criminal justice system.

### ABUSES IN CIVIL ASSET FORFEITURE: THE VICTIMS

The limited constitutional protections for individuals subjected to civil forfeiture laws coupled with unbridled, permissive law enforcement authority, creates a civil forfeiture system that is ripe for abuse. Particularly appalling is the list of cases documenting the disproportionate victimization of minorities through the use racially based criteria to unlawfully target and stop African-American and Hispanic travelers. Willie Jones, an African American landscaper, had the misfortune to experience this humiliation.<sup>4</sup> He had \$9600 in cash seized from him at the Nashville airport simply because he fit a so called "drug courier profile" – that is, an African American paying for a round-trip airline ticket with cash. He actually planned to use the money to buy landscape materials. Unfortunately, Mr. Jones' plight is not that unusual. Several investigative media reports

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<sup>2</sup> Illustration is based upon a real case documented in the statement of James Hoyle, submitted to the House Committee on Government Operations, Legislation and National Security Subcommittee, Re: The Federal Asset Forfeiture Program, September 30, 1992.

<sup>3</sup> See, e.g., *Austin v. United States*, 113 S. Ct. 2801 (1993), *Alexander v. United States*, 113 S. Ct. 2766 (1993).

<sup>4</sup> Andrew Schneider & Mary P. Flaherty, *Drug Agents Far More Likely to Stop Minorities*, Pitt. Press, Aug. 12, 1991, at A1.

have chronicled and exposed how civil forfeiture is particularly harsh on minorities as a result of the extensive use of racially based profiles to determine law enforcement targets.<sup>5</sup>

Further abuse is found in what is sometimes described as law enforcement extortion. This involves the practice of offering "out of court" cash settlements to otherwise innocent or minimally culpable individuals whose property was seized in exchange for a return of their property. Debra V. Hill's case illustrates this practice in action. She and her family were guests in a house that police raided. During the raid, the police discovered a small amount of methamphetamine in a box of clothing that did not belong to her. The police confiscated the \$550 in her possession. She was so desperate for the cash that she agreed to forfeit \$250 to the prosecutor in return for the remaining \$300. When the charges against her were dropped, she did not receive the balance of her money. And there is the case of Kevin Perry, a gravel pit laborer from Ossipee, New Hampshire. After he and his wife pleaded guilty to the misdemeanor of growing four marijuana plants, the United States sought to forfeit their mobile home, worth \$22,000. Following a fifteen-month battle to avoid homelessness, the government finally agreed to return the home for \$2500. In order to pay the \$2500, Mr. Perry had to take out a loan to be repaid at a rate of \$155.63 a month.<sup>7</sup>

Finally, the lucrative business of asset forfeiture has created a strong temptation for law enforcement officials to pursue assets at the expense of pursuing convictions. The extensive use of civil forfeiture by federal and state law enforcement authorities has led to the confiscation of billions of dollars in drug assets. All of the money and property seized by state and federal officials is

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<sup>5</sup> See, e.g., Steve Berry & Jeff Brazil, *Tanned Cash or Easy Money?*, ORLANDO SENTINEL, June 14, 1992, at A-1; *supra* note 3, see also *60 Minutes: You're Under Arrest* (CBS television broadcast, Apr. 5, 1992).

<sup>6</sup> *Oregonian*, June 20, 1990, p.D-4.

<sup>7</sup> *USA Today*, May 18, 1992, pp. 1A, 7A.

deposited back into the budgets of the seizing agencies. What originally was seen as a means of forcing criminals to pay for their own apprehension, has become an incentive for local, state and federal officials to seize property to auction justice to the highest bidder. As a result, major drug dealers are allowed to barter their way out of lengthy prison terms by prosecutors who have become preoccupied with huge sums of money to be obtained from drug forfeiture assets. Conversely, low level drug users, with no assets or information to swap, are exposed to the full wrath of the harsh drug laws, specifically designed over the past decade for the worst drug offenders. Last fall, two reporters from the *Boston Globe* uncovered the distressing truth about this practice in action in Massachusetts. They compared the distinctly different experiences of Rachel Acevedo and Stephen Fenderson. Rachel Acevedo, a 25-year-old mother of three, is currently serving a ten year mandatory sentence, without the possibility of parole. She was prosecuted along with her former boyfriend for selling four ounces of cocaine to an undercover drug officer. The boyfriend fled before trial, leaving Ms. Acevedo the lone target for the prosecutors. Stephen Fenderson, on the other hand, had his home raided by police, where they found 23 bags of cocaine, a loaded illegal shotgun, ammunition, and other drugs hidden throughout the house. All tolled, these offenses would normally subject him to a mandatory sentence of fifteen years in prison. This did not occur. Mr. Fenderson forfeited \$425,000 in drug money, and is a free man today after serving only 2 ½ years.<sup>8</sup> It seems that crime does pay if you can actually afford to pay.

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<sup>8</sup> Dick Lehr & Bruce Butterfield, *Small-Timers Get Hard Time*, THE BOSTON GLOBE, Metro p. 1 (September 24, 1995).



**REFORMING CIVIL ASSET FORFEITURE: ANALYSIS OF H.R. 1916**

To be sure, the abuses discussed above clearly make the case for civil asset forfeiture reform. The current law of civil forfeiture borders on the Medieval: it allows law enforcement authorities full discretion to confiscate any and all cash and property based upon mere suspicion of wrongdoing; owners of such money and property are not entitled to appointed legal counsel; unjust procedural barriers such as an unreasonable short time limits to contest a seizure and the requirement that a property owner post a bond in order to contest the seizure often times bar recovery; and the uncharged and completely innocent are presumed guilty in court because the burden of proof is on the individual whose property is being seized. H.R. 1916, the Civil Asset Forfeiture Reform Act represents a beginning in the reform of these civil asset forfeiture laws.

Possibly the most important provision in H.R. 1916, places the burden of proof on the government to prove that property it has seized was subject to forfeiture by clear and convincing evidence.<sup>9</sup> Under current law, the government is simply required to meet its low standard of proof – probable cause that the property is subject to forfeiture – then the burden shifts to the property owner to prove either the “properties innocence,” or that the owner did not know and did not consent to the property’s illegal use.<sup>10</sup> The government’s probable cause burden, in reality, means only slightly more than a hunch and far less than what is necessary to prove guilt in a criminal court. It is commonplace to have a seizure and forfeiture of money and property based solely on hearsay “evidence” that is deemed too unreliable to be admissible in most other judicial proceedings. These

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<sup>9</sup> This standard has been adopted in New York and Florida. See, N.Y. Civ. Prac. L. & R. Section 1311(3)(McKinney Supp. 1994), Department of Law Enforcement v. Real Property, 588 So.2d 957, 967 (Fl. 1991).

<sup>10</sup> This is commonly referred to the “innocent owner” defense which requires the owner of seized property to carry the burden of proving that she did not know and did not consent to the property’s illegal use. 21 U.S.C. Sec. 881(a).

burdens, easy on the government, hard on the property owner, often result in the seizure of property owned by one against whom the government cannot support a criminal charge. An owner can only overcome this presumption by proving that he had no knowledge of the illicit activity or did not consent to that activity. That is, the owner is required to prove a negative. H.R. 1916 corrects this unfairness by simply restoring fundamental due process for property owners by changing these unfair evidentiary rules.

Section eight of H.R. 1916 offers a clarification of the "innocent owner" defense. This provision specifically provides for the protection of owners from civil forfeiture who neither knew of the criminal misuse of their property nor consented to the illegal activity. Although under this codification, an innocent owner would still have the burden of proving his ignorance or non-consent, the ACLU believes this provision would provide additional protection for innocent property owners and insure uniform enforcement of the forfeiture laws.<sup>12</sup>

H.R. 1916 also provides for the appointment of counsel for indigents. Section five allows indigent property owners the opportunity to obtain court-appointed counsel to assist them throughout the forfeiture process. Since the civil forfeiture system can be as punitive as the criminal system, it is essential that those exposed to either system receive legal counsel to protect their rights and liberties. The ACLU believes that this provision is absolutely essential in order to insure that individuals can avail themselves of the other reforms contained in H.R. 1916 designed to protect their property rights

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<sup>11</sup> Eighty percent of the people who lost property to the Federal government were never charged with a crime "Government Seizure Victimize Innocent." *Pittsburgh Press*, August 11, 1991.

<sup>12</sup> The Supreme Court's recent confounding decision in *Bennis v. Michigan*, 116 S. Ct. 994 (1996) emphasized the importance of the innocent owner defense. Despite acknowledging that Ms. Bennis lacked any knowledge that her husband had used their jointly owned automobile to engage in criminal sexual indiscretions with a prostitute, the Court permitted the forfeiture of the automobile.

and liberties. Indeed, without the right to counsel, the other reforms have less impact on reforming the system.

The ACLU also supports the provisions in H.R. 1916 that improve the unfair procedural obstacles that make it difficult to contest forfeitures. First of all, section three of H.R. 1916 extends the deadline to contest a government forfeiture from as little as ten days to thirty days. Although we would prefer a longer period of time,<sup>13</sup> this provision improves the extremely short time period currently in effect, thus, reducing the chances that a claimant will miss the deadline for filing a claim to recover his property. In addition, the Act also eliminates the need for an owner to pay the cost of a bond in order to file a claim. The government has strictly enforced these requirements, and has permanently deprived owners of their property for any slight non-compliance with them. It also would allow for the release of confiscated property if the seizure causes a substantial hardship on the owner and a right to sue if confiscated property is damaged through governmental negligence.

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<sup>13</sup> Chairman Hyde's previous Asset Forfeiture Reform Act, H.R. 2417, provided for a sixty day time period for filing a claim. This would be a preferable time period.

**THE ACLU SUPPORTS ADDITIONAL REFORM MEASURES**

While the ACLU supports H.R. 1916 and urge its adoption, we believe additional provisions should be added to the bill that would further curtail abuses and protect the civil liberties of citizens.

Any future forfeiture reform initiatives should include the following measures:

- A person should be convicted criminally before the government may seize the property involved.
- The government should be required to conduct an adversarial preliminary hearing prior to seizure.
- The standard of proof to support a forfeiture should be beyond a reasonable doubt
- There should be a proportionality requirement that only allows for the forfeiture of property that is equal to or less than the crime.
- The property seized should be limited to the items used to facilitate the criminal enterprise.
- Asset forfeiture proceeds should be turned over to the general fund to allow for the equitable distribution of the proceeds among governmental agencies.

**CONCLUSION**

Civil forfeiture as a whole stands outside the doctrines of due process and criminal procedure. Despite the widespread use and misuse of civil forfeiture, it is an arcane legal doctrine which exists merely because of its historical foundation and its fiscal advantage to law enforcement agencies. While promoted as a civil cause of action, its ramifications are more akin to the harsh punitive aspects associated with the criminal system – without any of the important fundamental constitutional protections for civil rights and liberties. This leaves many citizens unprotected from law enforcement's overzealous and unencumbered use of these laws. The time is long overdue to reform the unfair civil asset forfeiture system. As stated earlier, the ACLU believes that all civil forfeiture schemes should be abandoned. However, we do support H.R. 1916 and other meaningful reform efforts which would mitigate the harshness of civil asset forfeiture and incorporate equitable provisions and principles of due process which strengthen the position of a claimant when faced with a prospective forfeiture. We believe that Chairman Hyde's proposal is a welcome and important first step in this direction.

We thank you Chairman Hyde for the opportunity to present our comments to your Committee today.

Mr. HYDE. Mr. Edwards.

**STATEMENT OF E.E. (BO) EDWARDS III, ESQ., ON BEHALF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS**

Mr. EDWARDS. Thank you, Mr. Chairman. It is a pleasure to be with you today and I relish the opportunity to take a nibble on the other side of the apple this afternoon.

There are a couple of comments that I would like to make, but then I would try to turn my attention to the DOJ proposal and offer you some thoughts and reactions from our side of the aisle, as it were, to what the DOJ has brought to you in the last week or so.

I think the proper way to approach forfeiture reform is to recognize that forfeiture, modern civil asset forfeiture is not fought on a level playing field. The laws and procedures as now written are structured so the Government will win. There are pitfalls, deadlines, hoops you have to jump through in order to get into court to get your case heard, let alone to prevail. So it is easier for the Government to win.

Unfortunately, that attitude has not diminished one bit. What is going on in modern forfeiture is really not only inconsistent, but it is anathema to the role, the high esteem which this country has paid to the private ownership of property since its founding, and in fact the vital role that it has always played to a democratic society.

An argument could be made that as much as we like to stand up for freedoms that are enunciated in the Bill of Rights, freedom of press, freedom of assembly and speech, et cetera, if we didn't have private property in this country we probably wouldn't be here today with the structure that we have. So I think it is vital that the fundamental tenets of private ownership of property be upheld, and they are not consistent with modern asset forfeiture.

It needs to be recognized and it needs to be said that the imposition of forfeiture in America in the 1990s has its hardest impact on the least of those among us, on the poor, on people who are not able to afford a lawyer, on the weak, people who are afraid that if they assert themselves against the government there will be re-criminations, and upon minorities.

There are people who cannot leave Austin, TX, and drive to Detroit without being stopped, and I am presuming that they observe every motor vehicle law and rule of the road that exists. They couldn't do it. Why? Because they would be stopped by a State trooper before they got out of Texas, and they certainly wouldn't make it across Arkansas. The deputy sheriffs wouldn't let people go across Arkansas without a courtesy search. They might be stopped because they were following too close, weaving a little, but they would be stopped for the purpose of searching their car to see if they have some money. If they have money, it will be taken. If they are white, it is going to be taken too, but the likelihood that they are going to be stopped if their complexion is dark is substantial.

It happens in Shelby County, TN, but it also happens in Grand Rapids, MI, for example. In the West of our country the police have

a slang expression for a particular type of highway stop. It is called "driving while Hispanic," and they make stops of Hispanic drivers, and police and lawyers in the west coast States will confirm that. They stop Hispanic drivers because they want to search the car to see if they have any drugs or money, and if it is money, they take it. Eagle County, CO, the home of Vail, CO, one of the most exclusive ski resorts in the country, has been cited by a Federal judge in Denver for stopping Hispanics routinely because they are Hispanic.

Then there is the problem that when someone who is not totally innocent does something wrong, such as committing a drug offense and loses a family car or home, spouses and children suffer as well. It seems to me our society is much better served by punishing the person who commits the crime by imprisonment than by taking property upon which his dependents depend.

Now to this piece of work that the Justice Department has sent over—I haven't thought about a movie that I saw a month or two ago channel surfing one day since I watched it until today. The thing that popped in my mind as I looked and listened this morning to the DOJ proposal was a scene from an old black and white movie starring the Marx Brothers called "A Day at the Races." There is a scene where Harpo and Groucho are standing outside of a racetrack. A debt collector comes up and demands payment. Groucho pulls a \$5 bill out of his pocket and gives it to the man. The man immediately sticks it in his pocket, and Harpo goes around and picks his pocket and slips it back to Groucho. The debt collector says, \$5 is not enough. Groucho looks through a couple of pockets, pulls out another \$5 bill and gives it to the man. The debt collector sticks it in his pocket and Harpo picks his pocket and slips it back to Groucho. This keeps going on, and finally the debt collector happily walks away believing that he has collected \$25 from Groucho and he has nothing in his pocket.

The Justice Department magnanimously says we will agree to change the burden of proof to a preponderance of the evidence on the Government, but there are a couple of presumptions of evidence we would like for you to include in your law while you are at it.

All they are doing is taking from the right hand and giving to left. Peter and Paul are going to wind up no richer or more in debt than they started. In fact, there are provisions in the DOJ proposal, it is like a supplementary appropriations bill. It has everything that any law enforcement agency could want stuck in that bill.

There is a provision called an investigative summons that would make a little star chamber out of every U.S. attorney's office in the country. Under this proposal, any AUSA who would issue a civil summons to any citizen anywhere in the country and make that citizen come to his office, it is done ex parte, the citizen would have to sit down and answer his questions. The provision includes the possibility of subpoenaing records so an AUSA could subpoena someone from a thousand miles away to come to his office and bring any record he wanted to demand that he produce.

That harkens back to the days before the founding of our Republic when things went on that were repudiated by the American

Revolution, and it is certainly reminiscent of the KGB and of similar institutions in other nations that we do not revere.

In short, the DOJ proposal is replete with every Christmas tree light the DOJ could think of, and I would suggest, and this is literally how strongly I feel about it, I would rather keep what we have on the books now than have your legitimate and laudable efforts to reform forfeiture be demeaned by passing this bill, because it is not reform at all.

Now, to be sure, there are things in this bill that are consistent and compatible with proposals that you have made, and that we agree with. The problem is that DOJ wants to bargain. They don't want to give any reform without taking some place else.

I think I should add, Stef Cassella is a friend of mine. We have appeared on panels before and I have a very high respect for him and his intellect and his integrity. But he has a client: The law enforcement community. And the proposals he has made here in many, many instances are bordering on reprehensible.

Let me respond to a couple of things that were mentioned this morning. The cost bond, there is no reason to phase out the cost bond. It should be repealed today. It should have been repealed yesterday. There shouldn't be a cost, a price of admission, to get in Federal court when it is the Government that is trying to take property that somebody already owns. It just shouldn't be.

There is a modest filing fee when I go down to the clerk of my Federal Court and file a lawsuit. It is usually depending on the type of case, 60 or 70 bucks. That is fine. That is enough. And if the Government needs some sort of reparation in extraordinary cases, if they have to dry dock a yacht or something, then I have no problem with a provision where they can go before a judge and show the judge that there is cause that there ought to be a bond. But the ordinary run-of-the-mill case, the property owner ought to be able to go into court for nothing, or for a very modest filing fee.

What I would suggest—they are concerned about frivolous claims. Well, my goodness, they are taking property from someone else that it belongs to before they got it. Let's try it for a year or two and see how it works. And then if they can come back before this committee and prove that there is a problem with frivolous claims, then I will be very happy to second Mr. Cassella in suggesting some modification of the abolition of cost bond.

This bill provides for a pretrial restraint of substitute assets. That means if the Government believes they can prove that there were some assets that were illegally obtained, but no longer available for the government to seize, after the case is over and they have won, they have the right to go after substitute assets in the hands of the property owner, but they don't want to wait.

Well, the amount of abuse replete in that proposal, I would think, is obvious. But I can tell you from my experience what will happen. They will try to seize every asset. If they have a target, they think they know somebody is engaging in criminal conduct, they will seize every asset they can find that that person owns under the guise of being substitute assets for the forfeiture that has not yet occurred and then they will wait months, maybe even years, and then indict them. And in the meantime, these people are crippled, economically I mean, and far less able to defend them-



selves and maybe, just maybe, the Government is wrong and they really aren't as bad as guys as the Government thinks they are.

There is one thing—there are a couple of things that I would urge the Chair to consider adding to your bill. One, I have discussed with Stef Cassella in the past and I don't want to represent what DOJ's response is, but I don't think he thought it was a bad idea, and that is to have a time requirement, such as 90 days—a reasonable time—after a claim is filed for the Government to go into court.

As it is now, once a property owner has filed a claim, property has been seized and a claim is filed, there is an indefinite period up to the 5-year statute of limitations that the Government has to file a complaint in a Federal court. And very often, the wait from the time the property owner files a claim to the time the Government files the case in court, so you have a court to go to, it may be months and in some cases even years.

So I would propose, or suggest, that there be a 90-day time period, after a claim is filed that the Government has to file a complaint in the Federal court and if they don't meet that, or perhaps go into Federal court and ask for an extension, I mean, sometimes you get in a bind. It happens to private lawyers. It happens to Government lawyers. Then that's fine. Let them go into Federal court, show cause why they should be given an extension, but there ought to be a time limit.

Property is often damaged and it often deteriorates, especially vehicles that are seized by the Government are invariably worthless when they are returned than they were when they were seized by the Government. Cars sit out in open weather storage lots. Boats deteriorate because the Government doesn't want to spend money to maintain them and winterize them and so forth. There should be provisions whereby property owners who establish their right to property can get it back.

Then there is one other thing that I would like to ask the committee to consider. And that is making forfeiture cases in personam cases after a claim is filed. As it stands now, when a forfeiture action is filed, it is *United States versus a parcel of land or a lot of—\$100,000 in currency* and it stays that way. And courts sometimes use the legal fiction that it is the property that has done wrong and it is the property we are punishing to avoid the application of basic fundamental rights that we accept in this country.

So my suggestion is that the committee consider, when there is a case pending in Federal court, and in rem action against property, and a claim is filed, allow the claimant to be substituted as a party for the property so the case may start off *United States v. a Parcel of Land at 101 North Main Street*, but after the owner files a claim let it be *United States v. John Brown*, owner of that parcel of land. Then it is an in personam action.

And if Mr. Brown, the property owner, has some rights, they can be protected by the Federal court and this legal fiction that really was devised at the time of the formation of the country in order to get jurisdiction—because as we discussed this morning, the little federation we formed back in 1776 couldn't hold on to those ships that were owned by the East India Co. and so on, the Dutch and

the English and the French, if they didn't grab the boat and keep it.

Well, it is fine for the Government to use that to get jurisdiction, to get into court. But consider making it an in personam case, just like all the other cases in Federal court, once a claimant files, and some of the mischief that has been done in modern Federal forfeiture will end.

And then the final thing, the one thing that would change the complexion of forfeiture more than anything else is to have forfeited property or the liquidation, the money received from liquidation of forfeited property, go into the general fund of the United States or of the State or of the local government.

If we had a bounty every time a police officer made an arrest, the people of this country would rise up in outcry. Well, what we have now is a bounty on property. And drug officers, DEA and local drug officers alike, have told me privately, you know, we used to get promoted and we used to get good writeups, good recommendations in our annual reviews by making big drug busts. It doesn't work that way anymore, Mr. Edwards. It is how much property we have seized.

If you take the financial incentive out of the priorities in law enforcement, it will change the complexion for the better of law enforcement in this country.

Mr. Chairman, thank you so much for hearing me.

[The prepared statement of Messrs. Edwards, Smith, and Troberman follows:]

**PREPARED STATEMENT OF E.E. (BO) EDWARDS III, ESQ., DAVID B. SMITH, AND RICHARD J. TROBERMAN, COCHAIRS, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS ASSET FORFEITURE ABUSE TASK FORCE, ON BEHALF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS**

**Chairman Hyde and Members of the Committee:**

The 9,000 direct and 30,000 state and local affiliated members of the National Association of Criminal Defense Lawyers are private defense lawyers, public defenders, judges and law professors. They have devoted their lives to protecting the many provisions of the Constitution and the Bill of Rights concerned with fairness in the criminal justice system. NACDL's interest in, and special qualifications for understanding the import of H.R. 1916, and the dangers of the currently unabated federal government asset seizure and forfeiture programs, are keen.

On behalf of NACDL, we thank you for inviting us to share our collective expertise on asset seizure and forfeiture programs, and for inviting one of us, E.E. Edwards, to speak on behalf of the Association at this hearing. We are also thankful that other outstanding members of NACDL will be appearing on behalf of their clients and other bar associations: Terrance G. Reed, of Washington, D.C.; and Stephen M. Komie, of Chicago, Illinois.

## **I. Background**

### **A. Summary of NACDL's Position on H.R. 1916 and the DOJ's Latest "Reform" Proposal(s)**

For several years now, the Department of Justice's (DOJ) asset forfeiture program and similar state and local programs, utilizing a broad array of new and expanded federal and state forfeiture statutes<sup>1</sup>, have provided federal, state and local law enforcement agencies with an unduly powerful weapon with which to fight the War on Drugs. And too often, the weaponry has been deployed to abuse law-abiding Americans.

The unchecked use of over-broad civil forfeiture statutes has run amok. Law enforcement agencies, in their zeal, have turned the War on Drugs into a War on the Constitution. NACDL has long had several concerns with the federal asset forfeiture program, and the resulting denigration of constitutional protections. We thus support Chairman Hyde's much-needed bill, H.R. 1916, although we think it does not go far enough to reign in over-zealous law enforcement in this area. We also think the Department of Justice's latest "reform" proposal still fails to rise to the level of a meaningful set of corrections. Attached to this statement is our analysis of the latest DOJ proposal(s) (1994 and 1996), which we regard as taking away at least as much as they would give in terms of reform. Still, there is some common ground between DOJ and NACDL on this subject, and any provisions of their proposal left un-critiqued in the attachment are unobjectionable to us. **See Attachments A and B.**

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<sup>1</sup> There are over two hundred federal civil forfeiture statutes, encompassing crimes from gambling and narcotics violations to child pornography profiteering.

**B. Criminal Forfeiture Versus Civil Forfeiture**

For purposes of this hearing, we will distinguish between civil forfeitures and criminal forfeitures. We will focus on the former.

Criminal forfeitures are part of a criminal proceeding against a defendant. The verdict of forfeiture is rendered by a court or jury only if the defendant is found guilty of the underlying crime giving rise to the forfeiture. While defendants facing criminal forfeiture have most of the constitutional safeguards afforded persons in criminal proceedings, substantial problems nevertheless persist, particularly for third party claimants who have an interest in property subject to criminal forfeiture. Moreover, in its most recent Term, the United States Supreme Court held that Federal Rule of Criminal Procedure 11(f) does not require a trial court to make a factual inquiry at the time it accepts a guilty plea to determine that there is a factual basis for a criminal forfeiture as charged in the indictment.<sup>2</sup> The Court also held in that case that criminal forfeiture is an element of the sentence imposed for violation of certain laws, and is not an element of the offense. Accordingly, the Court held that the right to a jury verdict on forfeitability of property does not fall within the Sixth Amendment's constitutional protection, but is merely statutory; and that a trial court does not have to advise a defendant of the right to a jury trial in a criminal forfeiture case at the time it accepts a guilty plea.

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<sup>2</sup> *Libretti v. U.S.*, -- U.S. --, 116 S.Ct. 356 (1995). NACDL recommends that Congress amend Rule 11(f) to require a trial judge to determine whether there is a factual basis for a criminal forfeiture included in a plea agreement. The Supreme Court in *Libretti* recognized the desirability of such a congressionally clarified requirement, but felt bound by the current text of 11(f), which was not changed after Congress enacted the criminal forfeiture statutes in 1970. This oversight should be corrected.

It is civil forfeiture law, however, which concerns us the most, due to the utter lack of constitutional safeguards and the unfair procedural advantages it affords the government at the expense of law-abiding citizens.<sup>3</sup>

### C. Civil Forfeiture in Particular

Civil forfeitures are *in rem* proceedings. The government is technically targeting the property, as, according to a "legal fiction," the inanimate property is deemed to be guilty and condemned. Because the property itself is the defendant, the guilt or innocence of the property owner is said to be irrelevant. The "use" made of the property becomes the central issue. It is the legal fiction which allows many extremely harsh and unwarranted repercussions to flow from the use of civil forfeiture statutes.<sup>4</sup>

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<sup>3</sup> The abuse of the civil forfeiture laws, and the concomitant destruction of private property rights, has been well documented in both scholarly and popular publications. See e.g., Honorable Henry J. Hyde, **Forfeiting Our Property Rights: Is Your Property Safe From Seizure?** (Cato Inst. 1995); Leonard L. Levy, **A License to Steal, The Forfeiture of Property** (Univ. of N. Car. 1996); Tamara Piety, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process*, 45 U. Miami L. Rev. 911 (1991); Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives*, 42 Hastings L.J. 1325 (1991); George Fishman, *Civil Asset Forfeiture Reform: The Agenda Before Congress*, 39 New York L.S.L.R. 121 (1994); Anthony J. Franze, *Casualties of War?: Drugs, Civil Forfeiture and the Plight of the Innocent Owner*, 70 Notre Dame L. Rev. 369 (1994); Brazil & Berry, "Tainted Cash or Easy Money?," Orlando Sentinel Tribune (June 14-15, 1992 expose); Schneider & Flaherty, "Presumed Guilty: The Law's Victims in the War on Drugs," Pittsburgh Press (Aug. 11-Sept. 6, 1991 expose).

<sup>4</sup> In a 1993 decision, the United States Supreme Court in *Austin v. U.S.*, 509 U.S. 602, all but laid to rest the legal fiction that the guilt or innocence of the property owner is irrelevant because it is the property that is the "wrongdoer" in an *in rem* forfeiture. However, during its most recent Term, the Court breathed new flames into this fiction, in *Bennis v. Michigan*, -- U.S. --, 116 S.Ct. 994 (1996); and then completely retreated from logic and fundamental fairness in *United States v. Ursery*, and *United States v. \$405,089.23 U.S. Currency*, 516 U.S. --, 116 S.Ct. -- (1996).

Civil forfeitures allow the government to impose economic sanctions on persons who are beyond the reach of the criminal law -- either because there is insufficient evidence to obtain a conviction against them; or because, while innocently supplying the material means necessary for certain criminal activity, they have broken no laws themselves.

In deciding when to seize property under these laws -- power which is largely unbridled -- law enforcement officers are influenced by provisions which often allow them to profit directly from the forfeiture. This obvious conflict of interest invites abusive practices.

Historically and traditionally, as a matter of fundamental due process, the Supreme Court has recognized the need for special scrutiny where the government stands to benefit financially from the imposition of sanctions as a result of criminal laws. As Justice Antonin Scalia has well explained:

There is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence. Imprisonment, corporal punishment and even capital punishment cost a State money; fines are a source of revenue. As we have recognized in the context of other constitutional provisions, it makes sense to scrutinize governmental action more closely when the State stands to benefit.<sup>5</sup>

The Supreme Court has also recognized that, under the forfeiture statutes, the government “has a direct pecuniary interest in the outcome of [forfeiture] proceeding[s].”<sup>6</sup> The Court put it this way:

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<sup>5</sup> *Harmelin v. Michigan*, 111 U.S. 2680, 2693 n.9 (1991) (Scalia, J., concurring) (citing cases).

<sup>6</sup> *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993).

The extent of the Government's financial stake in drug forfeiture is apparent from the 1990 memo in which the Attorney General urged United States Attorneys to increase the volume of forfeitures in order to meet the Department of Justice's annual budget target:

"We must significantly increase production to reach our budget target."

\* \* \*

"... Failure to achieve the \$470 million projection would expose the Department's forfeiture program to criticism and undermine confidence in our budget projections. Every effort must be made to increase forfeiture income during the remaining three months of [fiscal year] 1990."

Executive Office of the U.S. Attorneys, U.S. Department of Justice, 38 U.S. Attorney's Bulletin 180 (Aug. 15, 1990).<sup>7</sup>

Likewise recognizing that the practical implications of this inherent conflict, a federal district court recently explained well the unintended consequences of the current civil forfeiture statutes so in need of congressional reform:

Failure to strictly enforce the Excessive Fines Clause inevitably gives the government an incentive to investigate criminal activity in situations involving valuable property, regardless of its seriousness, but to ignore more serious criminal activity that does not provide financial gain to the government.<sup>8</sup>

Indeed, this inherent conflict of interest can and does lead to serious law enforcement problems. For example, assume that law enforcement agents receive information from an informant that a shipment of 20 kilos of cocaine, worth an estimated \$500,000, is to arrive at a stash house on Monday; that it is to be "fronted" to mid-level dealers once it arrives; and that those mid-level dealers are to deliver \$500,000 to the stash house on Friday. If the agents make the arrests on Monday, they can confiscate the cocaine. If, on the other hand, they wait until Friday to make arrests, they can seize the \$500,000, which they can forfeit for their use. Which do you think they

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<sup>7</sup> *Id.* at 502, n.2.

<sup>8</sup> *United States v. Real Property Located at 6625 Zumeriz Drive*, 845 F. Supp. 725, 735 (C.D. Cal. 1994).



will choose, the money or the cocaine? Again and again, the money is too enticing to pass up.

The incentive structure under current law is actually *debilitating* to effective law enforcement. And all too often is the root of outright abuse of entirely *innocent, but property-holding*, Americans.

**The presumption of innocence is fundamental to the American criminal justice system.** This basic tenet is compromised whenever assets are confiscated, as they are under federal and many state civil forfeiture statutes, without any proof of wrongdoing.<sup>9</sup> Under these unconscionable laws, after confiscation it is up to the person whose assets have been seized to prove that he or she, and the “suspect” property, is innocent, and thus that the Government should give the property back to the owner. This turns our precious justice system “on its head.”

Although these forfeiture laws *can*, as Congress intended, serve legitimate law enforcement purposes, they are currently susceptible to (and arguably *invite*) unwise, unjust, or unconstitutional abuse. The current forfeiture laws are being used to forfeit property of persons who have no responsibility for its criminal misuse -- for instance, as occurs with the forfeiture of currency due to cocaine “traces” found on it (a very, very large percentage of all the currency in America). This “police practice” has funneled millions of dollars into local police and federal agency coffers, with most of the seizures -- between 80% to 90% -- *never challenged*. The reason they are so rarely challenged has nothing to do with the owner’s guilt, and everything to do with the arduous path one

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<sup>9</sup> For example, the Orlando Sentinel investigation found that no charges were filed in three out of every four cases lodged by Volusia County Sheriff’s Deputies. And the Pittsburgh Press investigation found that Americans fared even worse when encountering federal law enforcement agents: **80% of the people who lost property to the federal government were never charged.**

must journey against a presumption of guilt, often without the benefit of counsel, and perhaps without any money left after the seizure with which to fight the battle. As in Witness Willie Jones' case, authorities unbridled in their handling of the current, unrestrained civil forfeiture laws routinely seize large amounts of cash at airports and roadblocks without establishing any connections to drug dealing other than the money itself (and perhaps, even more perniciously, the racial "profile" of the money-holder).

The policy of allowing the seizures of large sums of cash simply because it is currency, must be re-evaluated for comportment with sound policy as well as constitutional protections. Studies have shown that between 80% and 90% of the currency available today will test positive for some kind of drug; therefore, the practice of having drug dogs "alert" on the money is meaningless.<sup>10</sup> The frequent practice of targeting minorities in airports and along interstate highways for search and seizure<sup>11</sup> is based on nothing more than blatant racism. It is morally (and should be legally) bankrupt.

Statistics on seizures document the use of racially based "profiles" to determine law enforcement targets. Willie Jones' case is but one example. There is also the infamous, but not unique, case of Volusia County, Florida. Armed with "anything goes" asset forfeiture laws

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<sup>10</sup> See e.g., *United States v. \$639,558 U.S. Currency*, 955 F.2d 712, 714 n.2 (D.C. Cir. 1992); *United States v. \$53,082.00 U.S. Currency*, 985 F.2d 245, 250-251 n.5 (6th Cir. 1993); *United States v. \$30,060.00*, 39 F.3d 1039, 1042 (9th Cir. 1994). See also David B. Smith, *Prosecution and Defense of Forfeiture Cases* (Matthew Bender) at para. 4.03, 4-79-84.

<sup>11</sup> See "Tainted Cash or Easy Money", *Orlando Sentinel Tribune* (Jun.-Aug. 1992); "Presumed Guilty: The Law's Victims in the War on Drugs", *The Pittsburgh Press* (Aug. 11-16, 1991).

patterned after the federal statutes, Sheriff Bob Vogel's "elite drug squad" has seized well over \$8 million in the past few years from motorists exercising their constitutional right to travel peacefully along the Nation's highway system, on "I-95."

Out of 262 seizure cases, only 63 even resulted in criminal charges. Of the 199 cases in which there was no evidence to support criminal charges, 90% of the drivers were minorities. Though neither arrested nor charged with a crime, these individuals had their money seized. When confronted with the facts of his lucrative operation, Sheriff Vogel said: "What this data tells me is that the majority of money being transported for drug activity involves blacks and Hispanics."<sup>12</sup> Similarly, a 10-month Pittsburgh Press investigation of drug law seizure and forfeiture included an examination of court records on 121 "drug courier" stops where money was seized and no drugs were discovered. The Pittsburgh Press found that African-American, Latino, and Asian people accounted for 77% of the cases.<sup>13</sup>

Wherever these unrestrained asset forfeiture statutes exist, in the state or the federal system, they invite, and have borne, abuse of the Nation's citizenry. This is true, be it by state and local officers, federal agents, or some combination of the two in ever-more-frequent joint "task force" operations.

H.R. 1916 is an important first step toward ensuring that federal agents, and those with whom they work in joint task force operations, do not wreak havoc upon the People's rights in the name

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<sup>12</sup> *See id.*

<sup>13</sup> *See id.*

of "asset forfeiture" and for their own financial benefit. Moreover, many state civil asset forfeiture statutes are patterned on the federal scheme. Thus, congressional correction of the federal asset forfeiture will also provide the states with a better, more just model to follow.

D. Case Study

A prime example of forfeiture "justice" in America is the Volusia County, Florida case study. In the absence of any evidence of criminal complicity, and with the Sheriff's knowledge that the currency would have to be returned, the law enforcement agency offers "settlement" to asset forfeiture victims who seek to (or who for economic reasons, must) avoid undue delay and unnecessary legal fees.<sup>14</sup> Rather than go to court to defend seizures, the agency cuts "deals" with the drivers.

Motorists can get some of their money back if they agree not to sue the abusive agency. For example, Sheriff's Deputies seized \$19,000 from a Massachusetts paint shop owner. They returned \$14,250 and kept \$4750. They seized \$38,923 from a Miami lawn care business owner; returned \$28,923 and kept \$10,000. They seized \$31,000 from a Virginia car salesman; returned \$27,250 and kept \$3750. None of these people were charged with a crime. All were offered out-of-court settlements with no judicial supervision of the process. Indeed, Volusia County judges expressed surprise at these settlements.<sup>15</sup>

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<sup>14</sup> Note that there is no "speedy trial" right to assist a citizen in getting back her wrongfully seized property, although we strongly encourage this as an amendment to H.R. 1916.

<sup>15</sup> See authorities cited *supra* note 3.

Volusia County is just one especially well documented case study. Its fact pattern is neither anomalous nor confined to state and local authorities. If anything, the federal government's civil asset arsenal is even more ripe for abuse, more troubling, and pervasive. Federal law enforcement's jurisdictional reach, funding and equipment grows ever-more expansive and sophisticated (even militaristic).<sup>16</sup>

Although DOJ professes in its public documents to abide by the principle that "[n]o property may be seized unless the government has probable cause to believe that it is subject to forfeiture,"<sup>17</sup> the reality is very different. Federal agents routinely seize people's property based on nothing more than otherwise inadmissible "hearsay" evidence, frequently from notoriously suspect "informants" who stand to profit from production of such "tips." DOJ gives monetary rewards to individuals who "report" information leading to a forfeiture. These contingency bounties can be as much as 25% of

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<sup>16</sup> See generally e.g., James Bovard, *Lost Rights: The Destruction of American Liberty* 13 (St. Martin's 1994), chronicling the fatal case of the unfortunately property-rich, Donald Scott:

Early in the morning of October 2, 1992, a small army of thirty-one people [from several law enforcement agencies, including the federal Drug Enforcement Agency (DEA)] smashed their way into sixty-one-year-old Donald Scott's home on his 200-acre Trails' End Ranch in Malibu, California. The raiders were equipped with automatic weapons, flak jackets, and a battering ram. \* \* \* After killing Scott, the agents thoroughly searched his house and ranch but failed to find any illicit drugs [One of the claimed objectives; they then said they were looking for undocumented aliens]. Ventura County [California] district attorney Michael Bradbury investigated the raid and issued a report in 1993 that concluded that a "primary purpose of the raid was a land grab [by the agencies]."

See also Edwin Meese III & Rhett DeHart, "How Washington Subverts Your Local Sheriff," Policy Review (Jan./Feb. 1996) (explaining dangers of current over-federalization of the criminal law, with federal criminal jurisdiction now spanning over 3,000 "federal" crimes).

<sup>17</sup> U.S. Department of Justice, *Annual Report of the Department of Justice Asset Forfeiture Program 1991* (Washington, D.C.: Government Printing Office, 1992), at 7.

the forfeiture proceeds. That kind of money can buy a lot of "tips."

The DOJ's internal documents read a little different from their public ones. A September 1992 DOJ newsletter noted: "Like children in a candy shop, the law enforcement community chose all manner and method of seizing and forfeiting property, gorging themselves in an effort which soon came to resemble one designed to raise revenues."<sup>18</sup> Nevertheless, Cary Copeland, Director of the DOJ's Executive Office for Asset Forfeiture, declared at a June 1993 congressional hearing: "Asset forfeiture is still in its relative infancy as a law enforcement program."<sup>19</sup> The darling of a federal police state's nursery? And the Federal Bureau of Investigation announced in 1992 that it anticipated its total seizures of private property would increase 25% each year for the following three years.<sup>20</sup>

Most courts have recognized the problem is the law; that any real relief from asset forfeiture abuse must come from Congress, through meaningful legislative reform. For example, as the United States Court of Appeals for the Second Circuit recently put it:

We continue to be enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes."<sup>21</sup>

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<sup>18</sup> U.S. Department of Justice, "Message From the Director: 'Do the Right Thing,'" *Asset Forfeiture News* (Sept./Oct. 1992), at p. 2.

<sup>19</sup> Statement of Cary H. Copeland before the Subcommittee on Legislation and National Security, United States House of Representatives Government Operations Committee (Jun. 22, 1993), at 4.

<sup>20</sup> U.S. Department of Justice, *Annual Report of the Department of Justice Asset Forfeiture Program 1991* (Washington, D.C.: Government Printing Office, 1992), at p. 27.

<sup>21</sup> *United States v. All Assets of Statewide Auto Parts*, 971 F.2d 896, 905 (2nd Cir. 1992).

In short, an utter tide of abuse of innocent citizens is sweeping the Nation, which has led to widespread awareness that the forfeiture law must be reformed to stop the abuse. This Committee's hearing, and H.R. 1916, should go some distance toward alerting the rest of the public and the rest of the Congress to the grave reality of the current laws, and toward correcting this egregious state of "justice" in America. We encourage you Mr. Hyde, and the rest of this Honorable Committee, to forge ahead on the road to real reform of the federal asset forfeiture regime.

## II. H.R. 1916:

### **Achieves Much; Should be Strengthened to Finish the Journey to Reform**

#### A. Notice of Seizure and Cost Bond

H.R. 1916 would correct the unfairness spawned by the currently unconscionable "cost bond" requirements for access to justice. The bill would eliminate the requirement of the cost bond, and it would extend the time limits under which a person whose property is seized may file a claim after the government files a forfeiture action in court against the property.

Now, many claimants are losing their right to contest the forfeiture of their property due to procedural defaults. For example, they may lose their rights because of a failure to meet the extremely short time deadlines for filing a claim and cost bond with the seizing agency under 19 U.S.C. Sec. 1608 (20 days from the date of the first publication of the notice of seizure), and for filing a second verified claim (this one in federal district court), under "Supplemental Admiralty Rule c (6)" (10 days from the date of which the warrant of arrest *in rem* is executed).

Shockingly, the application of the Supplemental Rules allows warrantless seizures where there are no recognized exceptions to the constitutionally mandated warrant requirement. These rules are often ignored in order to comply with due process, but they nevertheless remain on the

books, ready for abuse.

When the DEA or the FBI seizes property, a claimant is required to post a bond in the amount of 10% of the value of the property to preserve the right to contest in court the forfeiture (not less than \$250, up to a maximum of \$5,000). The claimant has up to 30 days to post the bond after receipt of the notice of forfeiture. Frequently, the government seizes several items, and requires that a separate bond be posted for each item. Many people lose their property at this stage because they are unable to post the cost bond within the time limit.

This administrative forfeiture proceeding was designed to resolve uncontested forfeitures. Under this process, a post-seizure probable cause determination is waived. The property is forfeited without benefit of court intervention. The cost bond is the antiquated, perfunctory mechanism through which contested seizures are supposed to be able to proceed to judicial resolution.

However, the requirement of posting a cost bond eliminates through attrition many claims which would otherwise be contested. Adding insult to injury, the cost bond is used to pay the government's costs of litigating the forfeiture. This is an absurdly unjust arrangement -- letting the government take property away from someone without having to prove anything, then making the owner pay in advance the government's costs of trying to take it away from him permanently. Furthermore, unlike criminal cases, the bond is imposed without any independent determination of probable cause.

The cost bond would be abolished by H.R. 1916, as it should be.

#### B. Court-Appointed Counsel for Indigents

Another extremely important reform that would be accomplished by H.R. 1916 is allowance for appointment of counsel in cases in which the claimant satisfactorily demonstrates to the court



that he or she is financially unable to retain counsel to fight for the return of the seized property. The standards to be applied are the same, well-established ones applicable to the appointment of counsel for indigent criminal defendants. But the money would come directly from the Justice Assets Forfeiture Fund, so no new money would need to be budgeted for this just cause.

Contesting a forfeiture case can be an expensive proposition for one seeking the return of his or her property. Many forfeitures go uncontested due to the high cost of litigating these cases. For example, often an owner cannot economically hire counsel to defend against forfeiture of a \$10,000-\$20,000 automobile if the government is intent on proceeding to trial. Legal fees in such a case might well eat up the value of this seized property in short order.

If a property owner has no money with which to retain counsel (either because he is too poor, or because the government has rendered him indigent by taking or restraining his property), he does not have a right to appointed counsel. He must defend the action without aid of counsel.

Claimants in civil forfeiture cases are not entitled to counsel as a matter of right, because the Sixth Amendment does not apply to "civil" proceedings, including effectively punitive forfeitures. Nor are federal defenders and Criminal Justice Act "panel" lawyers authorized to represent claimants in civil forfeitures. There is not even a provision in the law to allow a person to recoup his or her fees if a costly fight is undertaken and the property is ultimately shown to have been wrongly seized. Consequently, many people lose their property simply because they cannot afford to hire a lawyer and have no idea how to battle the government through the complex statutory terrain without one.

The indigent counsel provision in H.R. 1916 at least provides the indigent person a legally trained champion in his or her fight to get a seized property back, and is a first step toward bringing fundamental due process into this legal twilight zone of asset forfeiture law.

### C. Burdens and Standards of Proof

H.R. 1916 puts the burden of proof, and sets the standard of proof, where they should be according to fundamental principles of due process. Current statutory law gives the government many unfair procedural advantages over citizens, especially as regards the burden and the standard of proof.

#### *Who Should Bear the Burden of Proof?*

H.R. 1916 rightly places the burden of proof with the government so that the government must prove its case before it can permanently deprive a citizen of his or her property.

One of the gravest problems with the current statutory framework is the burden of proof provision, at 19 U.S.C. 1615. The statute places the burden of proof on the claimant to show that the property is not subject to forfeiture. This is fundamentally unfair and constitutionally anomalous in view of the quasi-criminal character of the proceedings and the important interest at stake. It is extremely difficult to prove a negative.

For example, when the government offers testimony that an unidentified informant claims to have participated in, or witnessed, a drug transaction at a claimant's residence, the claimant bears the burden of proof that it did not occur. This turns the criminal presumption of innocence on its ear. The reversal of the normal burden of proof is unique to civil forfeiture. In all other cases, the party trying to change the *status quo* has the burden of proof, by at least "a preponderance of the evidence."

#### *What Should the Burden Be?*

In addition to placing the burden of proof with the government, H.R. 1916 also rightly ensures that the government can deprive one of property only upon proof by "clear and convincing"

evidence that the property is forfeitable. This is much less than the standard applicable in quite similar criminal proceedings, in which the punishment can likewise be the taking of one's property, but it is still better than "probable cause." At least the clear and convincing standard recognizes that deprivation of property on allegation of criminality is fundamentally akin to a criminal matter, and not a mere "civil" one.

Moreover, Congress should clarify that the evidence allowed to meet the standard of proof must be that which existed at the time of the proceeding's commencement. Evidence acquired after the fact should not be allowed to "cure" the lack of cause at the time of the government's filing for the property. After-acquired evidence should be excluded and cases lacking cause at the time of filing should be barred.<sup>22</sup>

#### D. The Need for a Meaningful Innocent Owner Defense

H.R. 1916 provides important clarification of the drug forfeiture law's innocent owner provisions.

Presently, many innocent people lose valuable property rights because of something someone else has done which was beyond their control. The system treats a criminal defendant better than an innocent third party. In criminal forfeitures brought under 21 U.S.C. 853 and the "RICO" statutes,

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<sup>22</sup> See e.g., *United States v. \$191,910.00 in U.S. Currency*, 16 F.3d 1051 (9th Cir. 1994) ("Without such a rule, government agents might be tempted to bring proceedings (and thereby seize property) on the basis of mere suspicion or even enmity and then engage in a fishing expedition to discover whether . . . cause exists.). See also *United States v. \$31,990, 982 F.2d 851, 856* (2nd Cir. 1993) ("The institution of a forfeiture can have serious effects on an owner's right to use and control his property. It should not be undertaken without a demonstrably good reason.").

the criminal defendant is entitled to many criminal procedure safeguards.<sup>23</sup> Innocent third parties in civil forfeiture proceedings should receive at least the same, and probably more rights. Instead, they are required to bear the burden of proof and overcome the government's routine use of otherwise inadmissible hearsay.

In his Annual Report of the Department of Justice Asset Forfeiture Program (1990), the Attorney General claimed:

The Department of Justice routinely grants petitions for remission or mitigation of forfeiture, primarily to innocent lienholders and innocent family members. It is the Department's policy to liberally grant such petitions as a means of avoiding harsh results.

Although this statement sounds good, it is not accurate. Experienced defense attorneys rarely file such petitions, because far from being "routinely grant[ed]," they are routinely denied.

For two centuries, 19 U.S.C. 1618, the statute governing remission, has provided for the grant of remission to petitioners who establish that they acted "without willful negligence." Historically, DOJ had granted remission based upon a showing that the petitioner was not negligent in the care and use of the property. But on August 31, 1987, DOJ issued new regulations abandoning the statutory negligence standard and requiring petitioners to meet a more stringent standard of care.<sup>24</sup>

To get relief through the remission process, a petitioner now must prove that forfeiture of his

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<sup>23</sup> However, most circuits have misinterpreted Section 853 (d)'s rebuttable presumption to mean that any property of a person convicted of a Title 21 drug felony is subject to forfeiture under section 853 if the government establishes its case by a preponderance of the evidence. Congress should clarify its intent that the standard under Section 853 is beyond a reasonable doubt.

<sup>24</sup> See 28 C.F.R. Section 9.5(b)(5)

property would violate due process, a very high threshold. This policy is not only in conflict with the report of the Attorney General. It cannot be reconciled with the negligence standard adopted by Congress in Section 1618.

Moreover, DOJ does not make remission decisions public and typically does not even explain to the petitioner its reasons for denying a petition. Remission policies and procedures are intended to function as a check on unbridled prosecutorial discretion and to avoid unfair and unjust results. As implemented under current law, remission is totally left to the discretion of the DOJ, with virtually no review or appeal of its decisions.

This lack of oversight often results in harsh, unwarranted, and arbitrary forfeiture decisions. The examples cited in the Orlando Sentinel, in the Pittsburgh Press, in Chairman Hyde's book, **Forfeiting Our Property Rights**, and in the book, **License to Steal**, all exemplify the harm to innocent citizens that results from the abuse of unbridled prosecutorial discretion.<sup>25</sup> Congress should reign in the DOJ with respect to innocent parties, and return the law to its rightful place -- as it was before DOJ issued its August 31, 1987, self-interested, self-regulation.

21 U.S.C. 881, the federal drug forfeiture statute, currently provides a defense from government forfeiture to an innocent owner of the property. Section 881 provides:

“ . . . Except that no property shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without knowledge or consent of that owner.”

The majority of federal circuits have held that an owner may avoid forfeiture by establishing either

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<sup>25</sup> See *supra* note 3.

lack of knowledge or lack of consent.<sup>26</sup> However, a minority of circuits have held that congressional use of the word “or” really means “and.” They have held that in order to prevail, an owner must establish both lack of knowledge and lack of consent.<sup>27</sup> Although these decisions have been heavily criticized, they unfortunately persist as binding authority in their respective circuits.<sup>28</sup>

The requirement of establishing both lack of knowledge and lack of consent presents a particularly harsh problem for innocent spouses. The innocent spouse may have knowledge that the other spouse is engaging in unlawful activity in the home, but does not consent to it and is indeed powerless to do anything to stop it. Battered spouses are especially hurt by the predicament. The no-win situation presented is either: (1) leave the family home; or (2) report the activity to law enforcement, perhaps risking physical danger, and at least, the arrest and prosecution of the spouse (whose financial support may well be essential to the family’s survival).<sup>29</sup>

H.R. 1916 would clarify this statute, to confirm the existence of a defense when the innocent owner can establish *either* lack of knowledge *or* lack of consent.

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<sup>26</sup> See e.g., *United States v. 6109 Grubb Road*, 886 F.2d 618, 625 (3d Cir. 1989); *United States v. 141st Street Corp.*, 911 F.2d 870, 878 (2d Cir. 1990), *cert. denied*, — U.S. —, 111 S.Ct. 1017 (1991); *United States v. One Parcel of Real Estate at 1012 Germantown Road*, 963 F.2d 1496 (11th Cir. 1992).

<sup>27</sup> See e.g., *United States v. One Parcel of Land Known as Lot III-B*, 902 F.2d 1443 (9th Cir. 1990).

<sup>28</sup> And in its most recent Term, the Supreme Court expressly held that in the absence of an “innocent owner” statutory provision, due process is not offended by deployment of the “guilty property” fiction to the property of an actually innocent owner. *Bennis v. Michigan*, — U.S. —, 116 S.Ct. 994 (1996). Clearly, Congress must act.

<sup>29</sup> Such a “choice” also arguably infringes upon the concept of spousal privilege.

### E. Contested Property Possession Reforms

H.R. 1916 would reform the law to ensure that contested property is not abused or destroyed by the government during the time it holds it. The bill provides for cases in which the government's holding of the property under dispute would create a substantial hardship on the person from whom the government seeks to permanently deprive the person of her property.

#### *Victim's Right to Restitution for Wrongful Destruction of Property by the Government*

H.R. 1916 would make an important, narrow amendment to the federal Tort Claims Act, to allow an action for damages against the government should it wrongfully, intentionally, or negligently destroy the individual's property while it holds it in seizure.

The federal government now does an inadequate job of maintaining seized property. And currently, innocent owners have no recourse if their property is damaged or otherwise allowed to deteriorate in value while in the custody of the government.

The government often takes two years or more after seizure to bring a forfeiture case to trial. By the time a case is resolved, the asset has often depreciated to a fraction of its seized value.

When the government wins, the depreciated asset is auctioned off for a fraction of its seized value and innocent lienholders often lose part of their equity. If the owner wins the forfeiture case, it is a pyrrhic victory -- and an absolute travesty to the citizen who has been forced to spend money and time fighting the forfeiture case. The government raises its undeserved shield of sovereign immunity as a defense to any claims for depreciation and property damage. Therefore, even when the government cannot prove its case, the owner often still loses.

The United States should be liable for the loss of value and loss of use of any property it seizes if the claimant prevails, regardless of whether the government's care of the property was

negligent. This should certainly be the case when a court later determines that the seizure was illegal. Yet, under current law, it is unclear whether a claimant has a right of action against the government for losses occasioned by an illegal seizure and wrongful handling of property. H.R. 1916 would clarify the law.

*Substantial Hardship Temporary Relief Provision*

H.R. 1916 recognizes that often a seizure can deprive someone of their very home or livelihood before the property is returned to its rightful, private owner through the arduous asset forfeiture procedures. Accordingly, the bill provides for the temporary release of property where a claimant can demonstrate that a substantial hardship will result if property is not released during pendency of the action.

For example, where the government seizes a truck belonging to a trucker, the trucker is effectively out of business during the time it takes to resolve the forfeiture (which unfortunately, can take years, at least absent a "speedy trial"-type reform). Even if the claimant ultimately prevails, by the time he gets his truck back (even assuming it is in the same, undamaged shape it was in before the government took it), he could be out of business. H.R. 1916 would allow the trucker to continue using his truck, *under conditions imposed by the court (to safeguard the truck)*, while the action is pending and unless and until the government proves it is entitled to permanently deprive him of the truck. Meanwhile, the trucker, still employed, could continue contributing to the economy and the tax system. Other cases that come to mind in which this provision might prove essential are cases involving one's only place of residence; or a business, which, if seized, might put not only the proprietor, but all of his or her employees, out of work.



### III. Other Reform Suggestions

#### A. Governmental Use of Hearsay Must be Curbed

One of the most egregious problems in this area is the government's ability to meet its probable cause showing through the use of hearsay. Congress needs to curb this practice.

The courts allow the government to meet its threshold, probable cause showing, through otherwise inadmissible hearsay testimony.<sup>30</sup> But the cases offer virtually no discussion or rationale for their holdings. They seem to reflect nothing but a judicial tradition from an inapt context: the allowance of hearsay to establish probable cause for arrest and search warrants. The judicial analogy to cases allowing hearsay to support the issuance of warrants fails, because with regard to warrants other safeguards are in place. For instance, the government has the highest burden of proof in criminal cases spawned by the issuance of warrants. Whereas, in civil forfeiture proceedings, the government has no burden of proof at all once probable cause is satisfied.

If H.R. 1916 is passed, the burden of proof will rest with the government and the hearsay problem will no longer exist. But in the absence of H.R. 1916, Congress should immediately clarify that, subject to the Rules of Evidence, hearsay is not admissible by the government to establish probable cause to forfeit property. One way or another, Congress should forbid the use of hearsay to establish cause for forfeiture.

Rule 1101 of the Federal Rules of Evidence provides that the rules "apply generally to civil actions and proceedings including admiralty and maritime cases. . . .". Rule 1101(d) exempts the

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<sup>30</sup> See e.g., *United States v. \$91,960.00*, 897 F.2d 1457, 1462 (8th Cir. 1990). But see *United States v. One Pontiac Sedan*, 194 F.2d 756, 760 (7th Cir.), cert. denied, 343 U.S. 966 (1952).

issuance of search and arrest warrants from the scope of the Rules. Significantly, Rule 1101(e) provides that, absent statutory provisions to the contrary, the Rules apply to a list of enumerated proceedings, including “actions for fines, penalties, or forfeitures” under 19 U.S.C. 1581-1624.<sup>31</sup>

**B. Need for Statutory Time Limits on the Government: Speedy Trial Act for Forfeiture Cases**

H.R. 1916 should be strengthened to place time limits on the government’s ability to hold property without moving the process along for resolution of the contested possession.

Under the present forfeiture scheme, there are inadequate statutory deadlines placed on the government to keep the process moving. For example, except in the case of conveyances seized for violation of the drug laws, there is no time limit within which the seizing agency must give notice to the owner of the property, of the government’s intention to seek forfeiture of the property.

*Notice*

On January 15, 1993, Deputy Attorney General Cary Copeland, Director and Chief Counsel of the Executive Office for Asset Forfeiture, issued Directive 93-4, which recognizes that “a fundamental aspect of due process in any forfeiture proceeding is that notice be given as soon as practicable to apprise interested persons of the pendency of the action and afford them an opportunity to be heard.”

Directive 93-4 orders that written notice to owners and other interested parties (property stakeholders) known at the time of the seizure “shall occur not later than sixty (60) days from the date of the seizure.” It further provides that “where a reasonable effort of notice has not been made

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<sup>31</sup> Judge Beam of the Eighth Circuit has written persuasively that due process is offended by the permitting the government to forfeit a person’s property on the basis of the notoriously unreliable basis of hearsay. See *United States v. \$12,390.00*, 956 F.2d 801, 812 (8th Cir. 1992) (Beam, J., dissenting).

within the 60-day period and no waiver has been obtained, the seized property must be returned and the forfeiture proceeding terminated." This policy became effective March 1, 1993. Of course, this is merely a matter of DOJ policy, and not law, and thus a claimant does not enjoy standing to enforce it in court, or to contest a seizure based on a dilatory government practice with regard to the notice.

Directive 93-4 should become law, not just policy, through an amendment to H.R. 1916.

#### *Government Commencement of Proceedings*

A second, related matter, has also created problems for owners of seized property. There is no time limit governing the government's initiation of suit in federal court after receiving notice of an owner's claim and cost bond. Indeed, although the law requires that a property owner must file a claim and cost bond within 20 days of the date of first publication, there is no similar deadline placed on the government for commencing a judicial forfeiture action in district court.

Governmental delay in filing an action after receipt of a claim creates a severe hardship for property owners and other stakeholders in the property (e.g., investors). Not only does delay deprive owners the use of their property for an indefinite period of time, but it also puts them in the untenable position of having to either (1) continue making payments on the seized property, thereby possibly providing a windfall to the government and creating additional loss for themselves should the government prevail, or (2) risk destroying their credit. This Hobson's Choice can result in a substantial loss to the property owner and other stakeholders.

One has virtually no remedy in this situation. Most courts have held that once the government serves Notice of Seizure and Intended Forfeiture, the court is divested of jurisdiction

under the Rules of Criminal Procedure.<sup>32</sup>

In the interests of justice, and in the interest of the economy, Congress should require the government to commence an action for forfeiture in district court within 60 days of receipt of the notice of claim. This time frame is already in effect in forfeitures involving seized conveyances under 21 U.S.C. 888.<sup>33</sup> This provision should simply be extended to all forfeitures. By giving the seizing agency 60 days to file a Notice of Intent to Forfeit, and another 60 days to file the action once a claim is received, the government would still have a total of at least 120 days from the date of seizure in which to initiate action in district court.

### C. Need for a Substantial Nexus Requirement

Federal forfeiture statutes do not explicitly require that there be a substantial nexus between the alleged unlawful activity and the property seized. They should. Although the legislative history certainly suggests such a requirement, the courts are unfortunately split as to whether there need be such a substantial nexus and what it means.<sup>34</sup>

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<sup>32</sup> See e.g., *Shaw v. United States*, 891 F.2d 602 (6th Cir. 1989); *United States v. Elais*, 921 F.2d 870 (9th Cir. 1990); *United States v. U.S. Currency*, 851 F.2d 1231 (9th Cir. 1988); *United States v. Castro*, 883 F.2d 1018 (11th Cir. 1989); *United States v. Price*, 914 F.2d 1507 (D.C. Cir. 1990).

<sup>33</sup> See 21 U.S.C. 888(c).

<sup>34</sup> The Senate Report accompanying the amendment adding subsection (a)(7) to 21 U.S.C. 881 noted that the proposed amendment adding real property to the categories of property that could be forfeited would lead to the seizure and forfeiture of property "indispensable to the commission of a crime." S. Rep. No. 225, 98th Cong. 1st Sess. 195, reprinted in 1984 U.S.C.C.A.N. 3182, 3378. The Senate Report explained Congress' motivation in passing 21 U.S.C. 881 (a)(7) as follows:

Under current law, if a person uses a boat or a car to transport narcotics or uses equipment to manufacture dangerous drugs, his use of the property renders it subject to civil forfeiture. But if he uses a secluded barn to store tons of marijuana, or uses his

Absent explicit statutory guidance to the contrary, the courts have expanded the situations in which real property can be forfeited; in many cases, doing away with the requirement that there be a substantial connection to alleged criminality. In one of the most egregious cases, the court affirmed the forfeiture of a residence based on two telephone calls made *from the informant* to the homeowner at the residence, during which the sale of cocaine was said to have been negotiated.<sup>35</sup> This is all the evidence the government had, but it was deemed enough to allow a forfeiture of the residence. No drugs were ever stored at the residence and no sales took place there.

Congress could not have intended such an unfair result. Congress should modify the statute to require that a court must find that a substantial connection exists between the alleged unlawful activity and the property desired by the government before the property can be lawfully forfeited. Congress should also give some examples in the legislative history, in order to guide courts as to what "substantial nexus" means under this congressional revision. H.R. 1916 should be amended to provide this explicit statutory clarification on the need for a substantial connection nexus.

#### D. Economic Conflict of Interest Must Be Eliminated

The incentive scheme for law enforcement's direct profiteering from the forfeiture statutes must be addressed. H.R. 1916 should be amended to address this core problem with the current forfeiture laws.

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house as a manufacturing laboratory for methamphetamine, there is no provision to subject his real property to civil forfeiture even though its use was indispensable to the commission of a major drug offense and the prospect of forfeiture of the property would have been a powerful deterrent.  
(emphasis added here)

<sup>35</sup> **United States v. One Parcel of Real Estate Commonly Known as 916 Douglas Avenue**, 903 F.2d 490 (7th Cir. 1990), *cert. denied*, 111 S.Ct. 1090 (1991).

We can no longer ignore the conflicts of interest and policy problems which arise when law enforcement and prosecutorial agencies reap financial bounty from the forfeiture decisions they make. Decisions regarding whose property to seize, and how to deal with citizens whose property has been seized is too often dictated by the profit the agencies stand to realize from the seizures.

State and local law enforcement agencies frequently work with federal agencies on forfeiture cases and share the proceeds of the forfeiture. This procedure thwarts state law, which may require forfeited assets to be deposited into the general treasury. It also allows states to take advantage of broader federal statutes. The types of cases the state and local agencies choose to pursue together are often influenced by the state's knowledge that the federal government will share the proceeds from the forfeited assets they acquire together. The federal government's participation in this preemption of state priorities should be eliminated by Congress.

In short, the inherent conflict of interest and unbridled discretion sanctioned by the current forfeiture law invites abuse. The opportunities for abuse are legion. For example, local police may cut deals with federal agencies to target individuals whose assets can best benefit both agencies. Joint forfeitures allow local police and federal agencies to avoid state statutory and constitutional law. Law enforcement officers and prosecutors have come to rely on forfeitures as sources of extra revenue. Congress should especially investigate the conflict of interest created when prosecutors and law enforcement agencies set quotas for forfeited assets and use the money to create additional positions and buy "informants" (to help generate still more forfeitures, for still more revenue).

#### **IV. Recap: Congress Must Act to Reform the Abusive Asset Forfeiture Laws**

In August of 1991, NACDL's Board of Directors adopted the following resolution regarding asset forfeiture:

**It is the policy of the National Association of Criminal Defense Lawyers that the seizure of a person's assets by the government should be treated in exactly the same way as the seizure of a person, and all the protection afforded by the Bill of Rights should apply.**

Several basic safeguards should be incorporated into all forfeiture schemes, especially the federal one, after which so many states pattern their own:

➤ The burden of proving that forfeiture law applies should always be on the government just as it is in criminal prosecutions. The degree of proof required should be proof beyond a reasonable doubt. At the very least, it must be higher than the current mere probable cause standard.

➤ Hearsay should not be allowed in the government's case.

➤ In the absence of exigent circumstances, the government should be required to justify a seizure of property to a court before, not after, the seizure is made.

➤ The cost bond should be eliminated.

➤ Post-seizure probable cause determinations on demand should be instituted.

➤ Deadlines for property owners to comply with procedural requirements should be longer.

➤ The government should be required to promptly notify owners of the government's intent to forfeit property, and should be required to promptly commence a judicial forfeiture proceeding upon receipt of a claim -- in a manner similar to the requirement under the Speedy Trial Act.

➤ Provision should be made for the temporary release of seized property to the owner, where the claimant can demonstrate to a court that a substantial hardship will result if the property is not

so released during the pendency of the action.

➤ Forfeiture laws should recognize that innocent people often incur huge expenses in defending their property against wrongful seizure. Forfeiture laws should include an "early exit" innocent owner provision. This would allow a case to be dismissed when an innocent party shows that he has an ownership interest in the property, and the government has no proof that the person was involvement in the alleged criminal conduct.

➤ Forfeiture of real property should always require that there be a substantial nexus between the alleged unlawful activity and the property seized.

➤ Congress must acknowledge that forfeiture is a quasi-criminal action. Most people do not realize that, under current laws, a citizen can be found not guilty (indeed, may not even be charged with a crime), and nevertheless have her property taken by the government.

➤The United States government should be liable for the loss of use, and any deterioration of an asset in cases where the claimant prevails.

H.R. 1916 incorporates many of these essential safeguards, and NACDL supports the effort reflected in the bill.

#### **V. Conclusion**

We look forward to working with you, Chairman Hyde, and with the Committee, to achieve meaningful reform through H.R. 1916. We thank you again for affording us this opportunity to participate in this hearing on the need for civil asset forfeiture reform.



ATTACHMENT A

**NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS  
FORFEITURE ABUSE TASK FORCE  
SECTION BY SECTION ANALYSIS OF  
THE DEPARTMENT OF JUSTICE'S PROPOSED FORFEITURE ACT OF 1996**

**Section 101.**

**Time for Filing Claim; Waiver of Cost Bond.**

Claimants should not be required to set forth "how and when" their ownership interest was acquired. In a proceeds case this would often be very burdensome. Claimant may have to explain how and when he acquired dozens of items of property. He shouldn't have to do this even before a complaint is filed when he may not have counsel or counsel has just been retained.

The cost bond requirement should be completely eliminated or at least greatly reduced. The cost of hiring an attorney is sufficient incentive not to pursue frivolous claims.

**Section 103.**

**Judicial Review of Administrative Forfeitures.**

19 U.S.C. 1609(d) should allow claimants to proceed under Fed. R. Crim. P. 41(e) as well as by filing a separate civil action. Many or most claimants in this situation are proceeding *pro se* and are incapable of filing a civil suit.

The claimant should have to establish that he had "no other *actual* notice of the forfeiture proceeding within the period for filing a claim." He will always have constructive notice through publication but that is constitutionally insufficient where the agency could have given him personal notice but fails to.

The claimant should not have to establish that the seizing agency failed to comply with the notice requirements of 19 U.S.C. 1607. That section merely requires the agency to send written notice to each party who appears to have an interest in the seized property. Virtually all of the reported notice cases finding a due process violation deal with the situation where the agency technically complies with §1607 but makes no effort to actually get the notice letter to the property owner once the letter is returned to the agency by the postal service as undelivered. 19 U.S.C. 1609(d) should require the claimant to establish that

the seizing agency failed to take reasonable steps to locate and serve him with written notice and that he had no other *actual* notice of the forfeiture proceeding within the period for filing a claim.

**Section 105.**

**Preservation of Arrested Real Property.**

This seems to be an attempt to nullify much of the United States Supreme Court's Good decision. The point of Good is that the government can't interfere in this way with the owner's right to use his property without going through an adversary hearing. The government has said that Good has not been a problem. Why then does it need this?

**Section 108.**

**Prejudgment Interest.**

United States shouldn't be allowed to use seized cash to reduce its borrowing needs and then refuse to disgorge that benefit if it loses the case. This provision should codify the holding in United States v. \$277,000 U.S. Currency, 69 F.3d 1491 (9th Cir. 1995).

**Section 121.**

This section is an attempt to codify a lot of case law. In our view, much of that effort is unnecessary.

**Complaint.**

There should be a statutory provision barring the pursuit of a second *forfeiture* action simultaneously or successively. If the burden of proof is going to be preponderance in both cases what purpose is served by the pursuit of two forfeiture actions and how can it be justified?

**Time for Filing Complaint.**

This is the place to include a 90 day time limit for filing the complaint -- after claim and bond are filed. Time can be extended for good cause shown before 90 day period expires.

**Claim and Answer.**

We object to requiring the claimant to set forth in his claim facts supporting his standing. It's too burdensome and will give the government cheap victories where the claimant inadvertently fails to comply. In most cases standing isn't an issue. Where it is, the government can readily obtain the same facts and more thorough discovery filed with the Complaint.

**Standing.**

We also object to the provision making the court the sole arbiter of the facts relating to standing questions. That would diminish the right to trial by jury.

**Burden of Proof.**

Burden of proof provision is ok, but let's give the courts some guidance on what a "substantial connection" is -- at least by way of legislative history. Congress needs to clarify that making (let alone receiving from some notoriously suspect informant) some telephone calls from a house isn't a substantial connection, for example.

**Affirmative Defenses.**

If this provision is enacted the government will argue that a claimant has waived any defense not set forth in the answer. Civil forfeiture procedure already contains numerous traps for the unwary, ill-equipped, or ill-counseled claimant. There is no reason to create another one. Many claimants are forced to represent themselves for lack of funds. Even claimants represented by counsel usually have attorneys who know little if anything about the complex civil forfeiture law. At the time an answer must be filed they are often unaware of potential defenses to forfeiture.

**Use of Hearsay at Pretrial Hearings.**

We don't have a problem with the use of *reliable* hearsay at pretrial proceedings but there should be no hard and fast rule protecting the identity of the CI. If the government is seeking summary judgment based on a CI's statement, the owner should have the right to

impeach the CI, and to take his deposition. Moreover, the government clearly can't use *otherwise inadmissible hearsay at all* on a motion for summary judgment -- by the terms of Rule 56(e). Congress needs to make it clear. What sort of pre-trial hearings are contemplated here anyway?

**Adverse Inferences.**

There's no way we can agree to the adverse inference provision. As this is a constitutional question, it also seems inappropriate to try to address it in the statute.

**Preservation of Property Subject to Forfeiture.**

Why is it necessary to give the court power to enter restraining orders, create receiverships, etc., if property is under seizure? If it is realty, then James Good prevents the court from doing these things without a Good hearing.

**Release of Property to Pay Criminal Defense Costs.**

We have only one problem with this part of the draft -- the court is prohibited from considering any affirmative defenses at the hearing. Why should that be? Good allows affirmative defenses to be considered even at a pre-seizure hearing, which is *earlier* in time.

**Excessive Fines.**

No problem except for the timing. Why must claimant wait until the conclusion of the trial? There aren't many cases that go to trial. Usually a claimant would raise an excessiveness issue in his opposition to the government's motion for summary judgment or in a cross-motion for summary judgment.

**Applicability.**

Not applying these provisions to forfeitures under the customs laws is a major drawback. Couldn't they get Treasury on board?

### **Rebuttable Presumptions.**

Major problems with this provision. We don't see why the government needs these presumptions to prove its cases and the presumptions would allow it to seize and forfeit huge sums of money that is "clean." The presumptions appear to allow the government to dispense with any showing that the elements of §1956 or §1957 are proven!

As a practical matter, only the government has access to proof of whether the foreign country's bank secrecy laws have rendered the United States unable to obtain records relating to the transaction by judicial process, treaty or executive agreement. The courts would have to take the government's word for it.

If the country where the transaction takes place or was intended to take place satisfies both subparagraph A and subparagraph B, then the government would forfeit the money without more! This is mind-boggling.

We have a simpler proposal. Why not just make it illegal to transfer any money -- clean or dirty -- to specified bank secrecy countries. Any money transferred in violation of the law would be subject to forfeiture. That would take care of the offshore tax havens.

### **Section 122.**

#### **Time for Filing Claim and Answer.**

How is "actual notice of the execution of the process" to be provided to claimants? Right now there's no way to find out when process was executed except by periodically checking the file in the Clerk's Office to see when the deputy marshal's return was filed. Process is often executed *after* the receipt of the complaint.

### **Section 123.**

#### **Uniform Innocent Owner Defense.**

The exclusion of customs cases from this provision is objectionable. The forfeiture statutes without innocent owner provisions are mainly customs statutes in title 19 and 31, so this does not really deal with the problem.

From our point of view, the DOJ proposal for the uniform innocent owner defense is a step backward, because it reduces the protections for innocent owners that are currently

found in the CSA, the INA and the Money Laundering Act. We prefer to keep the actual knowledge/willful blindness standard in current law. See NACDL's detailed critique of the same provision in DOJ's draft Forfeiture Act of 1994. Attachment B.

The government's proposal would severely limit the innocent owner defense for those who acquire a property interest after the act giving rise to the forfeiture. Only BFPs who "did all that reasonably could be expected to ensure that the purchaser was not acquiring property that was subject to forfeiture" would qualify for relief. Innocent donees and heirs, who are presently protected, would be out of luck, no matter what their equities were. The innocent homemaker would lose everything she has. The government's proposal would also abolish defenses based on state property law. The innocent homemaker with a community property interest in the forfeitable property would get nothing.

Proposed 18 U.S.C. 983(c) significantly alters current law with respect to standing. Currently bailees and beneficiaries of constructive trusts have standing to contest the forfeiture. The proposed §983(c) specifically denies those potential claimants standing. We see no reason for this. The courts have imposed standing requirements on bailees designed to thwart money couriers from hiding the identity of the bailor. That is enough.

Proposed 983(d) would require the courts to enter orders severing tenancies by the entireties and joint tenancies and transferring the property to the government for sale, or converting joint tenancies and tenancy by the entireties property to a tenancy in common, irrespective of state law. The innocent homemaker would lose all interest in her home if it was purchased with drug money because she wouldn't qualify as a BFP.

How about this scenario?: Mr. Jones uses his home, bought with clean money, to facilitate a drug transaction thereby making it subject to forfeiture. Thereafter, Jones meets and marries innocent young woman who becomes owner of home by the entireties with husband. Later, government seizes home for forfeiture. Innocent Mrs. Jones loses the roof over her head because she isn't a BFP. She is thrown out in the street with her young children.

#### **Section 124.**

##### **Stay of Civil Forfeiture Case.**

The proposed change to 21 U.S.C. 881(I) would make it too easy for the government to obtain a stay of the civil forfeiture case and remove the district court's discretion in the granting of stays. Case law requires the government to make a specific showing of the harm

it will suffer without a stay and why other methods of protecting its interest are insufficient. See e.g., In re Ramu Corp., 903 F.2d 312, 320 (5th Cir. 1990). The language in the proposed bill would require the court to grant a stay if it determines that civil discovery or trial could possibly have an adverse affect on a related criminal investigation or prosecution. That would almost always be the case.

We approve of proposed §881(I)(2), which allows the claimant to seek a stay. (He already can under the case law.) We would clarify the language, however. Claimant ought to be able to get a stay when, in order to effectively defend the civil forfeiture case, claimant must testify and thereby risk self-incrimination. The courts have held that placing the claimant in that difficult situation does *not* violate the fifth amendment privilege, however. So the proposed language (“infringe upon the claimant’s right against self-incrimination”) doesn’t accomplish what DOJ’s Stef Cassella apparently thinks it does.

Proposed §881(I)(5) would allow the government to make *all* its requests for stays *ex parte* and under seal. This is obviously unacceptable. It would effectively prevent the claimant from challenging or rebutting the prosecutor’s arguments in favor of a stay.

#### Section 125.

##### Parallel Civil and Criminal Cases.

This provision doesn’t specifically authorize the civil forfeiture and the criminal case to be joined for trial. Isn’t that what the government wants to allow? It might be a good idea. Suggestion: where the two cases are joined for trial, allow the judge to appoint the same CJA counsel to handle both matters, at least at the trial stage. That would prevent the defendant from prejudicing his criminal case by being forced to appear *pro se* in the civil forfeiture case tried by the same jury.

#### Section 131.

##### Seizure Warrant Requirement.

Proposed 18 U.S.C. §981(b)(3) greatly increases the government’s flexibility in deciding where to seek a seizure warrant but restricts claimants to the district where the warrant was issued if they want to file a motion for return of seized property. This isn’t fair. The government has U.S. Attorneys and agents in every district. It would be allowed to choose the district most favorable to itself and make the claimant litigate any motion for return of seized property in that district, however inconvenient and expensive for the

claimant. 21 U.S.C. 881(b) would be amended to conform to the new §981(b).

Where a person is arrested or charged in a foreign country, the government could apply under §981(b)(5) to *any* federal judge or magistrate in the United States for an *ex parte* order restraining property subject to forfeiture in the United States for up to 30 days, which period could be extended for good cause shown. This provision invites completely unrestricted judge shopping. The government will go to judges or magistrates who it knows will rubber stamp their requests.

The government should be required to apply to a judge or magistrate in the district where the defendant's property is found. The provision is also objectionable because it provides no mechanism for the owner to be heard at any time. Through successive extensions of the original order a defendant's property can be frozen for a lengthy period of time without giving him any opportunity to be heard.

Finally, this provision would allow the government to freeze property without any showing -- even an *ex parte* showing -- that there is probable cause to believe the property is subject to forfeiture. This is very likely unconstitutional.

#### **Section 132.**

##### **Civil Investigative Demands.**

This provision is unacceptable for the reasons stated in our critique of the draft Forfeiture Act of 1994, which was never submitted to Congress. It's a terrible idea. See **Attachment B.**

#### **Section 135.**

##### **Currency Forfeitures.**

Proposed 21 U.S.C. §881(m) would create a rebuttable presumption that seized currency is forfeitable drug money in two circumstances. Neither circumstance justifies the presumption. For the reasons explained in David Smith's book (and even in the DEA's own forfeiture manual), the close proximity of personal use quantities of drugs proves little or nothing. The presumption would allow agents to seize any marijuana user's cash or pocket change, thereby inviting abuse.



The second set of circumstances is more reasonable but still no cigar. Even under the current probable cause standard, case law holds that the mere fact that a traveler offers a false explanation for his possession of the currency isn't enough by itself to prove it's drug money. It could easily be money derived from or intended for some other unlawful activity. We're concerned that the presumption would give some dishonest agents (or police, when the provision is copied on the state level) an incentive to fabricate "false explanations" secure in the knowledge that only the claimant can contradict their testimony.

*While purporting elsewhere to raise the burden of proof to a preponderance, this presumption would effectively lower it again -- to a level below probable cause.*

#### **Section 201.**

##### **Standard of Proof for Criminal Forfeiture.**

Rather than *lowering* the burden of proof in all criminal forfeitures to a preponderance, Congress should clarify that the burden of proof under 21 U.S.C. 853 is beyond a reasonable doubt. At the very least, clear and convincing standard of proof is needed.

#### **Section 203.**

##### **Nonabatement of Forfeiture When Defendant Dies Pending Appeal.**

We would limit this provision to forfeiture of the defendant's ill-gotten gains, which can be fairly characterized as remedial, not punitive. Where the forfeiture is basically punishment, no purpose is served except to punish the defendant's innocent heirs. While they should not profit from her wrongdoing, neither should they be punished for it.

#### **Section 205.**

##### **Motion and Discovery Procedures for Ancillary Hearings.**

This is a useful codification of the case law that has developed. We would modify Section 205(c) to provide: "the court *shall* permit the parties to conduct discovery in accordance with the Federal Rules of Civil Procedure to the extent necessary to reliably resolve factual issues before the hearing." The *denial* of needed discovery would be a denial of due process in this non-criminal context.

**Section 206.****Pretrial Restraint of Substitute Assets.**

While the government understandably wants the power to restrain substitute assets prior to trial, we are against it because of our continued doubts about the wisdom and constitutionality of substitute asset forfeiture and its large potential for abuse. The same Congress that enacted the landmark 1984 forfeiture act refused to authorize substitute asset forfeiture because of the same grave doubts. (Substitute asset forfeiture only passed in 1986, at the height of the War on Drugs.) If forfeiture is now to be vastly expanded to all title 18 offenses and "proceeds" is to be broadly defined, as proposed by the government, then it is all the more imperative that some limitations be placed on the availability of substitute asset forfeiture. One such limitation is to make it impossible for the government to seize or freeze substitute assets until the government gets an order forfeiting the tainted property as to which substitution is sought. Uncontrolled pretrial seizures and freezes of substitute assets allow the government to pauperize most defendants precisely when they are most in need of assets to defend themselves, support their families and post bond.

Congress should consider other limitations on the availability of substitute asset forfeiture. For example, it should clarify that substitute assets may not be forfeited merely because the defendant has *spent* the tainted assets, which is the government's theory in many cases. It should be available only when a defendant or his agent takes some action *for the purpose* of making the tainted property unavailable for forfeiture.

Congress should also provide that the defendant's primary homestead, up to a value of \$250,000, may not be forfeited as a *substitute* asset. This humanitarian limitation will prevent substitute asset forfeiture from becoming, in effect, Forfeiture of Estate -- the terrible common law practice that the Framers abolished more than 200 years ago.

**Section 207.****Defenses Applicable to Ancillary Proceedings in Criminal Forfeiture Cases.**

This provision would limit third parties to the innocent owner defense spelled out in proposed 18 U.S.C. §983. *While that sounds reasonable and logical, it isn't.* If a third party owns the property -- rather than the criminal defendant -- then the property simply cannot be forfeited in an *in personam* criminal proceeding against the defendant in which the third party has no opportunity to be heard. The ancillary "hearing" is no substitute for a civil forfeiture proceeding. In a civil forfeiture proceeding against the third party's property, the

property owner enjoys many valuable rights he does not have in a post-conviction ancillary proceeding. He has a right to full civil discovery under the Federal Rules, and a right to trial by jury, at which the government will have the burden of proof by a preponderance of the evidence. In the ancillary hearing, by contrast, there is no right to discovery, no right to a jury trial and the third party has the burden of proof. This severe limitation of third party rights is professedly justified (and we do not think it *can* be justified at all) on the theory that the criminal trial jury has found that the property belongs to the criminal defendant and is subject to forfeiture. But once a third party establishes that he is in fact the true owner of the property, the justification for the criminal forfeiture order against the criminal defendant vanishes -- and this is so *without regard to whether the third party is "innocent."*

The government's remedy, if it still wants to forfeit the third party's property, is to bring a civil forfeiture action against the property. Then the third party will have to establish his innocence or some other defense to forfeiture. The government should not be allowed to destroy the constitutional rights of third parties by letting the ancillary hearing serve as a substitute for a full-fledged civil forfeiture proceeding.

Recognizing these problems, DOJ proposes to deal with them in Section 216 of its bill. Section 216 would deem the ancillary proceeding an *in rem* proceeding for the purpose of adjudicating the third party's interest. DOJ would place the burden of establishing forfeitability on the government, where it belongs. However, there is no provision for discovery under the Federal Rules (discovery would be granted only in the discretion of the judge) and no provision for trial by jury. We would support Section 216 if it is modified to require opportunity for ample discovery and provide a right to trial by jury.

#### Section 209.

##### Criminal Seizure Warrants.

This little provision would vastly expand the government's ability to seize property in criminal forfeiture cases. If enacted, the government would routinely seize all allegedly forfeitable property prior to indictment or at the time of indictment. It should be kept in mind that the criminal forfeiture statutes also allow *substitute* assets to be forfeited, a drastic remedy not available in civil forfeiture cases. Because of the broad and loosely worded substitute asset provisions of our forfeiture laws, the government would regularly be able to seize all of a criminal defendant's property prior to indictment, thereby destroying his ability to defend himself and support his family. We should not entrust prosecutors with this awesome power. Indeed, as we explained above, prosecutors should not even be granted the power to *restrain* substitute assets prior to trial, much less to seize them. Rather, Congress

should clarify that current 21 U.S.C. §853(f) does not authorize pre-trial seizure of substitute assets -- something the courts have assumed from the fact that Congress did not authorize pre-trial restraint of substitute assets.

The government has been using civil forfeiture mechanisms to seize property for ultimate criminal forfeiture. It can continue to do that.

We note that the government has included a provision (Section 212(a)(2)) attempting to deal with some of these concerns. It provides that if substitute assets are restrained, "the court *may* exempt from the restraining order assets needed to pay attorney fees, other necessary costs of living expenses, and expenses of maintaining the restrained assets." If the word "may" was changed to "shall" the provision would blunt some but by no means all of my concerns about the pre-trial restraint of substitute assets.

#### **Section 212.**

##### **Hearing on Pretrial Restraining Orders; Assets Needed to Pay Attorney's Fees.**

Like so much of this bill, section 212 tracks the language of the aborted Forfeiture Act of 1994 (§130). Our detailed critique of §130 of the 1994 bill is still valid and need not be repeated here. See Attachment B. Even with respect to assets needed to obtain counsel, the DOJ proposal would give a defendant far less protection than the courts have held to be constitutionally required. E.g., United States v. Monsanto, 924 F.2d 1186 (2d Cir.) (en banc), cert. denied, 112 S.Ct. 382 (1991); United States v. Michelle's Lounge, 39 F.2d 684 (7th Cir. 1994).

#### **Section 214.**

##### **Appeals in Criminal Forfeiture Cases.**

The government wishes to be able to appeal from every order denying a criminal forfeiture except where the Double Jeopardy Clause prohibits an appeal. Rather than awaiting and trusting the Supreme Court to apply double jeopardy principles sensibly in this context, Congress should explicitly provide that the government may not appeal from a no-forfeiture verdict by the trier of fact, and may not appeal from an order granting a Rule 29 motion which prevents the forfeiture issue from going to the jury. In other words, Congress should ensure that a "no forfeiture" verdict is treated exactly the same as a "not guilty" verdict for double jeopardy purposes.

**Section 216.****Ancillary Proceeding as *in rem* for Purposes of Third Party Interests.**

See the discussion above, under **Section 207.**

**Section 301.****Forfeiture of Proceeds of Federal Offenses.**

In its 1994 analysis, NACDL did not oppose the concept of forfeiting ill-gotten gains (net profits) of all criminal offenses provided that forfeiture procedure is made fair and there are adequate protections for innocent owners. See **Attachment B.** We see no reason to change that position. DOJ still would define "proceeds" in the broadest possible fashion (see Section 302 of the bill), making the provision highly punitive and unreasonable. See our 1994 analysis at pages 21-22 for a critique of this proposal. **Attachment B.** The unfairness of forfeiting gross proceeds (as opposed to net profits) is greatly aggravated by the substitute asset provisions and the judicially developed concept of joint and several liability. Each defendant in a criminal venture or conspiracy becomes jointly and severally liable for the *entire amount* of the gross proceeds received by all participants in the criminal venture -- usually a staggering sum that allows the government to wipe out the assets, clean or not, of every defendant.

One possible compromise would be to place the burden of going forward with respect to the cost of goods sold on the claimant/defendant and to disallow any deduction for indirect or overhead costs. The defendant or claimant is in the best position to know what his costs were, not the government. The government would not need to prove the absence of direct costs in a case in which the defendant or claimant has not pointed to costs that should be deducted from his gross proceeds. See United States v. Ofchinick, 883 F.2d 1172, 1182 (3d Cir. 1989), cert. denied, 110 S.Ct. 753 (1990).

If we support a vast expansion of the concept of proceeds forfeiture, DOJ should support an amendment to the excessively broad money laundering statutes. DOJ would no longer have to prove so-called "money laundering" to obtain forfeiture of criminal proceeds so there would be no reason to retain the money laundering statutes in their present absurd form. They should be limited to what is actually money laundering and should not criminalize (and severely punish) the mere act of depositing tainted money in a bank account (18 U.S.C. 1957) or the mere deposit of such money "with the intent to promote the carrying on" of the underlying unlawful activity (18 U.S.C. 1956(a)(1)(A)). These provisions have

been routinely abused to tremendously escalate the punishment of those who engage in the underlying unlawful activity at the whim of line prosecutors.

One other problem with the term "proceeds" is its application to certain offenses that do not generate any ill-gotten gains. The best example is the obtaining of a bank loan based on an application containing one or more false statements in violation of 18 U.S.C. 1014. The entire "proceeds" obtained from such a bank loan are currently subject to civil forfeiture under §982(a)(2), whether or not the owner ever defaulted on the loan. This statute is so obviously unfair that the government has seldom used it, but it remains available for abuse. Congress should examine each section of Title 18 carefully to determine whether the adoption of "proceeds" forfeiture across the board would create similar problems.

### **Section 303.**

#### **Forfeiture of Firearms Used in Crimes of Violence and Felonies.**

How would 18 U.S.C. 924(d) mesh with proposed 18 U.S.C. 981(a)(1)(D)? Wouldn't §924(d) be completely superseded by §981(a)(1)(D)? What is the purpose of proposed §924(d)(4)? We don't see what it accomplishes.

### **Section 308.**

#### **Forfeiture for Violations of Section 6050I and 1960.**

We adhere to our 1994 critique of this provision. *See NACDL Section by Section Analysis of DOJ's Proposed Forfeiture Act of 1994 at pages 18-19, Attachment B.* In our view, current 18 U.S.C. 981(a)(1)(A)'s language is far too broad and invites abuse. As explained in David Smith's forfeiture treatise, at ¶5.01[1]: the broad language of that provision has been held to authorize seizure and civil forfeiture of entire legitimate businesses simply because the business's bank account was involved in a so-called "money laundering" or structuring offense. At most, the entire bank account involved in the offense should be subject to forfeiture, not the entire business that owns the bank account.

### **Section 313.**

#### **Forfeiture of Criminal Proceeds Transported in Interstate Commerce.**

This provision would allow forfeiture of "any property involved in" a violation of 18 U.S.C. 1952(a)(1), which prohibits interstate or foreign travel or use of the mail to distribute

the proceeds of any unlawful activity listed in §1952(b). Congress should limit the forfeiture to the actual proceeds. The extremely broad “any property involved in” language would allow forfeiture of any conveyance used to transport the proceeds or perhaps any bank account into which the proceeds are deposited. If the proceeds were distributed at someone’s residence, prosecutors would argue that the residence is subject to forfeiture since it “facilitated” the offense. Some courts might agree with that interpretation, causing undue hardship on persons unfortunate enough to fall within those jurisdictions.

#### **Section 403.**

##### **Minor and Technical Amendments Relating to 1992 Forfeiture Amendments.**

The DOJ would amend 18 U.S.C. 984(b) to extend the period of time in which an action to civilly forfeit substitute funds may be commenced. Currently the forfeiture suit must be *filed* within a year of the offense that is the basis for the forfeiture. DOJ would merely require a *seizure* within *two* years of the offense. This change would undercut the rationale of §984. As the legislative history of §984 explains, the purpose of the short limitations period is to provide some basis for believing that the substitute funds are likely to be tainted.

#### **Section 409.**

##### **Statute of Limitations for Civil Forfeiture Actions.**

We can see why the government would want the limitations to run from the time the *involvement of the property* in the offense was discovered, rather than from the time the offense is discovered. But the government doesn’t need, and shouldn’t be given, five years. *Three years is more than enough time.* The statutory language should also reflect the explicit requirement (being read into the statute by case law) that the government exercise reasonable diligence in investigating the case. The courts have held that under §1621, the time begins to run as soon as the government is aware of facts that should trigger an investigation leading to discovery of the offense.

#### **Section 416.**

##### **Fugitive Disentitlement.**

This section of the bill would overrule the Supreme Court’s *unanimous* decision in Degen v. United States, 1996 WL 305720 (June 10, 1996). Before the ink on the decision

is dry, DOJ is asking Congress to overrule it! This seems to be DOJ's (over)reaction to every adverse decision on a rule of law. Maybe it ought to stop and think about whether the decision makes sense (or is constitutionally based), before running to Congress. Moreover, while in Degen, the Supreme Court did not have to decide whether disentitlement of a fugitive forfeiture claimant would violate *due process*, there is a strong argument that it would. For instance, the Seventh Circuit previously so held. See United States v. Schmitt in United States Currency, 32 F.3d 1151 (7th Cir. 1994).



## ATTACHMENT B

**NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS  
FORFEITURE ABUSE TASK FORCE SECTION BY SECTION ANALYSIS OF  
THE DEPARTMENT OF JUSTICE'S PROPOSED FORFEITURE ACT OF 1994**

1. Section 101. Timing of Notice of Intent to Forfeit.

A. **Subsection (d)(1).** There is no valid reason why the time requirements proposed by DOJ should not also apply to United States Customs. Customs seizures include most currency seizures at or near borders and at most major airports around the country, pursuant to Title 31 United States Code. Customs is also involved in seizures based on Title 19 violations.

B. **Subsection (d)(2).** This provision is reasonable and we have no objection to the proposed amendment, subject to the proposed changes to section (d)(3), below.

C. **Subsection (d)(3).** While we agree that a 60 day notice provision is appropriate, DOJ's proposal is actually a substantial step backward from current DOJ policy. Pursuant to DOJ Executive Office for Asset Forfeiture Directive 93-4 (January 14, 1993; effective March 1, 1993), if the seizing agency does not give notice within 60 days, then it must return the property and cannot proceed with the forfeiture ("Where a reasonable effort of notice has not been made within the 60 day period and no waiver has been obtained, the seized property must be returned and the forfeiture proceeding terminated.").

Contrary to the position asserted by DOJ in its section-by-section analysis (at page 1), the changes to the statute proposed in this section should confer substantive rights on claimants. Indeed, DOJ acknowledges in Directive 93-4 that prompt notice is a fundamental aspect of due process ("A fundamental aspect of due process in any forfeiture proceeding is that notice be given as soon as practicable to apprise interested persons of the pendency of the action and afford them an opportunity to be heard.") As currently proposed by DOJ, a claimant would have no real remedy for a violation of the time limit, other than the return of the property while the forfeiture is pending. This is patently unfair. There is no valid justification for not conferring substantive rights on claimants, because DOJ's proposed amendment contains adequate safeguards to protect the seizing agency where it can establish good cause for an extension of time. See Section (d)(2), above. Indeed, DOJ offers no explanation of why the proposed amendment should not confer substantive rights.

Simply returning the property to the owner does not remedy the problems caused by lengthy delays in instituting forfeiture proceedings. If the government is free to pursue the forfeiture at any time up to five years from the date of discovery that the property is subject to forfeiture (the applicable statute of limitations), the owner of the property is left in an untenable position. For example, the owner doesn't know whether to continue making payments, repairs or improvements to the property. The problem will be exacerbated if the statute is further amended to provide for the forfeiture of assets traceable to such property (See Section 203, *infra*.)

Accordingly, DOJ's proposed amendment should itself be amended to read as follows:

(d)(3) If the seizing agency fails to provide notice to the party from whom the property was seized within the time limits set forth in this subsection and no extension is granted pursuant to subsection (d)(2), the seized article shall be returned to that party ~~pending further forfeiture proceedings and the forfeiture may not take place unless~~ ~~(A) the property constitutes the proceeds of a criminal offense,~~ ~~(B)~~ (A) an independent basis exists to retain the article as evidence of a violation of law, or ~~(C)~~ (B) the article constitutes contraband or other property the possession of which would be illegal.

## 2. Section 102. Time to File Claim and Cost Bond; Waiver.

A. While the expansion of the time in which to file a claim is welcomed, there is no reason to expand the content of the claim to require "the time and circumstances of the claimant's acquisition of the interest in the property." 19 U.S.C. §1608 currently requires only that the claim state the claimant's interest in the property (*e.g.*, ownership, possessory, leasehold, etc.). There is no valid reason to expand this requirement, and DOJ does not offer any explanation justifying this proposed change.

B. The requirement of a cost bond [subsection (b)] should be eliminated in its entirety, rather than simply creating exceptions. The cost bond requirement has long since outlived its usefulness. There is no real danger of frivolous claims being filed, because of the high cost of hiring counsel and litigating forfeiture claims. The only reason DOJ is unwilling to see this provision eliminated is because it knows through experience that the bond requirement poses a serious impediment to the average claimant to contest a forfeiture. Under current law, if no bond is posted, the claimant forever waives his or her right to contest the forfeiture in court.

Given that the Supreme Court has held that forfeitures constitute punishment (*Austin v. United States*, 509 U.S. \_\_\_, 125 L.Ed.2d 488, 113 S.Ct. 2801 (1993)), a property owner cannot constitutionally be required to post a cost bond as a condition of contesting the forfeiture in court (See DOJ analysis, Section 110: "Such a change is warranted in light of the recognition by the courts that the civil forfeiture actions are punitive in nature and serve as adjuncts to criminal law enforcement.") The right of free access to the courts should not be dependent on the claimant's wealth. Many people of modest means, who do qualify as indigent, are nevertheless unable to raise sufficient cash to post a bond within the short amount of time allowed, and thus no bond should be required to contest a forfeiture in court.

C. The "waiver" language in subsection (b) "all supporting information as required by the agency" is ambiguous and overly broad. Further, the proposed amendment vests too much discretion in the Attorney General and Secretary of the Treasury with regard to waiver (or reduction) of the cost bond. There are no provisions for judicial review of the denial of a waiver.

There are also no provisions to deal with the problem of the seizing agency requiring multiple bonds where multiple items of property are seized, even though there will only be one court proceeding. What often results is that the claimant must file several bonds, amounting to several, or even tens of thousands of dollars, which far exceeds the amount of costs that may be incurred.

Accordingly, NACDL strongly urges Congress to completely do away with the cost bond requirement as proposed in the Hyde bill.

### 3. Section 103. Time to File Action in District Court.

A. A time limit imposed on the government for filing forfeiture actions is long overdue, and we strongly support the concept. However, §(k)(1) should require the action to be instituted within sixty (60) days, not ninety (90) days. If the government has trouble instituting the action within 60 days, it has the protections set forth in §(k)(2).

B. Section (k)(2) should be amended by inserting the word "good" before cause on the third line.

C. Like DOJ's proposed Section 101, this amendment is not intended to confer any substantive rights on claimants, and provides the claimant with little or no remedy if the government does not file the action within 90 days. We strongly urge that Section (k)(3) confirm substantive rights, and that it be amended as follows:

(3) If the Attorney General fails to institute a forfeiture action within the requisite time period and no extension is granted, the property shall be returned to the party from whom it was seized unless ~~(A) the property constitutes the proceeds of a criminal offense, (B) (A) an independent basis exists to retain the article as evidence of a violation of law, or (C) (B) the article constitutes contraband or other property the possession of which would be illegal, and the forfeiture may not take place.~~

Such an amendment would be consistent with existing law for the seizure of conveyances for drug related offenses. 21 U.S.C. §888(c). DOJ's analysis refers to this provision (see last full paragraph, page 3) but neglects to state that that provision requires the action to be filed with 60 days, not 90, and that it prohibits the subsequent forfeiture if the time requirements for filing are not met. Thus, DOJ's representation that its proposed amendment makes 21 U.S.C. §888(c) unnecessary and that it should be repealed "in the interest of uniformity" is, at best, misleading.

D. Similar amendments should be made to Sections (n)(2) and (n)(3) [DRUG FORFEITURES] to make them consistent with (k)(2) and (k)(3), above.

E. The proposed amendment extending the time in which to file an answer [Section (d)] is reasonable and welcomed, and we urge its adoption.

#### 4. Section 104. Stay of Civil Forfeiture Action.

A. The government should be required to establish probable cause in an adversarial hearing that the property is subject to forfeiture before obtaining a stay (this is especially true if the claimant must establish standing before requesting a stay). Otherwise, the claimant may be deprived of his or her property for several years, without ever being afforded a hearing to contest the seizure. Even if the Claimant ultimately prevails, the losses occasioned by such a delay are irreparable. As recently observed by the United States Supreme Court:

The purpose of an adversary hearing is to ensure the requisite neutrality that must inform all governmental decisionmaking. That protection is of particular importance here, where the Government has a direct pecuniary interest in the outcome of the proceeding. . . . Moreover, the availability of a postseizure hearing may be no recompense for losses caused by erroneous seizure . . . . And even if the ultimate judicial decision is that the claimant was an innocent owner, or that the Government lacked probable cause, this determination, coming months after the seizure, "would not cure the temporary deprivation that an earlier hearing might have prevented." *Doehr, supra*, at \_\_\_, 115 L.Ed.2d 1, 111 S.Ct. 2105.

*United States v. James Daniel Good Real Property*, 510 U.S. \_\_\_, 126 L.Ed.2d 490, 504-05, 114 S.Ct. 492 (1993)

B. There is no good reason to relax the requirement of "for good cause shown." Consequently, we recommend that subsection (a)(1)(i) be amended to add the word "unduly" before the word "infringe" in the fourth line.

C. We welcome the amendment to make the request for stay reciprocal, although we note that the courts have been willing to grant stay requests for claimants despite the absence of express statutory language. However, serious questions are raised by the proposed amendment. For example, how is the Claimant supposed to establish that there is a related "investigation." Investigation of whom? Is it sufficient merely to assert that there is an investigation? If the claimant asserts that there is an investigation, does the government get to respond *in camera*? Doesn't the mere fact that the property has been seized suggest that there is going to be, or already is, some investigation pending?

#### 5. Section 105. Narrowing of Statutory Innocent Owner Defense.

In her October 18, 1993 letter to Rep. Jack Brooks (D-TX), Chairman of the House Judiciary Committee, Attorney General Reno stated that DOJ's forfeiture reform proposals would "improve current procedures to insure fairness and due process to all innocent owners."

DOJ now proposes to all but abolish the statutory innocent owner defense, which protects property owners who lack knowledge that their property is being (or will be) used for an unlawful purpose. DOJ proposes to replace the current statutory defense with a much more narrow defense -- one which requires the property owner to demonstrate not merely that he or she lacked knowledge of the illegal activity and was not willfully blind, but that he or she took all reasonable steps to prevent the property from being put to illegal use. In short, DOJ proposes to limit the defense to the bare constitutional minimum allowed by the Supreme Court in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 688-690, 40 L.Ed.2d 452, 94 S.Ct. 2080 (1974) (it would be difficult to reject the constitutional claim of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of the property.)

Thus, the "one uniform innocent owner defense" (see DOJ's Section-by-Section analysis at p.7) proposed by DOJ is the minimal due process defense already afforded by the constitution. Far from "insuring fairness to innocent owners," DOJ would saddle innocent owners with what even DOJ concedes is a more onerous burden of proving that they did all that they could reasonably be expected to do to prevent the proscribed use of their property.

At oral argument in *Austin v. United States*, 113 S.Ct. 2801, 125 L.Ed 488 (1993), several justices questioned how the forfeiture of an innocent person's property could be deemed "excessive" under the Eighth Amendment's Excessive Fines Clause. In other words, those justices could not reconcile claimant Austin's position with the traditional view expressed in the *Calero-Toledo* decision, which is based on the legal fiction that an *in rem* action is one against inanimate property. The Court's unanimous ruling in favor of Austin thus clearly casts doubt on the continued vitality of the *Calero-Toledo* decision. See also, *Sheldon v. United States*, 7 F.3d 1022 (Fed. Cir. 1993) (accepting Takings Clause argument rejected by the Supreme Court in *Calero-Toledo*). Following *Austin*, it is difficult to believe that there will be many cases where the forfeiture of an innocent person's property on the ground that he or she failed to exercise the highest standard of care would not be deemed excessive. Thus, the onerous standard proposed by DOJ would be unconstitutional in the vast majority of cases.

Entirely apart from these constitutional problems, DOJ's proposal is simply bad policy. It would require every property owner to investigate the background of persons with whom they conduct business if there was anything even the least bit "suspicious" about the other party or the proposed transaction. Such a burden of investigation is unrealistic, impractical, and most importantly, unfair. It would impose unnecessary costs on legitimate businesses and accomplish nothing -- except the occasional forfeiture of an innocent person's property when a prosecutor decides that the person deserves to be punished for not conducting an adequate investigation or for not taking sufficient precautions.

We agree with DOJ that it would be desirable to create a uniform statutory innocent owner defense. However, that defense should be based on the current statutory defense for innocent owners found in 21 U.S.C. §881(a) and 18 U.S.C. §981(a)(2), the two most important civil forfeiture statutes. We also agree with DOJ that there should be a separate defense for innocent owners based upon lack of consent, as is currently interpreted by the majority of circuits (but which is not currently found in §981(a)(2)). The majority of federal circuits have held that an owner may avoid forfeiture by establishing either lack of knowledge or lack of

consent. See, e.g., *United States v. 6109 Grubb Road*, 866 F.2d 618, 625 (3rd Cir. 1989); *United States v. 141st Street Corp.*, 911 F.2d 870, 878 (2nd Cir. 1990), cert. denied, \_\_\_ U.S. \_\_\_, 111 S.Ct. 1017, 112 L.Ed.2d 1099 (1991); *United States v. One Parcel of Real Estate at 1012 Germantown Road*, 963 F.2d 1496 (11th Cir. 1992). This, we believe, is the correct application of the defense.

We also agree that when an owner learns that his or her property was or is being used in the commission of an illegal act, he or she should be required to do "all that reasonably could be expected to terminate such use of the property." This, however, is very different than imposing an onerous duty of investigation on all property owners.

In sum, like DOJ, we propose that a uniform innocent owner defense be adopted to apply to all forfeitures. We therefore propose that DOJ's proposed §983 itself be amended to read as follows:

**"§983. Innocent Owners.**

(a) An innocent owner's interest in property shall not be forfeited under any civil forfeiture statute.

(1) With respect to a property interest in existence at the time the illegal act or omission giving rise to forfeiture took place, a person is an innocent owner if:

(a) that person did not know of, and was not willfully blind to, the act or omission giving rise to forfeiture; or

(b) that upon learning of the act or omission giving rise to the forfeiture, he or she did all that reasonably could be expected under the circumstances to terminate such use of the property.

(2) With respect to a property interest acquired after the act giving rise to forfeiture has taken place, a person is an innocent owner if at the time that person acquired the interest in the property that person did not know of, nor was willfully blind to, the act or omission giving rise to the forfeiture, or the fact that the property was subject to forfeiture.

Finally, we believe it would be useful to create a safe harbor provision that would assure innocent property owners of protection where, having acquired knowledge of illegal activity involving their property, they take reasonable steps to terminate the illegal use. We would suggest Congress consider the safe harbor provision in the March 15, 1994 Draft Uniform Controlled Substances Act (Article V - Forfeiture), which provides as follows:

Reasonable measures to prevent a [wrongdoer's] conduct or assist its prosecution include, to the extent permitted by law:

- (1) notifying an appropriate law enforcement agency of information that led the owner to know the conduct would occur and other information the law enforcement agency reasonably requests to prevent or prosecute the conduct; and
- (2) revoking permission for the [wrongdoer] to use the property or taking reasonable actions in consultation with a law enforcement agency to discourage or prevent the illegal use of the property, provided that a person shall not be required to undertake any action which may threaten any person's personal security or safety.

This safe harbor provision would not preclude a claimant from showing lack of consent in some other fashion.

DOJ also wants a different standard to apply to owners who acquire property subsequent to the unlawful conduct giving rise to forfeiture, even where the owner had no knowledge of the prior activity. The United States Supreme Court recently held that a donee can be an innocent owner, and that anyone acquiring an interest in property prior to the government's title vesting in the property following a decree of forfeiture can raise any defense that would have otherwise been available. See, *United States v. A Parcel of Land, etc.*, 507 U.S. \_\_\_\_, 122 L.Ed.2d 469, 113 S.Ct. 1126 (1993). There is no reason to treat donees differently than bona fide purchasers. Donees have just as much right to be secure in their ownership of property received as a gift, devise, or bequest as do bona fide purchasers. Nevertheless, DOJ now wants to legislate away the Supreme Court's holding, but does not provide any justification for such a change.

DOJ's proposed subsection (d), which provides for forfeiture of property jointly held, is unreasonable and unacceptable. It constitutes an assault on long established and time honored state law principles of property ownership. DOJ offers no valid reason for interfering with state property laws.

DOJ's proposed subsection (e), which provides a rebuttable presumption that a financial institution acted "reasonably" under certain conditions, is reasonable.

#### **6. Section 106. Judicial Forfeitures of Real Property.**

We have no objection to this proposal, which amends 19 U.S.C. §1610 to require that all forfeitures relating to real property be done through judicial proceedings, rather than administratively.

#### **7. Section 107. Review of Administrative Forfeitures.**

This proposed amendment, which would require the seizing agency to review the evidence supporting probable cause for forfeiture even where no claim is filed, is reasonable and appropriate. However, if the cost bond requirement is not eliminated, there should also be a provision allowing judicial review of an administrative decision of forfeiture in contested cases.

8. **Section 108.** Preservation of Arrested Real Property.

As drafted by DOJ, this provision is clearly unconstitutional. See, *United States v. James Daniel Good Property et al.*, *supra*. This amendment will comport with due process only if, prior to the issuance of any such order, the government establishes probable cause for the seizure at an adversarial hearing.

9. **Section 109.** Elimination of Right to Article III Judge in Smaller Cases.

As DOJ points out, this amendment will only work where the parties consent to waive jury, due to the Seventh Amendment right to a jury trial. However, DOJ fails to recognize that a claimant also has a constitutional right to a bench trial before an Article III judge. The Supreme Court has held that the question of whether Article III allows Congress to assign adjudication of a cause of action to a non-Article III tribunal is the same as the question whether the Seventh Amendment permits Congress to assign adjudication to a tribunal that does not employ juries as fact finders. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53-54 (1989). Thus, DOJ's proposal is constitutionally deficient.

Clearly, there should be a right to a jury trial in civil forfeiture proceedings. Indeed, the statute should make the right to a jury trial explicit in all forfeiture cases. Under current law, forfeitures of vessels on certain navigable waters are not subject to jury trials. There is no modern justification for treating the forfeiture of vessels differently from other types of property. Consequently, the statute should be amended to expressly provide the right to a jury trial in all forfeitures.

Further, existing law already allows forfeiture cases (including forfeitures involving more than \$10,000) to be tried by a magistrate with the parties consent. Accordingly, there is no reason to alter existing law. The solution to the problem of handling small cases is for DOJ to be more discriminating in the cases it adopts for seizure -- not to pass unconstitutional legislation.

10. **Section 110.** Burden of Proof; Adverse Inferences; Rebuttable Presumptions.

A. We wholeheartedly support a change which would place the burden of proof on the seizing agency, but we believe that the constitution requires, in light of *Austin, supra*, that the standard of proof should be at least by clear and convincing evidence, as proposed in the Hyde bill (H.R. 2417).

B. **Standing.** We reject DOJ's proposal that would require the claimant to establish standing pre-trial, for several reasons. First, DOJ's proposal violates the constitution's Seventh Amendment right to a jury trial on this issue. Ownership is currently an issue for the jury. For example, in cases where the claimant has initially denied ownership of the property, the claimant should be able to explain the circumstances to a jury.



Second, DOJ proposes in other sections of the bill to limit the definition of who is an owner, or who has standing to contest a forfeiture. For example, DOJ proposes to legislate away the Supreme Court's decision in *A Parcel of Land, supra*, to deny standing to all but bona fide purchasers.

C. Hearsay. Hearsay should not be admissible in forfeiture proceedings. A majority of courts currently allow hearsay to establish probable cause justifying the seizure of the property and the institution of the forfeiture action. But even these courts bifurcate the probable cause hearing, so that the hearsay does not come before the jury.

However, since DOJ agrees that the burden of proof should be on the seizing agency by a preponderance of the evidence (Section 105), the justification for allowing hearsay evidence in the forfeiture trial no longer exists. Questions regarding the legality of the seizure, in which hearsay may be admissible, can be litigated pre-trial in the form of motions to suppress, or for return of property pursuant to Fed.R.Crim.Pro. 41(e), thus eliminating the justification for the use of hearsay at trial.

Generally, hearsay is inadmissible under the Federal Rules of Evidence. These rules expressly declare that they "apply generally" in all federal court cases, unless otherwise provided in the rules themselves. E.R. 1101(b). E.R. 1101(e) expressly provides that the rules of evidence apply to proceedings under "part IV of the Tariff Act of 1930 (which includes 19 U.S.C. §1615). See generally, D. Smith, *Prosecution and Defense of Forfeiture Cases*, ¶11.03 [5]. See also, *Jones v. U.S. Drug Enforcement Administration*, 819 F.Supp. 698, 721, n. 24. (M.D. Tenn 1993).

D. Section (d) (Affirmative Defenses) is unnecessary.

E. Section (e) (Adverse Inferences) is unreasonable, and clearly unconstitutional. There may be no adverse inferences drawn from the legitimate exercise of Fifth Amendment privilege. This is especially important in view of the fact that the Supreme Court has held that forfeitures are punishment. See, *Austin v. United States, supra*; *Boyd v. United States*, 116 U.S. 616, 29 L.Ed.2d 746 (1886).

F. Section (g) (Rebuttable Presumptions). The DOJ giveth (burden shift), and the DOJ taketh away (rebuttable presumptions). These rebuttable presumptions have the practical effect of putting the burden right back on the claimant, rendering illusory DOJ's proposed burden shift.

(1) Subsection (m). DOJ's comparison to 21 U.S.C. §853 is absurd. The presumption under §853(d) arises only with respect to a person who has been convicted (found guilty beyond a reasonable doubt) of a felony drug trafficking offense. DOJ wants to extend this presumption to cases where the seizing agency merely establishes by a preponderance that the person was engaged in an offense. Furthermore, there is no need for such a provision, because the DOJ can use the "net worth" method of proof.

'2) The presumptions in subsection (b)(1) and (b)(2) are equally onerous, for the same reasons. Section (b)(2) makes no sense. Does this mean that just because money was separated into amounts of less than \$10,000, without any attempt to conduct a financial transaction, it is subject to forfeiture for violation of §5324?

11. **Section 121.** Use of Grand Jury Information for Civil Forfeitures.

Subsection (a). There is no valid reason to extend the use of grand jury information by government attorneys to civil forfeiture cases. (The provision the FIRREA Act of 1989 authorizing such use should be repealed.)

The grand jury is not a tool for civil enforcement by the government. *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 103 S.Ct. 3133, 3142 (1983). Expansion of this section will permit the government to surreptitiously expand the evidence gathering function of grand juries to gather evidence for civil forfeiture cases. Grand jury secrecy rules will preclude effective oversight. Legitimate challenges will also be difficult because of the grand jury's legitimate investigation of criminal forfeitures.

This proposal would permit the government to utilize the investigatory powers of the grand jury while forcing claimants to rely on the civil discovery process. After obtaining grand jury information, the government could then elect to pursue civil forfeiture remedies which have lower burdens of proof and more limited subpoena power. Civil subpoenas available to claimants can be served only within 100 miles of the courthouse. The government would, on the other hand, be able to compel evidence from all judicial districts.

The government can freely elect between civil and criminal forfeiture. However, claimants in civil forfeiture cases are bound by strict filing deadlines and bond requirements. Innocent owners are also limited by the federal discovery rules and relevancy requirements that do not apply in the grand jury. The government could, therefore, obtain all the investigative advantages of pursuing criminal forfeitures and later benefit from the lesser burdens of proof applicable in civil cases.

Under this proposal, the government could also gather its evidence through the grand jury and then obtain a stay of civil forfeiture proceedings (See §104, *supra*), effectively preventing claimants from gathering evidence because of the pending criminal proceeding.

Grand jury material is not needed by the government in civil forfeiture cases because civil discovery is available to the government as well as to claimants. Furthermore, the government can get already obtain grand jury materials under Fed.R.Crim.Pro 6(e) upon a proper showing of need.

Subsection (b). The same arguments are made against expanding the use of grand jury materials in administrative forfeitures.

12. Section 122. Civil Investigative Demands.

There is no valid reason, and DOJ has offered none, why it is necessary to establish an inquisitorial method of obtaining information from citizens in civil investigations. DOJ proposes, in the context of civil enforcement, to provide a procedure analogous to the issuance of a grand jury subpoena that allows the government to gather evidence before the filing of a civil complaint. A civil proceeding is not a criminal prosecution. Most of the constitutional protections guaranteed to criminal defendants do not attach in civil forfeitures. Under DOJ's proposal, the government would not even have to have an articulable suspicion of any wrongdoing, and the prosecutor conducting the inquisition would not be subject to any court supervision, or other safeguards traditionally associated with grand jury proceedings. Thus, the government should not be permitted to bring the intrusive powers of law enforcement to bear in civil forfeiture proceedings.

Contrary to DOJ's assertions, the government does gather evidence for use in civil forfeiture cases by way of their criminal investigations. These investigations, which include extensive interviews of witnesses provide substantial investigative information not available to claimants. The government also retains its ability to conduct discovery after the civil complaint is filed. Additionally, the government may file a civil forfeiture complaint and have the action stayed pending the outcome of any related criminal proceeding (See §104, *supra*). At the conclusion of the criminal case, the government will have available all the evidence gathered by the United States for the criminal case. Claimants, on the other hand, are limited by the civil discovery rules and the 100 mile limitation on subpoenas power in civil cases.

The scope of the civil demand here is broader than even the civil investigative demands authorized under RICO, 18 U.S.C. §1968. This demand authorizes the government to administer oaths and compel testimony as well as compel the production of documents. The current RICO provision (Section 1968) only authorizes civil demands for the production of documents. DOJ's proposed amendment goes far beyond anything ever contemplated by Congress and far beyond any even remotely similar existing provision. There is no valid reason to expand the government's authority to compel evidence before a complaint is filed in a civil case. The proposed section also reduces the period for filing a petition opposing compliance to as short as five days. Under RICO, a party may file a petition up to 20 days after service.

The notification provisions of Subsection (d) prevent notification under circumstances that have historically been limited by statute and confined to criminal investigations leading to indictment. Use of the information has also been limited to the grand jury. There is no valid law enforcement reason to extend this authority to civil investigations by the government.

The government's financial interest in the outcome of civil and criminal forfeiture proceedings provides additional motive for overreaching where disclosure of the demand is prohibited. Congress has carefully regulated access to financial and credit information. There is no valid reason to permit the secret gathering of private information before the filing of a civil complaint where the grand jury process is available to investigate crime.

13. Section 23. Access to Records in Bank Secrecy Jurisdictions.

The reason offered by DOJ for this proposal is not valid because the claimant would still have to prove the legitimate source of the funds just as he or she would if the funds were held in an American bank. It will not be sufficient for the claimant to simply say that funds have come from a legitimate account. Proof of ownership of the funds will always be required.

There is no valid reason to treat non-production of foreign account information any differently than any other failure to comply with a legitimate discovery request. Under the Federal Rules of Civil Procedure, a party can move the court for appropriate relief for an opposing party's failure to comply. Each case should be determined on its own merits as are all present discovery disputes.

14. Section 124. Access to Tax Records.

For the reasons previously stated, civil forfeiture investigations should not be treated in the same manner as criminal investigations. The government's financial motive, as well as the lack of court supervision over civil investigations, strongly militates against expanding criminal investigative authority into the area of civil enforcement.

15. Section 125. Civil Forfeiture Seizure Warrant Authority.

Subsection (a)(2)(ii) should be changed by adding the words "judicially recognized" prior to the word "exception".

Subsection (a)(5) would authorize *ex parte* orders restraining property when a person is arrested or charged in a foreign country to permit the government to gather information to obtain probable cause. All that need be alleged is the nature and circumstances of the foreign charge and "the basis for belief" that the person arrested has property subject to forfeiture in the United States. This provision is probably unconstitutional in that it permits the restraint or seizure of property without notice or a hearing in the absence of probable cause. Restraining orders and seizure may not be obtained in criminal cases without probable cause. There is no legitimate reason to authorize restraint or seizure without probable cause for the enforcement of civil forfeitures.

Section (b) [Drug Forfeitures] doesn't make sense. Subsection (b)(4) provides for seizure without process. Thus the proposed amendment "and requests the issuance of a seizure warrant" doesn't belong here. The second part of this amendment should be changed to read: "the Attorney General has probable cause to believe that the property is subject to civil forfeiture and a judicially recognized exception to the warrant requirement exists." This makes it clear that the determination of the existence of an exception to the warrant requirement must be made by a court (*i.e.*, it is not sufficient that the AG believes, no matter how reasonable that belief, that an exception applies).

We strongly agree that an amendment is necessary in light of the Second Circuit's well reasoned opinion in *United States v. LaSana*, 978 F.2d 1300 (2nd Cir. 1992) recognizing that there is no "forfeiture" exception to the warrant requirement, and that the Attorney General may

not seize property based solely on probable cause, absent some recognized exception to the warrant requirement.

**16. Section 130. Hearings on Pretrial Restraint of Assets.**

Section 130 addresses the circumstances under which a court, after *parte* restraining order freezing a defendant's assets, can hold a hearing to consider the need for such property restraints. The overwhelming majority of federal courts have held that due process requires that a court hold such a hearing.

This proposal seeks to unduly limit the ability of a court to modify a restraining order to circumstances in which (i) the defendant needs the restrained assets to pay legal fees; (ii) the order restrains assets that are not alleged to be forfeitable in the indictment; or (iii) the order causes irreparable harm to the property owner and less intrusive means exist to preserve the property for forfeiture. This proposal expressly forbids the court from entertaining challenges to the probable cause finding of an indictment, forbids application of Rule 65 of the Federal Rules of Civil Procedure, and bars third parties from raising factual challenges to the validity of the restraining order.

Under existing laws, courts issue pretrial restraining orders under their broad equitable powers, and traditional equitable doctrine requires a court to consider all relevant evidence in the exercise of its equitable discretion. Further, equity, and due process, require that the party who seeks to justify injunctive decrees bear the burden of proving their necessity. DOJ's proposal would strip federal courts of their equitable powers in an effort to reduce dramatically the burden of proof that the government must shoulder to freeze all of a defendant's assets. Most courts apply Civil Rule 65 to determine whether preliminary injunctive relief is appropriate in criminal forfeiture cases; Section 130's prohibition on application of Rule 65 is a reflection of the fact that DOJ does not want to be held to the same standard as every other litigant seeking equitable relief, but rather wants to have a grand jury make all the decisions concerning the propriety of pretrial restraining orders.

DOJ's analysis offers no explanation for why it cannot satisfy the traditional requirements for equitable relief, nor does it explain why the DOJ needs to hamstring the exercise of equitable discretion of trial courts by narrowly limiting the procedures, evidence, and criteria they can consider in modifying *ex parte* restraining orders.

As to the specific provisions proposed by DOJ, we have the following comments:

Paragraph (3)(B) unduly limits the grounds upon which modification of a restraining order may be sought where the right to counsel of choice is not implicated. It permits modification only where 1) the property restrained "would not be subject to forfeiture even if all of the facts set forth in the indictment were established or true" or 2) it causes irreparable harm to the moving party and less intrusive means exist to preserve the subject property for forfeiture.

The problem is that most indictments contain wholly conclusory forfeiture allegations tracking the language of the forfeiture statute without even setting forth the actual legal theory upon which the forfeiture is predicated, much less the evidentiary or factual basis for the forfeiture. In many cases the government seeks forfeiture of property that is plainly not subject to forfeiture because the prosecutor doesn't understand the law of forfeiture or else simply makes the broadest forfeiture allegations possible without carefully considering individual property items. Evidence regarding the forfeiture allegations is often not presented at all to the grand jury, which simply rubber stamps the indictment.

Given this reality, the standard established in paragraph (3)(B) is meaningless and unworkable. It assumes incorrectly that "facts" will be "set forth in the indictment," which, if "true," would make the property subject to forfeiture. But what happens when the indictment sets forth no facts at all regarding the forfeiture allegations? Is the property owner then to be deprived of an opportunity to seek modification of the restraining order that has been issued ex parte?

Even if some facts are set forth regarding forfeiture, the grand jury generally hears little or no evidence to support those facts so the indictment should not be presumed valid with respect to forfeiture. A famous judge once said that "a grand jury would indict a ham sandwich if asked to do so by a prosecutor." Defendants and third parties should have the right to argue that there is no legal or factual basis for forfeiture of particular assets and to require the government to show probable cause for forfeiture of those assets at a pretrial hearing. In other words, there is no reason to insulate the forfeiture aspect of the indictment from all challenge even where the right to counsel of choice is not implicated.

Paragraph (3)(C) should also provide that if a restraining order is modified to permit the defendant to use a particular asset to retain counsel the government may not later seek forfeiture of that asset. Counsel should not have to run the risk that the asset exempted from the restraining order may ultimately be forfeited.

#### 17. Section 131. The Standard of Proof.

We strongly oppose this proposal to drastically lower the government's burden of proof in criminal forfeiture cases from beyond a reasonable doubt to a mere preponderance of the evidence. DOJ offers no policy reason for this radical change in the burden of proof. Nor does it assert that it has had a problem meeting the current beyond a reasonable doubt standard.

Instead, DOJ's section-by-section analysis claims that the current burden of proof is unclear and treats this as a "clarifying" amendment. DOJ provides a completely distorted summary of the case law to support its position. Under current law it is clear that the burden of proof is beyond a reasonable doubt in all criminal forfeiture cases. The only "ambiguity" concerns forfeiture of drug proceeds under 21 U.S.C. § 853(a)(1). Some circuits have misconstrued § 853(d), which creates a rebuttable presumption respecting drug proceeds, as lowering the ultimate burden of proof to preponderance of the evidence where facts triggering the presumption are present. The § 853(d) presumption plainly has no application to facilitation cases under § 853(a)(2) or enterprise forfeiture under § 853(a)(3).

Instead of lowering the burden of proof for all criminal forfeitures, Congress should delete § 853(d) altogether. The provision is constitutionally infirm for the reasons stated in 2 D. Smith, Prosecution and Defense of Forfeiture Cases § 14.03.

18. **Section 132**. Early Order of Forfeiture.

We have no objection to amending Rule 32 (d)(2) of the Federal Rules of Criminal Procedure to require an entry of a preliminary order of forfeiture "as soon as practicable" after the verdict of forfeiture is returned. The proposed amendment should make clear, however, that no final order of forfeiture may be entered until all of the defendant's legal challenges to the forfeiture have been ruled upon. This would include challenges to the sufficiency of the evidence under Rule 29 and excessiveness challenges under the Eighth Amendment. Further, there should be no discovery undertaken by the government with respect to the defendant prior to sentencing, and there should be a right to a stay pending appeal.

We have no objection to the initiation of third party ancillary proceedings commencing immediately following the jury verdict on the forfeiture issues.

19. **Section 133**. Non-Abatement of Criminal Forfeitures.

We object to the proposal to abolish the ancient common law rule that criminal forfeitures abate when the defendant dies pending appeal. Courts have properly held that abatement applies to criminal forfeitures. Given the punitive purpose of criminal forfeitures, this conclusion is sound. The government does not explain why only criminal forfeitures -- of all criminal penalties -- should not abate upon the death of the defendant.

DOJ asserts that the Solicitor General's office has written memoranda criticizing the rationale for abatement in the criminal forfeiture context. However, DOJ does not tell us what the Solicitor General's memos actually say -- perhaps, we suspect, because their criticism of the abatement rule is unpersuasive. If it is persuasive, why hasn't the government ever sought Supreme Court review of this issue? Indeed, we see no reason to distinguish between criminal forfeiture and civil forfeitures which both serve to punish the property owner. See, *United States v. \$47,409.00 In U.S. Currency*, 810 F. Supp. 919 (N.D. Ohio 1993) (civil forfeiture under 18 U.S.C. 1955(d) abates upon death of the wrongdoer).

20. **Section 134**. Repatriation of Property.

This section, which authorizes a court to order a criminal defendant to repatriate forfeitable assets, is entirely unnecessary, as it is already sufficiently covered by existing law.

21. **Section 135**. Codifying Procedures for Existing Ancillary Proceeding.

This proposal would give parties participating in post-trial ancillary proceedings the right to file dispositive motions, to conduct discovery, and to perfect an appeal. This section appears

to be reasonable, except for subsection (D), which would deny third parties the right to an immediate appeal of an adverse judicial determination on their petition for relief if other petitions are still pending. This may work a hardship on third parties, as they may have to wait months or years to obtain appellate review of an adverse trial court finding.

**22. Section 136. Pre-trial Restraint of Substitute Assets.**

This proposal would dramatically expand current statutory authority to impose pretrial restraints. Currently, the government can obtain pretrial restraints only on property that is subject to forfeiture. DOJ proposes to extend the power to restrain assets to wholly legitimate "substitute" assets. In other words, a defendant would be denied the use pretrial not only of his allegedly forfeitable assets, but also his wholly legitimate assets.

The majority view of the federal appellate courts is that the government may not seize or restrain substitute assets. *United States v. Floyd*, 992 F.2d 498 (5th Cir. 1993); *United States v. Martin*, 1 F.3d 1351 (3rd Cir. 1993); *United States v. Ripinsky*, \_\_\_ F.3d \_\_\_ (9th Cir. 1994), 55 CrL 1028. DOJ has offered no explanation for why it needs to freeze wholly legitimate assets prior to trial. Such practice will work a substantial hardship not only on defendants, but also on numerous third parties who depend upon or have vested rights in the legitimate property that will be restrained under DOJ's proposal. The hardship imposed upon third parties is especially pronounced as they are otherwise barred from protecting their property through intervention, and Section 130(a)(D) proposes to limit the ability of a third party to seek pretrial modification of a restraining order.

**23. Section 137. Elimination of Superior Title as a Defense to Forfeiture.**

Under existing criminal forfeiture laws, a third party property owner can obtain relief from a criminal forfeiture order if he or she can prove that he or she, rather than the convicted defendant, owned the property subject to forfeiture at the time the property originally became subject to forfeiture because of its unlawful use. Thus, third party property owners (*i.e.*, property owners who have not been indicted or charged with any criminal conduct but whose property has nonetheless become the subject of a forfeiture order) currently have a statutory defense to criminal forfeiture of their property on the ground that they had a "right, title or interest" in the property "superior to any right, title or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property." 18 U.S.C. 1963(n)(6)(A).

DOJ's proposal would eliminate this defense as it is currently enacted. DOJ would condition the defense on an additional showing of innocence, meaning that a third party could lose their property in a criminal forfeiture case without ever having the opportunity to establish that the property was theirs and not the defendant's. This is grossly unfair, and a violation of due process, given the paucity of protections available to third party claimants. Third parties (who are not even accused of any misconduct) are barred from participating in the criminal trial, and have no right to a jury trial on their third party claims, and the burden of proof is on them to establish their superior title. Thus, even though a third party may be totally innocent of any



wrongdoing, third parties are afforded none of the protections provided to the criminal defendant. Moreover, the purpose of criminal forfeiture -- to punish a convicted defendant (and only a convicted defendant) -- is not advanced by forfeiting property that belongs to a third party not accused of any criminal conduct.

**24. Section 138. Uniform Procedures for Criminal Forfeiture.**

This section proposes to make the procedures currently applicable to drug forfeiture the uniform procedure for all money laundering criminal forfeitures. This proposal would expand existing money laundering law by, *inter alia*, allowing seizure of allegedly forfeitable property prior to conviction in a variety of cases involving financial institutions. Although we believe that some changes may be appropriate here, there should not be a complete incorporation by reference of the procedures set forth in 21 U.S.C. §853.

**25. Section 139. Seizure Warrant Authority for RICO.**

Section 139 proposes to allow the government to seize (rather than only restrain) allegedly forfeitable property pretrial in a RICO prosecution. This would be a substantial expansion of the government's forfeiture authority in RICO cases. RICO prosecutions have traditionally involved the largest forfeitures because the government is authorized to forfeit the entirety of a defendant's interest in legitimate "enterprise" under 18 U.S.C. §1963(a)(2). In particular, the use of pretrial restraining orders under RICO to freeze ongoing businesses has been controversial; expanding government authority to include outright seizure of ongoing businesses prior to the filing of a criminal case will be even more disruptive and subject to abuse.

**26. Section 140. Automatic Judgment Against Transferees.**

This eleventh hour provision would create an automatic personal judgment against anyone who is a transferee of property from a defendant in the amount of property transferred. Under the relation back doctrine, property is deemed to have belonged to the government at the time it was used in a way which makes it forfeitable. A defendant sometimes transfers the property to a third party for value or by gift prior to the time the government commences its forfeiture proceeding. Incredibly, DOJ now proposes to make every third party who obtains an asset from a defendant (including bankers, doctors, car dealer, etc.) personally liable to the government for the value of any asset they received from a defendant. The unfairness of this provision is palpable, as it will require third parties to pay the government the value of assets for which they have already paid value and as to which they have been given no notice that the transfer was in any way improper.

Moreover, the commercial mischief this provision will cause is reason alone to reject the proposal. Commercial entities conduct commerce with individuals who later become defendants. Unfortunately, these entities typically do not receive notice from either the government or the defendant that the assets they are dealing with may become forfeitable at a later date. Complex

commercial codes have been devised to protect the property rights of those engaged in commerce, including the creation of recordation and other notice regimes. Section 140 would give the government a hidden civil judgment for the value of assets that will not be apparent to anyone, including banks and other credit sources, until long after the defendant has sold or transferred an asset. Moreover, this civil judgment against third parties would be automatically created in a criminal proceeding in which the third parties are precluded from participating. Such a "judgment" is not worthy of the name and would be a per se violation of due process.

### **Sections 201 through 211. Expansion of the Substantive Scope of Forfeiture.**

Sections 201 through 211 greatly expand the substantive scope of forfeiture. While some of these provisions are not controversial, others are alarming both for the scope of the proposed expansion and for the Department's total insensitivity to the rights of property owners and due process of law. Accordingly, NACDL opposes any substantive expansion of forfeiture unless and until the process is made fair and provides adequate protections for innocent owners. An analysis of some of the more controversial proposals follows.

#### **28. Section 201. Forfeiture of Proceeds of Federal Crimes.**

Section 201 would expand forfeiture to include the proceeds of every Title 18 offense, misdemeanor and felony alike. Currently, only a handful of offenses are covered.

#### **29. Section 203. Forfeiture of Traceable Proceeds.**

This section would amend 21 U.S.C. §881(a)(4) and (a)(7) to provide for forfeiture of proceeds traceable to property (conveyances and real property) which are used, or intended to be used to commit, or to facilitate the commission of a drug offense. Under current law, only property which is actually used, or intended to be used, is subject to forfeiture. DOJ now proposes to expand the forfeiture to property traceable to property used, or intended to be used, in violation of Title 21. Thus, the person who used his car to transport drugs (even for his own use) and who later sold that car and bought a new car would forfeit the new car under DOJ's proposal. This can, and surely will, lead to draconian results.

#### **30. Section 207. Forfeiture for Violations of §60501.**

DOJ and IRS are currently embroiled in a heated dispute with the defense bar over the IRS's stepped up efforts to enforce 26 U.S.C. §60501 against defense counsel who file incomplete IRS Form 8300s. At least nine states have specific ethics opinions prohibiting attorneys from providing the client identifying information requested on Form 8300 absent a court order. Thus, attorneys in those states face a Hobson's choice.

In December, 1993, the IRS began unilaterally imposing "intentional disregard" fines ranging from \$25,000 to \$100,000 on attorneys for each refusal to disclose a client's name on a Form 8300. The enforcement campaign is continuing at the present time despite the defense bar's repeated calls for a truce and a negotiated *modus vivendi*.

In a wholly gratuitous slap at the defense bar, DOJ now proposes to make all property "involved in" violations of §6050I subject to civil and criminal forfeiture under 18 U.S.C. §§ 981 and 982. This would allow the government to forfeit the entire legal fee -- even where paid entirely with "clean" money which was fully earned by the attorney -- in addition to potentially prosecuting the attorney and levying drastic "intentional disregard" fines.

It should not be overlooked that defense attorneys would not be the only victims of this provision. Legitimate merchants and service providers who fail to file a Form 8300 or file an incomplete form would also suffer a drastic forfeiture penalty.

### 31. Section 209. Summary Forfeiture of Unregistered Firearms.

This amazing provision would amend 26 U.S.C. §5872(a) to allow summary forfeiture of certain dangerous weapons not registered under the National Firearms Act. According to DOJ's section by section analysis, this section "would eliminate the need for what are useless but costly forfeiture proceedings for unregistered weapons that are popular with drug dealers and other criminals" and would allow law enforcement to simply seize weapons and declare them forfeited without any further process. DOJ notes that it is allowed to summarily forfeit controlled substances which cannot be legally possessed by anyone [21 U.S.C. §881(f)] and it apparently sees no difference between a firearm, such as a machine gun, which can be lawfully possessed if registered, and a bale of marijuana.

A law abiding gun collector or gun dealer who has legally registered one of these dangerous weapons would have absolutely no recourse for a wrongful seizure and subsequent summary forfeiture. He would have no right to notice of the seizure and no opportunity to be heard (not even by the seizing agency) before his valuable gun is summarily forfeited. No doubt the NRA will have much to say about this proposal.

As anyone who regularly defends criminal cases knows, the definitions of firearms in 26 U.S.C. §5845 are very technical. For example, firearms within the ambit the NFA include a shotgun having a barrel of less than 18 inches and a rifle having a barrel of less than 16 inches. If a shotgun has a barrel 18 inches long it is perfectly legal. If its barrel is 17¾ inches in length it must be registered under NFA. Police conducting searches do not generally carry tape measures with them. They typically seize whatever firearms they find. DOJ's proposed amendment would allow law enforcement to arbitrarily seize and forfeit rifles and shotguns with no proof required (1) that the gun barrel is too short to be legal or (2) that the firearms are not in fact registered. According to DOJ, allowing a gun owner to be heard on these questions is a costly waste of time!

Clearly, this proposal is blatantly unconstitutional, and speaks volumes about DOJ's mindset. It treats the constitution as an inconvenience to be sidestepped. DOJ appears to have learned nothing from the Supreme Court's rebuke in the five most recent forfeiture cases to come before the Court, or from the torrent of media criticism over forfeiture abuse.

**32. Sections 301 through 315. So-called Minor and Technical Amendments.**

We, of course, do not oppose those amendments that are truly minor and technical corrections to various forfeiture statutes. However, under the guise of being minor or technical amendments, DOJ has included some of the most bizarre and draconian provisions in the entire Act.

**33. Section 303. Extension of 18 U.S.C. §984 to All Civil Forfeitures.**

We do not oppose the clarifying changes to 18 U.S.C. § 984. However, we vigorously oppose the extension of § 984 to all civil forfeitures, which is hardly a "minor and technical correction" to that statute. To the contrary, it would vastly expand the forfeitability of substitute assets in civil in rem cases. Prior to the Annunzio-Wylie Anti-Money Laundering Act of 1992, which included the current version of § 984, there was a hard and fast line between criminal in personam forfeitures (where the concept of substitute asset forfeiture was introduced in 1986) and civil in rem forfeiture where no asset forfeiture was authorized. Congress, and even the Department of Justice, believed that the punitive concept of substitute assets could not and should not be extended to civil in rem cases because it ran contrary to the fundamental legal theory upon which in rem forfeitures are based, *i.e.*, that the property itself is "tainted" by its association with criminal activity.

Section 984 made a narrowly limited breach in the aforementioned wall separating criminal and civil forfeiture in order to deal with a discrete law enforcement problem in the money laundering area. Big time launderers move large amounts of cash rapidly in and out of bank accounts also containing funds not being laundered, thereby frustrating the government's efforts to seize the laundered funds. In order to combat such methods, it was thought necessary to authorize seizure of substitute cash in the same bank account even if the substitute cash was not otherwise forfeitable. However, to prevent abuse of this new authority, Congress required that an action to forfeit substitute property under §984 be commenced within one year from the date of the offense. Section 984(c).

In a section by section analysis accompanying Annunzio-Wylie, Congress acknowledged the fundamental distinction between civil and criminal forfeiture in this regard and urged that that distinction "should be maintained." Having got its nose under the tent, the DOJ now wants to expand § 984 to all civil forfeitures, not just money laundering cases. There is no law enforcement justification for doing so and DOJ provides none, preferring to slip this major change in under the smokescreen of "minor and technical corrections."

Substitute asset forfeiture should be narrowed or eliminated, not expanded. We believe that recent Supreme Court decisions throw the constitutionality of substitute asset forfeiture into serious doubt, particularly in civil *in rem* cases. In his concurring opinion in *Austin v. United States*, 509 U.S. \_\_\_, 113 S.Ct. 2801, 2815 (1993), Justice Scalia states that the constitutionality under the Eighth Amendment of a civil forfeiture turns on whether the relationship of the property to the offense is close enough to render it "guilty" or "tainted" under traditional standards. If Justice Scalia is correct then even the current version of § 984 is unconstitutional. See also *Alexander v. United States*, 509 U.S. \_\_\_, 113 S. Ct. 2766, 2778 (1993) (Kennedy, J. dissenting) ("Civil *in rem* forfeiture is limited in application to contraband and articles put to unlawful use, or in its broadest reach, to proceeds traceable to unlawful activity."). Not satisfied with the *in rem* forfeiture of traceable proceeds, the government now wants to be able to civilly confiscate completely untainted funds if the traceable proceeds somehow elude its grasp. At some point the almost mindless annual expansion of our forfeiture laws must stop. This is a good place to draw a line in the sand and say to the government, "You go no further."

The proposed amendment would also gut the salutary one year statute of limitations in § 984(c) and replace it with a requirement that the substitute assets merely be seized within two years of the offense. § 984(c) currently requires that the forfeiture action be commenced within one year of the offense. As the legislative history of Section 984(c) explains, the purpose of the short limitations period is to provide some basis for believing that the substitute cash is, in fact, likely to be tainted.

### 33. Section 310. Expansion of the Term "Proceeds."

Under the guise of a "minor and technical" amendment, DOJ proposes to radically alter the definition of "proceeds" in all civil and criminal forfeitures statutes. Courts have consistently interpreted the term proceeds to mean net profits, not gross revenues. See, e.g., *United States v. Masters*, 924 F.2d 1362, 1369-70 (7th Cir. 1991) (RICO); *United States v. Lizza Industries, Inc.*, 775 F.2d 492-499 (2nd Cir. 1985) (RICO); *United States v. Milicia*, 769 F.Supp. 877 (E.D. Pa. 1991) (pharmacist convicted of illegally dispensing controlled substances was allowed a deduction for wholesale cost of the illegal prescriptions he filled -- 60% of gross receipts -- under 21 U.S.C. §853); *United States v. \$122,942 Shares of Common Stock of FirstRock Bancorp Inc.*, Nos. 92 C 202288 etc. (N.D. Ill. March 22, 1994), 55 CrL 1027 (18 U.S.C. §981(a)(1)(C)).

This is the common definition of the term proceeds. Forcing criminals to disgorge their ill-gotten gains is justifiable, and even desirable, as a remedial measure designed to prevent unjust enrichment. However, DOJ now wants to convert all proceeds forfeitures into highly punitive measures by redefining the term "proceeds" to mean "all of the property derived directly or indirectly, from an offense or scheme, not just the profit." Astoundingly, DOJ offers no justification for this significant change in the law, while hiding behind the pretense that this is a minor or technical amendment designed to promote "uniformity" in the law.

The example unabashedly provided by DOJ in its Section-by-Section analysis illustrates the draconian results of the proposed change. All monies received as the result of a loan application containing a single false statement would be forfeitable -- even if the bank was fully

repaid; the bank was never at risk; and there was no intent to defraud the bank! Many decent and law-abiding people make some kind of false statement on a bank loan application in the belief, correct or not, that the statement will make it more likely that they will obtain the loan. DOJ would subject such people to a complete forfeiture of the loan proceeds. Ironically, the forfeiture of the loan proceeds might prevent the borrower from repaying the loan to the bank. If the loan is unsecured, the bank would have no standing to contest the forfeiture and it would be out of luck unless the government chose to grant it relief through the mitigation process.

The following example is illustrative of DOJ's proposal. Assume a bank loan application for a \$100,000 loan contain a false statement. The bank grants the loan. The borrower applies the proceeds of the loan to a building project of \$1,000,000. The borrower then secures other financing (with no false statements), and pays off the first bank. DOJ then learns of the false statement in the original loan application. Under DOJ's proposed amendment, the borrower would forfeit the entire building project (\$1,000,000), plus the \$100,000 loan, even though the bank had been fully repaid. Such a result defies logic and reason. DOJ has not offered any explanation, let alone justification for this bizarre proposal.

To make matters even worse, this proposal must be considered in tandem with proposed Section 201, which would vastly expand the number of criminal offenses that allow criminal and civil forfeiture of "proceeds". While we do not oppose the concept of forfeiting ill-gotten gains (net profits), we strongly disapprove of DOJ's shameless attempt to turn this basically remedial concept into an arbitrary punishment.

Mr. HYDE. Well, thank you, Mr. Edwards.

Before I recognize Mr. Barr for some questions, you heard this morning Mr. Komie talk about quotas and you heard a rather vigorous denial from the gentleman from the Justice Department. Have you any information to add to that?

Mr. EDWARDS. I am very glad you asked the question, Mr. Chairman. Yes, I do.

I would suggest that the Barr memorandum that was quoted in a footnote by the U.S. Supreme Court in the *Good* decision, while it—while Mr. Barr didn't call it a quota, what it was was a memorandum to all the U.S. attorneys saying, we don't want to be embarrassed by not meeting the projections we have made to Congress. So you guys get on the ball and get this property forfeited in a hurry.

I mean, that is essentially what the memorandum said, and anyone who doesn't like my characterization of it, that is fine. They can pick up the *Good* opinion and read it and decide for themselves what Mr. Barr was saying.

I have been told that Attorney General Reno has sent a more subtly and discretely worded memo to U.S. attorneys within the last year. Now, I have not seen that memo. In fact, I have made inquiries to try to get a copy of it. I suspect that, Mr. Chairman, you and your staff would have greater success than I.

But I have been told by a person who said—a reporter who said that they had seen this, that a memo has gone out from the Attorney General, presumably to the U.S. attorneys, that encourages the U.S. attorneys to provide adequate asset—adequate attention to the job of forfeiting assets.

Now, again, that is all I can tell you. I am not—since I haven't seen it, I do not want to represent what its contents are. That would be inappropriate. But I have seen nothing—and I do a lot of forfeiture work, and I have seen nothing through the changes of administrations that suggests to me that the Justice Department and the various law enforcement agencies in this country that have forfeiture authority have diminished in their zeal to get property from private sources at all.

Mr. HYDE. It is conceivable that a suggestion that the local U.S. attorneys step up their forfeiture action could have bypassed Mr. Cassella. Is that conceivable?

Mr. EDWARDS. I would think so. I have never worked for the Justice Department, but I have had some exposure to bureaucracy. I suppose that sort of thing could happen.

Mr. HYDE. We have had some discussion on the standard of proof. Clear and convincing is the standard that we have in our legislation for the Government to sustain that burden of proof by clear and convincing evidence. It seems that the Justice Department is interested in reducing that to mere preponderance, or preponderance.

Mr. EDWARDS. Yes.

Mr. HYDE. Do any of you three have, starting with you, Mr. Edwards, and Mr. Kappelhoff and Mr. Reed, do you have any comment on that change if that were to be adopted?

Mr. EDWARDS. Well, Mr. Chairman, I would suggest that you got it right the first time. Asset forfeiture is punishment. And in the

*Austin* decision, the Supreme Court made clear that they recognized, at least for eighth amendment purposes, that forfeiture was punishment. The label is different but, essentially, forfeiture is a type of fine.

Mr. HYDE. And clear and convincing is a midway between beyond all reasonable doubt and a mere presumption.

Mr. EDWARDS. That is exactly right.

Mr. HYDE. So it is not the harshest, but it is not the easiest.

Mr. EDWARDS. That is correct.

Mr. HYDE. That was its attraction to us.

Mr. EDWARDS. Yes, indeed. And as a trial lawyer, I think it is very significant to try a case where the judge, at the conclusion of that case, is going to tell the jury something more than it is just like getting the ball over the 50 yard line. Maybe you don't have to score a touchdown, but you do have to get close enough to the goal line that you are persuaded that the proponent of the forfeiture is right. And it is meaningful, I think, in its impact on juries to hear something from the judge that has more to it than preponderance.

So I think something—as you say, something in between is very meaningful and ought not to be relinquished without very serious thought.

Mr. HYDE. Mr. Kappelhoff.

Mr. KAPPELHOFF. We would actually ask for the standard beyond a reasonable doubt, but we are also pragmatists and we understand that you have arrived at this as somewhat of a compromise between the two, and we think that's a very common-sense approach to this and we believe the clear and convincing standard is satisfactory, although we would like it beyond a reasonable doubt.

And I think why your standard makes sense is, we say this is quasi criminal. Well, the Supreme Court, as Mr. Edwards has indicated, has suggested that there are penal aspects to this. We are taking people's property. Sometimes it is the only property they have. So to have that additional protection, which is simply—you know, you even mentioned mere preponderance as sort of a suggestion that that really isn't quite enough, you are taking the belongings of people, their property and everything they own. We certainly need to have a standard that warrants that, and I think clear and convincing does that and I think your approach to it made perfectly good sense in your bill when you initially introduced it. I think it makes sense today.

Mr. HYDE. Mr. Edwards was talking about private property, the right of private property being at the heart and soul of freedom. It is an ancient concept. I suggest it goes back to the Decalogue, "thou shalt not steal." It certainly implies the right to own property if someone else can steal it.

Mr. Reed, on the standard of proof?

Mr. REED. Well, you have to start first with the background. Most States, a majority of States, have a preponderance standard and almost all the States rejected a probable cause standard.

The Uniform Law Commission, the National Conference of Commissioners on Uniform State law, recently enacted a Uniform Civil Forfeiture Act and that adopted a preponderance standard. There



was considerable debate about clear and convincing, beyond a reasonable doubt, or preponderance.

Preponderance is a standard that is the basic standard for a civil system of justice and that is the standard that the ABA has endorsed. Now, the ABA has not objected to the clear and convincing standard. Quite frankly, it has not deliberated that. But the shift from probable cause to preponderance is a shift of a light year in terms of what goes on in a courtroom, or whether you will have a day in court, quite frankly, given the use of summary judgment procedures.

So I think that the minimum standard, the ABA has certainly endorsed as a minimum standard, the preponderance standard.

Mr. HYDE. Very well.

Mr. Barr.

Mr. BARR. Thank you, Mr. Chairman. Mr. Chairman, I want to commend you for introducing this legislation, which I support and for holding these hearings.

I have had experience, as have some other members of the committee on both sides, both as a prosecutor, a Federal prosecutor, enforcing our asset forfeiture laws and as an attorney in private practice representing innocent property owners, small businesses, small business people who have had their property seized and have great difficulty getting it back or even getting into court to get it back. So I am very mindful, as are members of this panel, certainly in the earlier panels, of the problems in current laws. And I think we have had some very enlightening testimony today.

One thing I have been doing, Mr. Chairman, while I have been listening to the testimony from this panel, is going over some of the written testimony from the earlier witnesses that I wasn't able to be present for because I hadn't gotten in from my district yet, and we have covered a number of questions already through the direct testimony of these witnesses, as well as through your questions, Mr. Chairman, that I had also, in looking through particularly the testimony of the Department of Justice and Department of Treasury proponents.

But just one question that we haven't covered, and if any of the gentlemen on this panel see the following different than I do, I would appreciate learning about it. The Department of Treasury representative raised an objection to H.R. 1916, which frankly, I had never thought of, and I think I have never thought of it because I don't think it's an appropriate one, but I would like to know if any of you gentlemen see a problem here.

They raise an objection raising what I think is sort of a red flag, a redherring, of it would endanger the public safety because it would impair the ability of the Customs Service to stop dangerous food products, adulterated or unlicensed drugs, child pornography, illegal firearms, unsafe consumer products, et cetera at our border. And I don't read the changes, Mr. Chairman, that we are proposing here as in any way affecting the Government's ability to stop those products at the border.

If, in fact, they are what the Department of the Treasury says they are, they certainly would fall under the category of things that could be seized and forfeiture action presented under this bill as well under current law.

But do any of you gentlemen see really any problem with, if the proposal that we have before us today were enacted into law, that the public safety would be somehow endangered?

Mr. REED. To respond, I don't see any legitimate basis for that concern on the part of the Government. The proposal in H.R. 1916 would not change the standard for seizing property. So if you had adulterated milk sitting on the dock, it could be seized under the same laws as it is seized today. The only issue that might arise is whether down the road the issue of ultimate forfeiture, whether that would be by a higher standard. Does that answer your question?

Mr. BARR. Yes. And, Mark?

Mr. KAPPELHOFF. I don't see how that would impact on it. The Government has the power, the tools, the resources to seize the item and it is later on down the road when this bill, or the law, if it becomes enacted, comes into play, not at the inception of the seizure.

Mr. BARR. OK.

Mr. EDWARDS. I agree with that.

Mr. BARR. Again, Mr. Chairman, I think particularly this panel has answered a number of questions that I have and, again, I would support this legislation. I think it is long overdue and a very important piece of legislation that I hope we can get through the Congress.

Thank you, Mr. Chairman.

Mr. HYDE. Well, I thank you.

I regret the press isn't here, and I don't mean to be critical of the press, but this is an example of if your ox isn't gored, you know, who cares? It won't ever happen to me. And this stuff can happen to anybody and everybody. When it happens to you, it's too late to drum up interest.

We have been trying to get somebody to give a damn about this and we are still trying and we are going to continue to try. You have made a great contribution. You have educated us, and anybody who has heard what you have had to say—I am going to have your testimony written up and I am going to distribute it to certain people, journalists, who weren't here today, but whom I wish had been here today.

I found an op-ed piece in the Washington Times very recently July 10 by Paul Craig Roberts who has written extensively on this issue and he is quoting from a book by someone named Leonard W. Levy, a new book called, "A License to Steal: The Forfeiture Of Property." And I will quote two paragraphs from it, as if you are not angry enough.

"Asset forfeitures came to prominence in the war against drugs. They have not dented drug use, but they have made thieves out of law enforcement officers. Mr. Levy recounts how Suffolk County New York district attorney, James M. Catterson, drives a swanky BMW as his official car instead of a county car. The luxury import was part of \$3 million worth of property seized by Mr. Catterson.

"Somerset County New Jersey prosecutor, Nicholas L. Bissell, used \$6,000 of seized funds, 'for a corporate membership in a private tennis and health club for the benefit of his 17 assistant prosecutors and 50 detectives.'" And it goes on, and on, and on.

Now, maybe those seizures were appropriate. This doesn't say. You would have to read Mr. Levy's book to see. But the interest that law enforcement has is patent here. If you are going to get the benefits of what you seize, why the sky is the limit. And everyone should have a BMW, I guess, and a tennis membership.

I think we have uncovered something that has been glaring at us for years. We have just noticed it. You have been living with it, you folks, and I am most grateful for your contribution, and we have only begun. Thank you.

The meeting is adjourned.

[Whereupon, at 3:05 p.m., the committee adjourned.]

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# APPENDIX

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## MATERIAL SUBMITTED FOR THE HEARING

### STATEMENT

of

Roger Pilon, Ph.D, J.D.  
Senior Fellow and Director  
Center for Constitutional Studies  
Cato Institute  
Washington, D.C.

for the

Committee on the Judiciary  
United States House of Representatives

July, 22, 1996

Mr. Chairman, distinguished members of the committee:

My name is Roger Pilon. I am a senior fellow at the Cato Institute and the director of Cato's Center for Constitutional Studies.

I want to thank Chairman Hyde for inviting me to submit a statement to the committee on H.R. 1916, the Civil Asset Forfeiture Reform Act. Fundamental reform of America's forfeiture law is long overdue. Although this measure, in my judgment, does not go far enough, it is a step in the right direction. Chairman Hyde, whose recent book on the subject I am pleased to have edited and the Cato Institute is proud to have published,<sup>1</sup> is to be commended for having introduced it and, more generally, for having taken up the issue of forfeiture reform when so many in Congress have ignored it.

That the state of our forfeiture law today is a disgrace is hardly in question. A body of "law" that enables law enforcement personnel to stop motorists and seize their cash on the spot, to destroy boats, cars, homes, airplanes, and businesses in often fruitless drug searches, and even to kill and maim in the course of seizure operations is out of control. Even lawyers, when they come upon this area of the law for the first time, are taken aback by the injustice--indeed, by the utter irrationality--of it all.

About the only people who defend forfeiture law today are those in law enforcement who benefit from it, either as a "tool of their trade" or, more directly, by keeping the goods they seize--a conflict of interest so stark that it takes us to another age. In

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<sup>1</sup> Henry J. Hyde, *Forfeiting Our Property Rights: Is Your Property Safe From Seizure?* (Cato Institute, 1995).

fact, that is just the problem with modern forfeiture law: in practice as well as in theory, its roots are in notions that have no place whatever in our legal system, animistic and authoritarian notions that countless people have died over the ages to bury and replace with the rule of law.

The very styling of the relatively few cases that make it to court tells the story: *United States v. \$405,089.23 U.S. Currency*<sup>2</sup>; *United States v. 92 Buena Vista Avenue*<sup>3</sup>; *United States v. One Mercedes 560 SEL*.<sup>4</sup> Civil forfeiture actions are brought against the property, not against the person. They are *in rem* proceedings--not for the purpose of gaining jurisdiction over a real person but for the purpose of seizing property for forfeiture to the government. Fantastic as it may sound, it is the property that is charged.

How can that be? Finding its origins in the Old Testament and in medieval doctrine, in the idea that animals and even inanimate objects involved in wrongdoing could be sacrificed in atonement or forfeited to the Crown, modern forfeiture law, filtered through early American admiralty and customs law, has simply carried forward, uncritically, the practice of charging things.

Thus, officials today can seize a person's property, real or chattel, without notice or hearing, upon an *ex parte* showing of mere probable cause to believe that the property has somehow been "involved" in a crime. Neither the owner nor anyone else need be charged with a crime, for the action, again, is against the thing. The allegation of "involvement" may range from a belief that the property is contraband to a belief that it represents the proceeds of crime (even if the property is in the hands of someone not suspected of criminal activity), that it is an instrumentality of crime, or that it somehow "facilitates" crime. And the probable cause showing may be based on nothing more than hearsay, innuendo, or even the paid, self-serving testimony of a party with interests adverse to the property owner.

Once the property is seized, the burden is upon any owner who wants to get his property back to prove its "innocence"--not by a probable-cause but by a preponderance-of-the-evidence standard. Yet that is possible only where innocent-owner defenses have been enacted or allowed. In defending the innocence of his accused property, the owner must of course prove a negative. Moreover, he must do that against the overwhelming resources of the government. And if he has been involved in activity that in any way might lead

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<sup>2</sup> 516 U.S. \_\_\_, 116 S.Ct. \_\_\_ (1996).

<sup>3</sup> 113 S.Ct. 1126 (1993).

<sup>4</sup> 919 F.2d 327 (5th Cir. 1990).

to criminal charges--however trivial or baseless those charges might ultimately prove to be--he has to weigh the risk of self-incrimination entailed by any effort to get his property back against the value of the property. As a practical matter, the burden is simply too high for many innocent owners, who end up walking away from their loss.

That, in a nutshell, is the state of modern American civil forfeiture law. It goes after property, not people--a ruse that permits the abandonment of elementary notions of due process. And it does so, most notoriously, on the ground that the property is guilty of "facilitating" a crime--a doctrine that is infinitely elastic.

Because others will testify before the committee about their tragic experiences under this law--many examples of which are to be found in Chairman Hyde's book--let me not give further examples here but instead focus on two basic questions: (1) What is the legitimate function and scope of forfeiture law? and (2) Does H.R. 1916 comport with such law? As suggested earlier, I am of the view that our civil forfeiture law is fundamentally misguided and unsound and that we need for the most part not merely to reform but to abandon it, relegating it to the dustbin of history. Because I have discussed the basis for that conclusion in some detail in an essay that I have made available to the committee,<sup>5</sup> let me simply summarize my arguments here.

Only people commit crimes. The so-called personification doctrine, which is the basis of our civil forfeiture law, is simply too fantastic to be taken seriously. Yet H.R. 1916 does nothing to challenge that fiction. Under the bill, the government would continue to bring cases not against people but against property. In quasi-criminal proceedings, the property would be charged, but those proceedings would have few of the safeguards found in true criminal proceedings. To be sure, the government would have the burden of proving, "by clear and convincing evidence, that the property was subject to forfeiture"--no small improvement. But the substantive law, the criteria for determining when property would be "subject to forfeiture," would remain unchanged.

The personification doctrine is thus intimately connected to the substantive criteria for forfeiture. To see how that is so, however, it is useful to look first at the ordinary criminal case, where a real person is charged. In such a case, the aim of the criminal proceeding is to determine the guilt or lack of guilt of the accused and, if guilty, to determine a remedy that will right the wrong at issue. Thus, not only compensation for crime victims but even punishment is, in this generic sense, "remedial." In

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<sup>5</sup> Roger Pilon, *Can American Asset Forfeiture Law Be Justified?* 39 New York L.S.L.R. 311 (1994).

principle, at least, those and only those who commit crimes must remedy their wrongdoing. The remedy is thus a function of the wrong to be remedied.

When we turn to forfeiture law, however, we are invited to believe that the property committed some "wrong," for it is the property that is charged and is "subject to forfeiture." Why? There are three basic rationales: the fruits of crime; contraband; and because the property "facilitates" crime. But are any of those rationales remedial?

Clearly, the first is. If a man robs a bank, he can be made to forfeit his ill-gotten gain. Setting aside complications that arise from conversions and third-party victims, no one objects to forfeiture in this context, not least because the forfeiture is less "of the property" than "from the criminal," and is directly related to the crime the forfeiture is meant to remedy. The forfeiture, in short, remedies the wrong, at least in part. At the same time, all of this can be accomplished ordinarily through an ordinary criminal proceeding, without resorting to a standard civil forfeiture action.

But if the fruits-of-crime rationale for forfeiture is not ordinarily problematic from a remedial perspective, neither is the contraband rationale. To be sure, there is always disagreement about what should be contraband--especially, today, regarding the never-ending "war on drugs." But once Congress decides to make the possession of alcohol, or drugs, or tobacco, or whatever illegal, then the seizure for forfeiture of that contraband can be said to remedy the "wrong" of possession.

The facilitation doctrine, however, is quite another matter, for when property is forfeited because it "facilitates" a crime--even when it is the property of the criminal himself--there is no obvious connection between the "remedy" and the wrong to be remedied. If I make a call from my home to consummate a drug deal, how does the forfeiture of my telephone, or my home, or the cattle on my ranch, "remedy" that crime? What is the connection, from a remedial perspective, between the crime and--let us be more candid than the Supreme Court--the "punishment"? And if that connection is missing when it is *my* property that is being forfeited, it is missing *a fortiori* when the property of some *third* party is forfeited on the ground that the property "facilitated" my crime.

Today, countless forfeitures take place under the facilitation doctrine. The property is personified. It is then said to "facilitate" a crime--however tenuous the connection may be. As a result, it is "subject to forfeiture." Never mind that the forfeiture will in no way remedy the crime--especially if the owner is not the criminal. Facilitation forfeiture can make no pretense at being remedial because it need take no measure of the crime that gives rise to it. Minor crimes can lead to major facilitation



forfeitures. Ships can be forfeited over the discovery of a marijuana "roach." Apartment buildings, hotels, cars, and second mortgages can be forfeited over illegal assignments.

The facilitation doctrine is boundless in practice because it is groundless in principle. Yet it drives our forfeiture law and practice today, and this bill leaves it in place. No "nexus" refinements will solve the problem. Nor will refinements of the "innocent-owner defense"--which effectively deputizes innocent people--offer anything but occasional relief. This substantive foundation of so much of our civil forfeiture law, the handmaiden of the personification doctrine, must be torn up, root and branch. Only then can we hope to secure the idea that forfeiture, in a free society, is not a free-standing doctrine but a very limited element in a remedial scheme that is rooted, ideally, in a rational system of wrongs to be remedied.

H.R. 1916 gives limited relief. It does not address the heart of the matter.

FACSIMILE  
(703) 548-8935

**ENGLISH & SMITH**  
ATTORNEYS AT LAW  
COURTHOUSE SQUARE  
526 KING STREET, SUITE 213  
ALEXANDRIA, VIRGINIA 22314-3163

TELEPHONE  
(703) 548-8911

September 5, 1996

Stefan D. Cassella, Esq.  
Deputy Chief  
Asset Forfeiture and Money Laundering Section  
1400 New York Avenue, NW  
Washington, DC 20530

Dear Stef:

I received your letter of August 26, 1996. Thus far, I have not memorialized any of my comments or suggestions in writing. I think your most recent letter calls for a written response so that there is no misunderstanding about where we stand. This letter has been reviewed and approved by my fellow co-chairs, Richard Troberman and E.E. ("Bo") Edwards and by NACDL's Legislative Director, Leslie Hagin. And thus you can consider it as representing NACDL's position even though much of it is written in the first person.

On page two of your letter, paragraph two, you state that with respect to the remaining 10 provisions on List B I have "rejected all efforts at compromise." That is not so. I made a number of suggestions for compromise, some of which you said you would consider. I do not see these suggestions reflected in your letter. I will reiterate some of them as I go down the various lists. In general, I think that I have gone much further in the direction of accommodating the DOJ's wishes than many NACDL members would think desirable. Remember, our organization strongly supports the Hyde bill but feels it does not go *far enough* in addressing our concerns! I wish the DOJ (not to mention the Treasury) could be as open-minded about reconsidering some of its more ill-conceived proposals. Of course, you are not personally to blame for the institutional biases that infect the DOJ bill. You are one of the *few* people over there who is capable of seeing another point of view.

Before I turn to List C, let me make some points about List A. The last time we spoke I requested a change in the legislative history you drafted for sections 206 and 215. You did not voice any objection to my proposal. However, the change I requested is not in the most recent draft of the legislative history for sections 206 and 215. I proposed that you strike the words "to challenge the finding that the property was subject to forfeiture" and substitute "to litigate the forfeitability of the property *de novo*". The evidence developed in the criminal proceeding

against the defendant could not be considered by the trier of fact in the *in rem* proceeding under §853(t) because the third party did not participate in the criminal proceeding.” This change in the language of the legislative history is needed because the current language might be read to suggest that the third party does not have a right to litigate the forfeitability of the property *de novo*. It is also needed because current §853(n)(5) requires the court to “consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.” It needs to be made clear that this provision doesn’t apply to an *in rem* proceeding under §853(t).

With respect to section 304 (dealing with the forfeiture of proceeds traceable to facilitating property in drug cases), I suggested that a narrow exception be written into the statute for the unusual situation where the facilitating property is a legitimate business. We both agreed that there is considerable unfairness in forfeiting all of the proceeds from a legitimate business which the property owner may have worked hard at for many years. I don’t see why law enforcement should object to a minor exclusion for that special situation.

My colleagues, Richard Troberman and E.E. (“Bo”) Edwards, have raised objections to sections 210, 304, 305, and 408, previously on List A, which I believe are well-founded. Thus, these sections should be moved to List B or C.

#### **Section 210 Right of Third Parties to Contest Forfeiture of Substitute Assets**

The main problem we see with respect to substitute assets based on a proceeds theory is that the government bases its estimate of the amount of proceeds subject to forfeiture on a “gross receipts” definition of proceeds, which greatly increases the amount of substitute property subject to forfeiture but which may be rejected later by the trial court based on case law holding that the defendant is entitled to a reduction for the cost of the goods sold. In addition, the government often exaggerates the amount of the defendant’s gross receipts based on arbitrary assumptions about the amount of drugs sold over the life of a long conspiracy. If the government has evidence that the defendant sold X pounds of marijuana during one week, then it is sometimes simply assumed that the defendant was probably selling the same amount of marijuana during each week of a five year conspiracy. Calculating the defendant’s gross receipts based on such extrapolation methods generally results in a great exaggeration of the defendant’s gross receipts not to mention his actual profits. The government will then assert in the indictment that the defendant must forfeit X million dollars as substitute assets. Because the defendant did not make nearly as much profit as the government’s exaggerated gross receipts figure suggests, and because the defendant’s profits will usually have been spent on ordinary living expenses, he will usually have property worth a small fraction of the staggering sum alleged in the indictment. Therefore, the substitute asset allegation in the indictment, whether or not well-grounded in law or fact, will effectively freeze all of the defendant’s assets in the vast majority of cases.

How is the defendant going to pay his family's living expenses and his attorney fees in these circumstances? He can't rely on §211(a)(2) because that provision applies only to property "restrained pre-trial." It doesn't apply to property that is effectively frozen as a result of the mere allegations in the indictment. The non-applicability of §211(a)(2) is also a problem with respect to substitute assets based on a facilitation theory. Whatever the theory, defendant has no mechanism for challenging the forfeiture allegations in the indictment and no right to seek exemption of property needed for attorney fees and living expenses *pendente lite*. If §210 is enacted, no attorney in his right mind would accept any money from such a defendant. And what we're talking about here is *clean* money or property alleged in the indictment to be forfeitable solely as a substitute asset.

### **Section 305 Forfeiture for Alien Smuggling**

We have no objection to permitting forfeiture of the proceeds of alien smuggling so long as proceeds is not defined as "gross receipts." We do object to permitting forfeiture of "any property, real or personal . . . that is used to facilitate, or is intended to be used to facilitate, the commission of a violation of [8 U.S.C. §1324(a)(1)(A)]." Of course, conveyances used for facilitation are already subject to forfeiture under 8 U.S.C. §1324(b). The question is whether the government should also be able to forfeit real estate and other valuable property, such as a business, based on a facilitation theory. We think not. We know based on experience that the government would apply these new powers to impose harsh and often wildly disproportionate penalties on anyone who allows his property to be used in any manner to "facilitate" the smuggling of even a single alien. While the Excessive Fines Clause provides some protection against the worst excesses (assuming a property owner has the wherewithal and determination to fight the government in court), it will not prevent the run-of-the-mill extremely harsh forfeiture. In most cases the criminal forfeiture of alien smuggling proceeds, combined with substitute assets, will allow the government to confiscate all of the defendant's property anyhow.

### **Section 408 Closing of Loophole to Defeat Criminal Forfeiture Through Bankruptcy**

We don't object to the thrust of this provision. Our problem is limited to the vagueness of the "in contemplation of a prosecution" language. What exactly does that mean? We are afraid the government will argue that whenever the defendant declared bankruptcy prior to an indictment, the bankruptcy was "in contemplation of a prosecution." This language might be changed to require either 1) that the defendant was formally put on notice via letter from the prosecutor that he was likely to be prosecuted or 2) proof by the government that the defendant instituted bankruptcy proceedings for the purpose of defeating or interfering with the

government's ability to forfeit his property.

This is an appropriate place to reiterate in writing a crucial caveat Troberman and I made earlier: NACDL's non-opposition to the List A provisions depends on the passage of the core provisions of the Hyde bill as part of the same legislative package. We also want a provision requiring the government to file its civil forfeiture complaint within 90 days of its receipt of the administrative claim unless the court extends the time limit for good cause shown. Although some of the List A provisions are not all that significant, they collectively constitute an important expansion of government forfeiture powers. We cannot agree to that unless forfeiture procedures are made more fair and the only way to do that is to pass the Hyde bill provisions or some recognizable version of them.

I will now turn to the List C provisions.

#### **Section 101 Time for Filing Claim; Waiver of Cost Bond**

With respect to the cost bond requirement I made two additional suggestions for DOJ compromise with the Hyde bill, which you said would be considered. I suggested DOJ might take the position that the maximum amount of the cost bond could be substantially reduced, which I believe would be more than adequate to deter frivolous claims, as the DOJ asserts is necessary; and second, that a trial judge be given discretion to return the cost bond to a claimant who loses the forfeiture case provided that the judge determines that the claimant's litigation position was *not* frivolous. If the purpose of the cost bond is to deter frivolous claims, then a claimant who asserts a non-frivolous position in litigation should not be compelled to pay the government's storage and litigation costs. You did not express objections to either of those suggestions of mine, and you said you would run them by your people. I have yet to hear back from you on the subject.

But I have now also had the opportunity to run this idea by my co-chairs of the NACDL Forfeiture Abuse Task Force, and the NACDL legislative director and leadership. This is an issue on which NACDL cannot backtrack. We have long strongly supported this proposal to abolish the cost bond requirement. And, still seeing no reason to deviate from that position, we continue to stand behind the Hyde bill provision. The cost bond requirement serves the supposed purpose of deterring frivolous claims. Rather, it simply assumes that only the poorer citizen (or indeed, the strapped middle class one) files frivolous claims, and suggests at least that one who can "afford" it can still jerk the over-burdened federal courts around, and file frivolous claims. This is at least an *odd* way to go about deterring frivolity in the courts. Even if the cost bond requirement *did* deter some frivolous claims, we think it clearly deters a much greater number of *non-frivolous* claims by those unfortunate enough to have been "priced out" of justice by the cost bond requirement -- economically barred from their supposed right of equal access

to justice.

In short, the cost bond requirement must be abolished, as Chairman Hyde has proposed in H.R. 1916. NACDL remains unconvinced that there should be a "poll tax" for justice in America. We remain convinced that Chairman Hyde's proposed abolition of this anomalous, anti-democratic, "justice tax" is a critically important reform to the law of asset forfeiture. As you know, the courts have ample powers (e.g., Rule 11), and every incentive -- given their notorious case (over)loads -- to boot out frivolous claims, be they filed by the poor or the rich.

I have no objection to a provision requiring the claimant to state "the nature and extent of his ownership interest" in the property. However, for the reasons I previously explained, we strongly object to a requirement that the claimant also state "how and when it was acquired." The how and when requirement would be onerous in many cases and we see no justification for it. The claimant may, of course, be required to explain how and when he acquired the property once litigation commences in the district court. The government frequently files form interrogatories together with the complaint in order to determine whether the claimant has standing to contest the forfeiture. We see no reason why a claimant should have to explain how and when he acquired each piece of property the government has seized at a very early stage in the proceeding, when he often hasn't even obtained the assistance of counsel yet. There are many cases where the government seizes literally everything a claimant owns, including many items of relatively small value. It would be extraordinarily difficult, if not impossible, for the claimant to quickly and accurately provide details as to how and when he acquired each piece of property.

In your letter you provide an example of the kind of information a claimant would be required to tell the government under the provision. However, you do not give any information as to "how and when" the hypothetical owner of the money acquired it. The mere statement that the money represents the operating capital of his business does not tell us how and when he acquired it.

#### **Section 105 Preservation of Arrested Real Property**

We have no objection to a statutory provision which merely codifies the Supreme Court's decision in United States v. James Daniel Good Real Property, 510 U.S. 43 (1993). However, we believe that the DOJ proposal does more than that. The videotaping of the interior of an occupied home is a very significant invasion of the privacy interests of the homeowner. As such, it interferes with the owner's use and enjoyment of the property. After all, one reason people choose to live in private dwellings is to protect the privacy of their possessions and lifestyle. Videotaping the interior of a home and all of its contents is the functional equivalent of a search. We believe that either a search warrant or an order issued after an adversary hearing

pursuant to Good would be required in order to authorize such videotaping. Apart from the constitutional issue involved, we also do not understand why law enforcement feels there is such a need to videotape. Normally, the government does not seek forfeiture of the homeowner's personal property contained within the home. In those cases, we see no justification for videotaping the entire contents of the home. In some cases, the government may have an interest in videotaping valuable fixtures such as an expensive chandelier hanging in the dining room. Those concerns can be dealt with in a far less intrusive manner than videotaping the entire contents of the house. Such videotaping will often merely be an excuse for rummaging through the homeowner's possessions in search of incriminating evidence.

#### **Section 107 Prejudgment Interest**

We see no reason why the government should not have to disgorge any benefit it receives from using the claimant's money when it loses the case. We would fully codify the decision in United States v. \$277,000.00 U.S. Currency, 69 F.3d 1491 (9th Cir. 1995). That decision does not expose the government to "unlimited liability based on uncertain calculations of what the government could have earned by investing the claimant's money," as you claim in your letter. The decision merely requires the government to pay prejudgment interest based on the then current Treasury borrowing rate. This is readily calculable and will merely deprive the government of the pecuniary benefit it has received by detaining the property owner's money. As the Ninth Circuit pointed out, the government derives a greater economic benefit from cash held by the Treasury than cash deposited into commercial banks at below Treasury interest rates because the cash deposited reduces the government's borrowing needs, which is the equivalent of earning interest. 69 F.3d at 1494-96. The DOJ has said the same thing for years. I remember going through that drill when I was deputy chief of the Asset Forfeiture Office. The government's proposal is designed to allow the government to continue to derive an unjustified benefit from the wrongful seizure of a citizen's money. Shame!

#### **Section 121 Trial Procedure for Civil Forfeiture**

We have no objection in principal to the codification of case law governing civil forfeiture procedures. However, we would like to study your codification more closely before signing off on that part of section 121.

United States v. Ursery, 116 S.Ct. 2135 (1996) does not deal with the problem of successive criminal and civil forfeiture actions, but rather with the separate question of successive criminal prosecutions and civil forfeiture actions. Of course, Ursery merely held that the Double Jeopardy Clause is not implicated by such successive actions. It does not prevent

Congress from enacting measures to ensure that the government does not overreach. Congress did just that in 18 U.S.C. §924(d), which was amended following the Supreme Court's double jeopardy decision in the 89 Firearms case in 1984. Section 924(d)(1) prohibits the government from bringing or continuing a civil forfeiture action against weapons following an acquittal of the gun owner. I would extend the same type of protection to all civil forfeiture actions, not just those involving guns. Other forms of property should have at least as much protection as guns. Congress should also require the government to elect between criminal and civil forfeiture remedies. There is no reason why the government should be able to bring a civil forfeiture action after losing a criminal forfeiture action *governed by the same burden of proof* where both actions involve the same factual issues and a jury has already ruled in the property owner's favor in the criminal forfeiture action. Indeed, well established principles of collateral estoppel would bar the government from doing that. I would concede your point that if the property is involved in a crime other than the one for which the defendant was convicted, a separate civil forfeiture action should not be barred. However, I would use a "same conduct" test here rather than a "same offense" test because it is too easy for the government to predicate the forfeiture on a slightly different offense than was charged in the criminal forfeiture case.

On the issue of standing, I would refer you to my previous criticism of section 101. How and when a claimant acquired a property interest generally has no bearing on his standing to contest the forfeiture. Normally, the evidence would only be relevant on the merits of the litigation, for example, on whether or not the property constitutes drug proceeds. Requiring a claimant to set forth the "nature and extent of his ownership interest" will allow the judge to determine on the face of the pleadings whether or not the claimant has alleged a sufficient interest to confer standing. If the claimant is merely an unsecured creditor that should be apparent from his description of the nature and extent of his ownership interest. We see no reason to require a further showing of how and when the claimant acquired his alleged interest at this stage of the proceedings. You suggest that an unscrupulous claimant presently has the ability to tailor his standing claims to fit whatever facts are adduced by the government. However, even today the claimant is required to state the interest in the property by virtue of which he claims to have standing. As I noted above, the government presently has the right to send interrogatories to the claimant at the same time the complaint is filed. Supp. Rule C(6) requires the claimant to answer the interrogatories served with the complaint at the time he files his answer. Therefore, the claimant must submit voluminous information regarding the evidence supporting his standing well before he gets to discover any of the government's evidence.

Although there is not a lot of caselaw on the question of whether standing is an issue exclusively for the court, I would cite the following cases to you for the proposition that standing is a jury issue where there is a genuine issue of material fact. United States v. DKG Appaloosas, Inc., 630 F. Supp. 1540, 1557-61, 1567-68 (E.D.Tex. 1986), *affirmed*, 829 F.2d 532 (5th Cir. 1987), *cert. denied*, 485 U.S. 976 (1988) (case in which the government was in unusual position of attempting to prove that horse ranch was really owned by a Bahamian shell corporation rather than by claimant, a convicted drug kingpin; the jury was not convinced); United States v.



Premises Known as 526 Liscomb Drive, 866 F.2d 213 (6th Cir. 1989); United States v. Contents of Account, 847 F. Supp. 329, 333 (S.D.N.Y. 1994) (husband's statement that he and his wife share jointly in their property holdings and that he had authority to sign his wife's name and make withdrawals or deposits in bank account held in his wife's name raised genuine issue of material fact as to his standing to challenge forfeiture of those accounts). As these cases illustrate, sometimes the entire case turns on a disputed issue of fact which is determinative of standing. That issue of fact must be decided by a jury rather than a court.

NACDL abides by its long-standing support for Chairman Hyde's proposal to correct the applicable standard of proof in civil asset forfeiture cases, raising the government's burden to clear and convincing proof. We think the clear and convincing standard is appropriate given the importance of the property interests at stake and especially given the punitive character of most civil forfeiture actions. See Department of Law Enforcement v. Real Property, 588 So.2d 957 (Fla. 1991) (holding that clear and convincing standard is constitutionally required in all civil forfeiture cases). Nonetheless, I do not believe that a preponderance standard would be a "deal breaker." It is a significant improvement over mere probable cause. We are more troubled by the government's proposal (in §201) to lower the burden of proof in criminal forfeiture cases.

We do not regard the "substantial connection" requirement as a major concession by the government. As you know, there isn't a dime's worth of difference between the cases holding that that is presently the government's burden and the cases which do not require a substantial connection. The results reached by the courts are the same regardless of which standard is applied. That is why we believe that Congress must define, at least in the legislative history, what it means by a substantial connection. Otherwise, the courts may hold that the slimmest possible nexus with a home, such as the use of a telephone on one occasion, constitutes a "substantial nexus."

I am still opposed to the section on affirmative defenses. I do not understand how it would protect claimants from any implication that they are required to put on evidence in support of an affirmative defense during the government's case in chief. I don't know where such a requirement could be inferred from. I am still concerned that many claimants will unknowingly waive affirmative defenses by failing to plead them. You say that the government will make the same waiver argument even if this provision is not enacted because that is what Rule 8(b) requires. So be it. But I will not help the government make that argument.

If the courts are not going to admit or give any weight to unreliable hearsay, then it does no harm to the government to insert the word "reliable" in this provision. You concede that no one should have to face the loss of his property "at trial" without being able to confront the witnesses against him, but your proposal would allow property to be forfeited on a government motion for summary judgment based on a CI's alleged statement to an agent. In many ways, that is even more unfair than not being confronted with the CI at trial. We see no reason to provide absolute protections for the identity of the government CI in pretrial proceedings. The common

law Roviano balancing test provides more than adequate protection for the government. See ¶10.04[1] of my treatise on the informer's privilege. As you are aware, few civil forfeiture cases actually go to trial. Most are decided on motions for summary judgment. Thus, this is a very important point. By the way, I do not believe that the present probable cause standard affords complete anonymity for informants. Most courts would hold that a claimant has a right to depose the confidential informant if the informant is a key witness. Your proposal would actually be a step backwards.

I don't understand your comments with respect to the Fifth Amendment privilege/adverse inference issue. I don't understand why you think the constitutional issue is limited to a narrow category of cases where there is an identity of issues in a civil forfeiture case and a pending criminal prosecution. You state that, in the vast majority of cases, there would be no constitutional issue under Baxter. Why? I still believe this issue is entirely constitutional in nature and therefore it is inappropriate for Congress to attempt to legislate in this area. Of course, Congress can provide greater protection than the Fifth Amendment requires -- but it may not provide less. That is what the DOJ proposal would do.

I agree that the government should be able to take steps short of seizure to preserve property subject to civil forfeiture. However, subsection (k) authorizes the judge to take certain steps, including physical seizure and the creation of a receivership, which would require a Good hearing. It needs to be made clear that if the action the court proposes to take to preserve the property would interfere with the owner's enjoyment or use, then there must be notice and an opportunity to be heard in accordance with the dictates of the Good decision. The problem with the subsection as written is that it is not limited to restraining orders and the like. Rather, it also authorizes far more drastic interferences with a property owner's rights. Even some restraining orders could interfere with the owner's use and enjoyment of his property.

With respect to the release of property to pay criminal defense costs, I believe you exaggerate the difficulties inherent in allowing consideration of affirmative defenses at the hearing. Evidently the Supreme Court saw no such difficulties when, in the Good case, it held that the Constitution requires consideration of affirmative defenses even at a pre-seizure hearing in a case involving real property. The government always has the option of trying to work things out with the defendant and his attorneys by releasing a reasonable amount of money to pay the criminal defense costs. The government's proposal also fails to give sufficient weight to the defendant's interest in obtaining the release of attorney fees necessary for the defense of his criminal case. Under the DOJ proposal a defendant may have a perfect affirmative defense to forfeiture which the court will not hear because the defendant is barred from even raising it at the pre-trial hearing. Why should that defendant be deprived of the financial means necessary to defend himself against serious criminal charges? NACDL can never agree to that. Again, this whole question is a matter of constitutional law and we believe that it is inappropriate for Congress to restrict a defendant's Sixth Amendment rights through legislation.

I believe that district judges can be trusted to not make excessiveness determinations until they have sufficient facts upon which to base their decision. I am not aware of any courts deciding such issues before they are ripe for decision. However, they may well be ripe for decision, before the end of a trial. For example, suppose the government seeks forfeiture of an expensive vehicle based on an allegation that a single marijuana cigarette was found inside the glove compartment of the car. That type of case ought to be subject to dismissal based on an excessiveness claim. Why should a defendant be forced to undergo the expense and inconvenience of a trial when the only issue is going to be the excessiveness of the forfeiture? I am still not sure exactly what the government's proposed legislation would entail. Would the claimant not be able to raise an excessiveness issue in opposition to the government's motion for summary judgment? If so, how can the government justify that?

You did not address my concern that the government's proposal would leave forfeitures under the customs laws unreformed. That is, the burden of proof in thousands of cases under the customs laws would remain on the property owner and the government would only have to show probable cause to believe that the property is subject to forfeiture. 19 U.S.C. §1615 would remain unchanged. This is not acceptable to NACDL.

I am glad to hear that you recognize I have raised some legitimate concerns with respect to the rebuttable presumptions regarding money laundering. You note that, in discussions with the Senate staff earlier this year, DOJ agreed that it would be necessary to tighten up the provisions so that the government, for example, would have to establish a factor from each of the two categories, to avoid a situation where the government could rely on the presumption in virtually any case involving a drug producing country like Colombia or a bank secrecy jurisdiction like the Cayman Islands. I am sympathetic to the government's concern about losing money laundering cases involving the most sophisticated and dangerous international criminals. I believe that some sort of evidentiary presumption may be justifiable in certain of these cases. I would suggest that you take another stab at drafting more reasonable presumptions. I don't think it is my role to do that for DOJ and frankly I don't have time to do so. However, I would be happy to discuss that with you and respond to your proposals. Nonetheless, I think you have exaggerated the risk that the government may someday lose one of these big cases. After all, preponderance of the evidence is not so much higher a standard than probable cause. If the government can't establish its case by a preponderance of the evidence perhaps it does not deserve to win. If and when the government loses such a case, that might be a better time to draft evidentiary presumptions to prevent that from happening again. You might then have a better understanding of what you really need.

By the way, my suggestion to simply make it illegal for an American to engage in banking transactions in specified bank secrecy jurisdictions was not in jest. Congress ought to consider that.

**Section 123**  
**Uniform Innocent Owner Defense**

You have little to say about this provision in your letter. You don't respond specifically to the concerns NACDL detailed in its June 1996 critique, which is attachment A to our written statement of July 22, 1996 before the House Judiciary Committee. We cannot accept this provision for all of the reasons stated in that earlier document. We regard it as a big step backwards. The limitation of new section 983 to Title 18 civil forfeitures is a glaring deficiency in DOJ's proposal. I know that the Treasury Department is unwilling to accept any reforms but that is not our problem. I guess they will just have to be hit over the head with a two-by-four. If I were Chairman Hyde, I would grill the responsible Treasury officials as to why they believe it is unacceptable to provide any protections for innocent owners in civil forfeiture cases under the customs laws and in IRS forfeiture cases. I would love to be in the hearing room when they try to justify their position.

**Section 124**  
**Stay of Civil Forfeiture Case**

Your letter does not deal with my criticism of §881(i)(5) which would allow the government to make all of its requests for stays *ex parte* and under seal. This provision would effectively prevent the claimant from challenging or rebutting the prosecutor's arguments in favor of the stay. This is obviously unacceptable. Moreover, we object to §881(I)(1) because it would make it easier for the government to obtain a stay than at present. Your proposal would basically require the court to grant the government's request for a stay in every case in which the government sought one. There is no justification for that.

You misunderstand my problem with §881(I)(2), which allows the claimant to seek a stay. I am not suggesting that the claimant be permitted to obtain a stay where his Fifth Amendment privilege is not implicated. What I am saying is that the claimant's ability to get a stay must not depend on whether or not the continuation of the forfeiture proceeding may infringe on his right against compulsory self-incrimination. Not because the Fifth Amendment isn't implicated, but because the courts have held that forcing the defendant to choose between incriminating himself and presenting a defense to the civil forfeiture proceeding does not violate the Fifth Amendment privilege. Thus, the language of §881(I)(2) needs to be tweaked.

**Section 131**  
**Seizure Warrant Requirement**

Your position with respect to proposed §981(b)(3) is logical. I don't consider this an important point. However, I would still feel more comfortable if, as I suggested before, the

legislative history acknowledges the burdens placed on a property owner by defending a case in a foreign district and encourages the courts to liberally grant motions for transfer under 28 U.S.C. §1404(a).

### **Section 132 Civil Investigative Demands**

Our 1994 critique of this provision still stands. (The 1994 critique is attachment B to our written statement of July 22, 1996 before the House Judiciary Committee.) I am amazed that this extraordinary provision was ever considered “non-controversial” by Congress. You state that this provision is intended to deal only with the “rare case where grand jury process is unavailable because no criminal investigation is contemplated.” But 80% of all civil forfeitures occur in cases in which there is no criminal conviction. Thus, the use of the provision would hardly be limited to the rare case.

You provide, as an example of the need for this provision, the hypothetical case of a deceased leader of a South American drug organization with assets hidden in the United States. You note that there is currently no authority to issue subpoenas to compel financial institutions or anyone else to provide evidence that would lead to the discovery of those assets so that can be forfeited. However, I believe it would be easy to use a grand jury to investigate that very case despite the fact that you could not indict the deceased leader of the drug organization. You could certainly indict his accomplices and co-conspirators. Hiding drug related assets in the American banking system would certainly violate the money laundering statutes. But, let’s assume for the sake of argument that a grand jury investigation could not be used in these circumstances. If the government’s real interest is only at getting at bank records, why not simply amend 18 U.S.C. §986 to allow for the issuance of subpoenas for bank records prior to the commencement of a civil forfeiture action? That would be a far more limited and thus less objectionable provision.

You state that “similar provisions have been part of other civil statutes for decades without any indication that any of the horror stories you envision have occurred.” I am not aware of any other similar provisions that are anywhere near as far reaching as this one would be. I am not familiar with the administrative subpoena provision added to the FIRREA Act in 1989. However, I suspect that it is limited to subpoenas for documentary evidence unlike section 132. It is also obviously limited to bank fraud cases. I would not want to give even the most responsible prosecutor the tremendous powers that section 132 would provide him. But unfortunately not every prosecutor fits the ideal. I am confident that this provision would be abused regularly because there are no restrictions on the prosecutor’s power. The government has ample means to investigate civil forfeiture cases at present. Other provisions of the DOJ bill which we have not objected to would augment the government’s investigative powers. For example, section 134 would make tax return information available to the government at the

investigatory stage. Section 133 would provide the government with access to records in bank secrecy jurisdictions; and section 418 would amend the FIRREA Act to permit the use of grand jury material by government attorneys in all civil forfeiture cases involving criminal proceeds forfeitable under §981(a)(1)(C) instead of only those involving certain bank frauds.

### Section 135 Currency Forfeitures

Your explanation for this provision is refreshingly candid. Although, in theory, the burden of proof would remain on the government, in practical effect the burden of proof would once again be shifted to the owner of the currency to explain the origin and intended use of the money. As you state, "as a practical matter, what this provision does is to ensure that in drug courier cases, the claimant has to take the stand to explain the provenance of the currency. He cannot rely on a motion to dismiss the forfeiture case for lack of evidence at the close of the government's case in chief under Rule 50." That is precisely what is wrong with this provision. It blatantly undermines the provision shifting the burden of proof to the government. You are correct in predicting that without the presumption, there will be cases where drug couriers sit on their hands while courts toss out cases because the suspicious circumstances by themselves don't add up to proof by a preponderance. But you cite a case, United States v. \$30,060.00, 39 F.3d 1039 (9th Cir. 1994), in which the same thing happened under the current probable cause standard. As you know, there are many other such cases. Thus, the police would not be substantially worse off under the preponderance standard than under the current probable cause standard. Indeed, as we noted in our June 1996 critique, which is attachment A to NACDL's written statement of July 22, 1996 before the House Judiciary Committee, this rebuttable presumption would actually have the effect of lowering the government's burden of proof to something below what it is today. This can hardly be labeled progress. The leitmotif running through much of your letter is that somehow the government must be ensured against ever losing a case. NACDL cannot accept that screwy premise. It's good for the system if the government loses occasionally!

I find it strange that the state police have so much difficulty in accepting a preponderance of the evidence standard. After all, virtually every state statute incorporates a preponderance of the evidence standard in drug cases and several large states require clear and convincing evidence. What is so objectionable about requiring the police to meet the same standard of proof in federal forfeiture cases? You also seem to think it remarkable that the police are willing to support the enactment of an innocent owner defense. But, as we point out in our June 1996 critique, the most significant federal forfeiture statutes already have innocent owner defenses in them and they provide for a much broader innocent owner defense than the one proposed in the DOJ bill. Thus, the DOJ bill is a big step backwards with respect to the federal statutory innocent owner defense. I am reasonably confident that the burden of proof will be changed to at least a preponderance standard whether or not the police support it. The police just want to

be able to continue to seize any traveler's money on suspicion and call it a forfeiture case. The NACDL is certainly not going to encourage that.

### Section 201 Standard of Proof for Criminal Forfeiture

Your discussion of this issue is simply not accurate. Libretti v. United States, 116 S.Ct. 356 (1995) did not address the question of what the burden of proof is in a criminal forfeiture case. Even though Libretti treated criminal forfeiture as an aspect of sentencing, there is no requirement that Congress establish a preponderance standard to govern the jury's verdict under Rule 31(e) of the Federal Rules of Criminal Procedure. In fact, as is absolutely clear from the legislative history of all the criminal forfeiture statutes on the books, Congress plainly intended to establish a beyond a reasonable doubt standard. The courts have repeatedly recognized this, contrary to your letter. See, e.g., United States v. Pelullo, 14 F.3d 881, 902-06 (3d Cir. 1994); United States v. \$814,254.76 in U.S. Currency, 51 F.3d 207, 211 (9th Cir. 1995) (criminal forfeiture under 18 U.S.C. §982(a) requires proof beyond a reasonable doubt); United States v. Pryba, 674 F. Supp. 1518, 1520-21 (E.D.Va. 1987), *affirmed*, 900 F.2d 748 (4th Cir.), *cert. denied*, 498 U.S. 924 (1990) (beyond a reasonable doubt standard applies to RICO forfeitures); United States v. Cauble, 706 F.2d 1322, 1347 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984) (RICO). See also 18 U.S.C. §1467(c)(1) (requiring the government to meet the beyond-a-reasonable-doubt burden for criminal forfeitures in federal obscenity prosecutions); Sullivan v. Louisiana, 113 S.Ct. 2078, 2081 (1993) ("It is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. . . In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.").

In fact, before the government decided that it was in its interest to ignore the clear legislative history, the government conceded that the government's burden of proof under §853 is also beyond a reasonable doubt. See United States v. Dunn, 802 F.2d 646, 647 (2d Cir. 1986), *cert. denied*, 480 U.S. 931 (1987) (agreeing with government's position that burden of proof is beyond a reasonable doubt). The Senate report on the 1984 legislation which included §853 repeatedly demonstrates Congress' understanding that the government's overall burden of proof under §853, as well as under the amended RICO forfeiture provisions, would remain beyond a reasonable doubt. United States v. Elgersma, 929 F.2d at 1547-48 (discussing legislative history). See also H.R.Rep. No. 845, 98th Cong., 2d Sess. 18, 38 (1984) (adopting the Justice Department's request for language that criminal forfeiture must be established by proof beyond a reasonable doubt). Because, following common law precedent, the Congress decided to provide for a jury verdict in criminal forfeiture cases, Congress naturally assumed that that verdict would be rendered under a beyond a reasonable doubt standard. I see no reason to change the law, but there is a need to clarify Congress' original intent. I was involved in drafting the 1984 legislation and am absolutely certain that Congress intended a beyond a

reasonable doubt standard in both the RICO and the §853 statutes. But don't take my word for it. Look at the legislative history again! Unfortunately, many courts have ignored that legislative history in cases under §853 and that is why Congress needs to clarify its intent.

### Section 202

#### Non-abatement of Criminal Forfeiture When Defendant Dies Pending Appeal

The government recently won the Ursery case by relying on an artificial distinction between *in rem* and *in personam* proceedings. Here the government wants to ignore that distinction and treat *in personam* criminal forfeitures like civil *in rem* forfeitures for purposes of abatement. The government should not be able to have it both ways.

Your premise that civil forfeitures survive the death of the wrongdoer is also incorrect. The federal common law rule is that civil actions for penalties or forfeitures do not survive the death of a defendant. See paragraph 14.05, page 14-44.4(8) of my treatise for a huge collection of cases on this point. In United States v. \$47,409.00 in U.S. Currency, 820 F. Supp. 919 (N.D. Ohio 1993), an Ohio district judge held that a civil forfeiture under 18 U.S.C. §1955(d) abates upon the death of the wrongdoer. The judge in that case wrote a comprehensive and persuasive analysis of the issue in line with my treatise. Thus, there is no anomalous distinction between the results in criminal and civil forfeiture cases that needs to be changed by Congress. There are simply some erroneous decisions holding that civil forfeitures do not abate because the action is against the property. The Supreme Court has repeatedly rejected that fiction in recent years.

In NACDL's June 1996 critique we offered what is essentially a compromise: provide for non-abatement of the criminal forfeiture where it involves proceeds. We said that where the forfeiture involves facilitation property it is clearly punitive in nature and no purpose is served by punishing the defendant's innocent heirs. On the other hand, there is no reason to allow them to profit from his wrongdoing, so we do not find forfeiture of drug proceeds to be illogical in this context.

### Sections 205 and 208

#### Pretrial Restraint of Substitute Assets/Seizure Warrant Authority

The Second and Fourth Circuits have held incorrectly that the government presently has the authority to restrain substitute assets pretrial. All the subsequent circuit cases have rejected that position based on clear legislative history to the contrary and on the plain language of the criminal forfeiture statutes. Thus, while section 205 may merely codify the Second and Fourth Circuit case law, that is meaningless since those cases are wrongly decided. What you are actually asking Congress to do is grant you new authority to restrain substitute assets for forfeiture. In our discussions I took the position that the government did not need this new



authority. I relied mainly on proposed section 210 of your bill, not section 209. It would amend §§ 1963(c) and 853(c) to provide that a third party may contest the forfeiture of substitute assets if the third party's interest in the property is vested before the property is named in an indictment, information or bill of particulars. My argument was that §210 will obviate the need to restrain substitute assets because if they are transferred after being named in an indictment, information or bill of particulars, the third party will have no interest in them. Section 209 provides the government with additional authority to recover substitute assets from a third party transferee. Although NACDL opposes §§209 and 210 for the reasons stated elsewhere, the burden is on the government to show why it needs §§205 and 208 in addition to the new authority that would be granted to it under §§209 and 210.

I also suggested that NACDL might be willing to support a more limited pretrial restraint provision -- one requiring the government to show that there is reason to believe the defendant will improperly transfer his assets without a restraining order. I do not see why that is unreasonable. As presently drafted, section 205 would give the government an automatic right to a restraining order reaching substitute assets upon indictment. We see no reason to require the district court to rubber stamp a request for such a far-reaching restraining order in every case. The government should have to demonstrate a need for this extreme measure and the defendant should have an opportunity to be heard before the restraining order is issued.

In NACDL's June 1996 critique we suggested that Congress should enact some sensible limitations on the scope of substitute asset forfeiture. We suggested that it should clarify that substitute assets may not be forfeited merely because the defendant had *spent* the tainted assets, which is the government's theory in many cases. Substitute asset forfeiture should be available only when a defendant or his agent *take some action for the purpose of making the tainted property unavailable* for forfeiture. We also suggested that Congress should provide that the defendant's primary homestead, up to a value of \$250,000.00, may not be forfeited as a substitute asset. This humanitarian limitation would prevent substitute asset forfeiture from becoming, in effect, forfeiture of estate, the terrible common law practice that the Framers abolished more than 200 years ago. The government has not responded to these suggestions.

You state that prosecutors have exercised restraint in not attempting to seize substitute assets under §853(f). However, that is not surprising since it is clear that §853(f) does not authorize the seizure of substitute assets. If assets are not subject to pretrial restraint, then it logically follows they are not subject to pretrial seizure.

In NACDL's June 1996 critique we noted that proposed section 211(a)(2), which deals with exemptions from restraining orders, merely gives the district court discretion to exempt money needed to pay attorney fees and other necessary living expenses. We suggested that the word "may" be changed to "shall" so as to provide more assurance that the provision's salutary purposes will actually be achieved.

§853(f) currently authorizes seizure of even tainted assets only on a showing by the government that less drastic measures such as a restraining order are likely to be ineffective in protecting the government's interests. We see no reason to alter that provision to require judges to issue seizure warrants in every case. That would be the effect of amending 21 U.S.C. §853(f) to conform the procedure for issuing a seizure warrant to the procedure in civil forfeiture cases. Criminal forfeiture cases are fundamentally different in that the court's jurisdiction does not depend upon a prior seizure of the property.

#### **Section 209 Forfeitable Property Transferred to Third Parties**

The NACDL believes that the Supreme Court decided Caplan & Drysdale v. United States, 491 U.S. 617 (1989) wrongly. We are not going to encourage Congress to enact legislation that makes it easier to forfeit attorney fees, particularly attorney fees that have already been fully earned. If this provision was limited to sham transactions, we could support it. However, as in the Moffitt, Zwierling case, this provision would hurt honest defense attorneys who have simply made a mistake in accepting a fee that they had reasonable cause to believe might be tainted. It is bad enough for the government to take the fee away before it has been spent: it is quite another thing for the government to be able to sue the defense attorneys and collect a judgment for the amount of the fees long after they have been spent. This will often entail substantial hardship for the attorneys as in the Moffitt, Zwierling case. In that very case, had the government acted sooner to put the defense attorneys on notice that it considered their fee to be subject to forfeiture, they could have withdrawn from the case before spending a huge amount of time defending it. They also could have segregated the fee money pending litigation over its forfeitability. The government won the Moffitt, Zwierling case in the Fourth Circuit and we therefore see no need to codify the result in that case. Because the outcome of these cases may turn to some degree on equitable considerations, it is probably best to leave the matter to the courts.

#### **Section 211 Hearings on Pretrial Restraining Orders; Assets Needed to Pay Attorneys' Fees**

I am pleased to see that you are willing to discuss alternatives to this section. We would be happy to do this. I believe that this is one provision where compromise could be reached. But I doubt that it can be done in time for enactment in this session of Congress. I understand the government's objection to allowing the court to look behind the grand jury indictment to review whether there is probable cause to support the underlying criminal charge. That is clearly subject to abuse for discovery purposes. Nonetheless, that is what the Second Circuit sitting *en banc* in United States v. Monsanto, 924 F.2d 1186 (2d Cir.), *cert. denied*, 112 S.Ct. 382 (1991), said was constitutionally required. Only one judge on the Second Circuit dissented. I am not

aware of any authority to the contrary decided after Monsanto. Thus, here is another area where you are asking the defense bar to alter existing law to our detriment. And again, you are asking us to agree to provide less protection than a distinguished court has said is constitutionally required. So this presents considerable difficulties, not the least of which is that this is a pocketbook issue for defense lawyers. If the government expects significant defense bar concessions here, it should be prepared to offer important concessions elsewhere in the bill. So far I do not see any readiness on the part of the government to do so.

### Section 213 Appeals in Criminal Forfeiture Cases

This dispute also does not turn on whether Libretti was correctly decided. Libretti says nothing about whether or when the government may appeal an adverse decision regarding criminal forfeiture. I find this proposal to be one of the most offensive ones in the package in that it demonstrates the government's lack of respect for jury verdicts. Again, DOJ apparently believes it ought to win every case it brings and if the jury disagrees, then to hell with them. Even in a civil forfeiture case the Seventh Amendment prevents the government from asking a federal appellate court to reexamine the facts found by the jury. See Gasparini v. Center for Humanities, Inc., 116 S.Ct. 2211 (1996). In particular, take a look at Justice Scalia's wonderful dissent in that case, joined by your friends Justice Thomas and Chief Justice Rehnquist. If a federal appellate tribunal may not constitutionally reexamine a civil jury verdict, why in the world should a criminal verdict under Rule 31(e) be subject to review by an appellate court? In the handful of states where juries are entrusted with non-capital sentencing responsibilities, the state may not appeal the jury's sentence. Why is this any different? We have no objection to authorizing government appeals from post-verdict decisions of a district judge denying forfeiture. Such a right of appeal would parallel the government's right to appeal the grant of a Rule 29(c) motion for judgment of acquittal.

### Section 301/302 Forfeiture of Proceeds of Federal Crimes/Uniform Definition of Proceeds

As set forth in our June 1996 critique, NACDL will not support any expansion of proceeds forfeiture unless proceeds is defined as profits, not gross receipts. We are not saying that a criminal should be given credit for his overhead. The caselaw distinguishes between overhead expenses and the cost of the goods sold. We are merely allowing the defendant to show what the cost of the goods sold are, whether those goods are widgets or marijuana. The fact that so many cases have interpreted the ambiguous word "proceeds" to mean net profits should suggest to the government that the forfeiture of gross receipts is often too harsh. As we noted in our June 1996 critique, the unfairness of forfeiting gross receipts is greatly aggravated by the substitute asset provisions and the judicially developed concept of joint and several

liability. Each defendant in a criminal venture or conspiracy becomes jointly and severally liable for the entire amount of the gross proceeds received by all participants in the criminal venture -- usually a staggering sum that allows the government to wipe out the assets of every defendant.

The best example of the untoward results that would follow from adopting the government's definition of proceeds arises in cases under 18 U.S.C. §1014. If a person makes a single false statement on a bank loan application the government may forfeit the entire amount of the loan proceeds he obtained from the bank. Everybody knows that it is extremely common for borrowers to make false statements on bank loan applications. These false statements are often immaterial and the bank may not lose a penny. Nonetheless, whenever the government sees fit to do so, it may destroy the borrower's life by prosecuting him for a §1014 offense and forfeiting the entire amount of the bank loan. Usually the bank loan is for the purpose of purchasing a home. If the defendant isn't rich, he loses his home. This is an outrageous provision and Congress ought to amend §§981 and 982 to exclude false bank loan applications from their ambit. I have found that the government uses §1014 forfeitures extremely selectively to "get" defendants or third parties whom it doesn't like for other reasons having nothing to do with the merits of the §1014 case. Most of the time the bank has not lost a dime, but the government seeks a huge forfeiture anyway.

If Congress *does* enact a broad provision authorizing forfeiture of proceeds for all Title 18 felonies, then it should seriously consider restricting the Money Laundering Act to offenses that actually involve money laundering and not include mere receipt and deposit offenses. If there is any justification for the extraordinary breadth of 18 U.S.C. §§1956 and 1957, it lies in the fact that forfeiture cannot be accomplished for the predicate crimes themselves. Once it is possible to forfeit the proceeds of all Title 18 felonies without charging money laundering, §§1956 and 1957 should be trimmed back substantially.

#### Section 308 Forfeiture for Violations of §60501

The NACDL is certainly not going to support this provision. As you know, our organization has been fighting for many years to get Congress to modify §60501 so that defense attorneys can comply with their ethical obligations and at the same time comply with the law, which in many states is not possible at present. *See, e.g., United States v. Monnat*, 853 F.Supp. 1301, 1303 (D. Kan. 1994); Tarlow, "IRS Currency Reporting -- Form 8300 Revisited," *The Champion*, July 1996, at 42. We have had no success with Congress and we have also had no success with the IRS and the DOJ in trying to get them to treat attorneys differently than car dealers and jewelry merchants. Lenin once said that the capitalists would try to sell the ropes that the Communists would use to hang them. We, as an organization, have no intention of providing you with the ropes to hang us.

The more serious violations of §6050I also involve violations of 18 U.S.C. §§1956 and 1957. Therefore, in the more serious cases, the government may forfeit the unreported cash under §§981 and 982. We see no reason to provide the government with the same harsh remedy for §6050I violations that do not amount to money laundering. It ought to be enough that the merchant or attorney can be convicted of a felony offense merely for failing to file IRS Form 8300. You neglect to mention that merchants and others who fail to file Form 8300 are also subject to heavy civil money penalties by the IRS. Indeed, even if one files the form but refuses to complete certain portions of the form because one desires to protect one's client's confidences, the IRS can and does levy heavy civil penalties against the defense attorney and those penalties must be paid in full before the attorney has the right to challenge the penalty assessment in court. Civil penalties under 26 U.S.C. §6721(e) for intentional non-disclosure of information equal the greater of \$25,000 or the amount of the cash received in a transaction, up to \$100,000. This is outrageous and should be changed. Very few attorneys have the wherewithal to pay these heavy civil penalties and therefore must immediately knuckle under to the IRS' demands. It is hardly necessary to threaten the attorney with forfeiture of his fee in addition to these onerous civil penalties. In any event, IRS takes the position that non-compliance with §6050I makes the proceeds of the transaction forfeitable under 26 U.S.C. §7203.

#### Section 403

##### Minor and Technical Amendments Relating to 1992 Forfeiture Amendments

I opposed §984 because I regarded it as a case of the camel's nose getting under the tent. The government's current proposals prove me right. Having gotten its nose under the tent the government now wishes to extend the dubious principal of substitute asset forfeiture in civil forfeiture cases across the board. I would never agree to this. I believe substitute asset forfeiture should be restricted, not expanded. I believe there is a good chance that the Supreme Court will someday hold substitute asset forfeiture unconstitutional on Eighth Amendment grounds because there is absolutely no nexus between a substitute asset and the predicate offense. Substitute asset forfeiture seems to run afoul of the Excessive Fines Clause.

As the legislative history of §984 explains, the purpose of the one year limitations period was to provide a factual basis for believing that the substitute funds were also likely to be tainted. The government is ignoring that rationale in arguing for a much longer limitations period. Currently, the forfeiture suit must be *filed* within a year of the offense that is the basis for the forfeiture. The DOJ proposal would merely require a *seizure* within *two* years of the offense. That change completely undercuts the rationale of §984.

**Section 409**  
**Statute of Limitations for Civil Forfeiture**

Your "compromise" proposal is another example of the government wanting to have its cake and eat it too. I cannot see why three years is not enough time for the government to commence a forfeiture action after it discovers the involvement of the property in the offense. That change would still give the government the benefit of a much longer limitations period than it presently enjoys in many cases. For example, if the involvement of the property was only discovered 10 years after the offense was committed, the government would have three additional years (a total of 13 years after the offense was committed) in which to bring a forfeiture action. At present, §1621 would begin to run from the date of the discovery of the offense and would bar the forfeiture of the property. Our willingness to let the limitations period run from the time the involvement of the property in the offense is discovered is a very substantial concession to the government.

**Section 416**  
**Fugitive Disentitlement**

Your reading of the Supreme Court's decision in Degen v. United States, 116 S.Ct. 1777 (1996), is seriously flawed. I do not see one word in the opinion which can be read as inviting Congress to codify the application of the disentitlement doctrine in the civil forfeiture context. True, the court did hold that judges lack the authority to create so sweeping a sanction on their own. However, the court made clear its disapproval of the way the disentitlement doctrine has been applied in civil forfeiture cases and that disapproval does not rest mainly on the judges' lack of authority. It rests rather on considerations of fundamental fairness. The Degen court did not have to decide whether disentitlement of a fugitive forfeiture claimant would violate due process, but it suggested that the due process issue was a serious one. The Seventh Circuit has held that application of the disentitlement doctrine in this context is a due process violation, relying on the same line of old Supreme Court cases discussed in Degen. See United States v. \$40,877.59 in U.S. Currency, 32 F.3d 1151 (7th Cir. 1994). I find the Seventh Circuit's constitutional analysis compelling and I believe the Supreme Court will decide the issue the same way if Congress is foolish enough to enact DOJ's proposal.

I believe that our exchange of views has been useful and illuminating. I hope that it helps the government to see our point of view more clearly than it did previously. I think we have identified the areas where we can find common ground and those where we cannot. Unfortunately, the latter area is a very broad one. We would be happy to continue these

discussions at your convenience.

Sincerely,

A handwritten signature in black ink that reads "David B. Smith". The signature is written in a cursive style with a large, prominent "D" and "S".

David B. Smith

Co-Chair, NACDL Forfeiture Abuse Task Force,  
on behalf of the NACDL Forfeiture Abuse Task  
Force and NACDL

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