

# The Civil Asset Forfeiture Reform Act of 2000

## Legislative History

The Civil Asset Forfeiture Reform Act (CAFRA) of 2000, Pub. L. No. 106-185, 114 Stat. 202 (2000), was signed by the President on April 25, 2000, and will apply to all civil forfeiture proceedings commenced on or after August 23, 2000. The Act represents a comprehensive redrafting of civil asset forfeiture procedure, ensuring due process for property owners and expanding in important respects the Government's ability to use asset forfeiture as a weapon against crime.

The legislative history of CAFRA stretches over five years, from hearings in 1996 and 1997 to the floor statements of its sponsors on the day it passed the House of Representatives in April, 2000. This book constitutes a compilation of the most significant portions of the legislative history of the provisions that were ultimately enacted. It includes an index that will direct the reader to the portions of the hearings, Committee Reports, and statements of members of Congress that relate to each of the statutes enacted or amended.

In many cases, provisions ultimately included in CAFRA can be traced directly back to provisions introduced by Representative Henry J. Hyde or offered by the Administration in 1996. The legislative history of those 1996 proposals therefore applies to the provisions that became law. Many of the pro-law enforcement provisions drafted by the Department of Justice, including the uniform innocent owner defense now codified as 18 U.S.C. § 983(d), fall into that category. In other cases, the provision enacted in 2000 is derived from a provision that appears in the legislative history for the first time in 1996 or 1997, but was changed substantially before final passage of the bill. In those cases, the early legislative history must be used advisedly, taking into account significant changes in the language of the statutory provision in question. Provisions relating to administrative forfeiture now codified in 18 U.S.C. § 983(a) fall into that category.

In still other cases, a provision ultimately included in CAFRA was not developed until late in 1999 when the bill moved to the Senate, or not until the final weeks before final passage. In those instances, the legislative history consists only of statements made by the Senate sponsors of the two bills that were ultimately combined to produce CAFRA, or of members when the bills went to a final vote in the Senate and House, respectively. The provision relating to attorneys' fees now codified as 28 U.S.C. § 2465(b) falls into that category.

This compilation only directs the reader to the relevant sections of the legislative history. It is up to the reader to compare the legislative language in the bill that was being considered at the time a given statement was made to the provision that ultimately became law. The following is a brief recitation of the legislative history.

## **Hearings on CAFRA in 1996 and 1997**

In 1996, Representative Hyde held hearings on H.R. 1916, 104th Congress, his original civil asset forfeiture reform bill, and on a counter proposal drafted by the Department of Justice. To the extent that the provisions in those two bills survived and made it into CAFRA—and many of them did—that hearing record constitutes the first legislative history.

The hearing record is available only in hardcopy and is reproduced in Part 1 of this book.

The 1996 hearing record includes the full text of the Administration's proposal and a section-by-section analysis. As mentioned, provisions of CAFRA relating to the innocent owner defense and numerous pro-law enforcement enhancements to civil forfeiture procedure are found here. *See Civil Asset Forfeiture Reform Act, Hearing Before the Committee on the Judiciary, No. 94, 104th Congress, 2nd Session (July 22, 1996).*

In 1997, Rep. Hyde reintroduced his bill as H.R. 1835, 105th Congress and the Administration's bill was introduced by then-Rep. Charles E. Schumer as H.R. 1745, 105th Congress. A second hearing was held in the House Judiciary Committee on these two bills. Excerpts of that hearing record are found in Part 2 of this book. Of particular interest is the testimony of the Department of Justice witness in support of H.R. 1745 and in opposition to S. 1835. *See Civil Asset Forfeiture Reform Act, Hearing Before the Committee on the Judiciary, 1997 WL 311709.*

Ultimately, in late 1997, a compromise was reached between the supporters of the Hyde bill and the Department of Justice. That compromise bill, H.R. 1965, 105th Congress, is similar in most respects to what was ultimately enacted in CAFRA, and the House Report on the 1997 bill is probably the most comprehensive legislative history of the new law. *See Civil Asset Forfeiture Reform Act, H. Rep. No. 105-358, 105th Cong., 1st Sess. (1997), 1997 WL 677201.* The Committee Report appears in Part 3 of this book, and contains an analysis of many of the provisions were ultimately enacted into law.

## **House passes H.R. 1658 in 1999**

The 1997 compromise failed, however, and no legislation was enacted in the 105th Congress. In 1999, Mr. Hyde started over by reintroducing a modified version of his original bill as H.R. 1658, 106th Congress. No hearings were held on that bill, but the 1999 Committee Report refers to, and incorporates, the testimony presented to the Committee at the 1996 and 1997 hearings. *See Civil Asset Forfeiture Reform Act, H. Rep. No. 106-192, 106th Congress, 1st Sess. (1999), 1999 WL 406892.* The Committee Report appears in Part 4 of this book. It should be noted that many of the pro-law enforcement provisions that were ultimately enacted as part of CAFRA were deleted from the 1999 Hyde bill and were not restored until the bill reached the Senate. Therefore, the 1999 House Report does not contain the discussion of all of the proposals that appeared in the 1997 Report.

In June 1999, the House passed H.R. 1658 after a lengthy Floor debate, and after rejecting a substitute amendment offered by Representative Asa Hutchinson and others. The Floor debate appears in Part 5 of this book. *See Floor Debate, 145 Cong. Rec. H4854 et seq. (June 24, 1999), 1999 WL 419756, 419758.*

Following the House's passage of the Hyde bill in June 1999, the Senate conducted a hearing. Among those who testified was Deputy Attorney General Eric Holder who inserted into the hearing record an analysis of the Department of Justice's counter proposal. That analysis is included in the hearing record that appears in Part 6 of this book, and is particularly relevant because it constitutes the legislative history of the provisions supported by the Department that were ultimately included in the bill introduced by Senators Jeff Sessions and Charles Schumer later in 1999. *See Oversight of Federal Asset Forfeiture: Its Role in Fighting Crime, Hearing Before the Senate Subcommittee on Criminal Justice Oversight*, 106th Cong. 1st Sess., including 1999 WL 20010421 (July 21, 1999) (statement of Deputy Attorney General Holder).

## **Two Senate bills introduced**

In late 1999, Senators Sessions, Schumer, and others introduced a compromise Senate bill, S.1701, that consisted primarily of provisions taken from the Administration bill to which Mr. Holder referred at the July Senate hearing. The text of S.1701 and Senator Sessions' statement at the time the bill was introduced appear in Part 7 of this book. *See* 145 Cong. Rec. S12101-03, S12108-S12109 (1999) (Sessions' Civil Asset Forfeiture Reform Bill), 1999 WL 794990. A number of important provisions of CAFRA, including the provision on payment of attorneys' fees now codified at 28 U.S.C. § 2465(b), appeared for the first time in this bill.

Also in late 1999, Senators Orrin Hatch and Patrick Leahy introduced another bill, S.1931, that contained most of the "reform" provisions that were enacted as part of CAFRA. The text of S.1931 and the statements of Senators Hatch and Leahy at the time the bill was introduced are included in Part 8 of this book. *See* 145 Cong. Rec. S14612-05, S14628-S14635 (1999) (Hatch Civil Asset Forfeiture Reform Bill), 1999 WL 103 7430.

In the end, what became law was a concatenation of the "reform" provisions from the Hatch-Leahy bill and the "law enforcement improvements" from the Sessions-Schumer bill. That bill passed by the Senate in March 2000, after Rep. Hyde agreed to accept it in place of the bill passed by the House. In other words, while the bill passed by the Senate was denoted H.R. 1658, the Senate did not act on the House bill, but instead substituted the language taken from the two Senate bills, and the House passed the bill as passed by the Senate without further amendment. The only legislative history directly linked to the bill as enacted consists of statements by Senators Hatch, Leahy and Sessions on March 27, 2000, on the Senate Floor, and statements by Rep. Hyde, on the House Floor on April 11, 2000. *See* Senate passage of H.R. 1658 as amended, 2000 WL 309749, 146 Cong. Rec. S1753 *et seq.* (Mar. 27, 2000); House passage of H.R. 1658, as amended, 146 Cong. Rec. H2040 *et seq.*, 2000 WL 368969 (Apr. 11, 2000). Those statements are reproduced in Parts 9 and 10 of this book.

Washington, D.C.  
June 20, 2000

# Table of Contents

## Part 1

<b>Hearing Before the House Committee on the Judiciary, July 22, 1996</b>	4
Department of Justice Draft of "Forfeiture Act of 1996"	24
Section by Section Analysis	26
Proposed Bill	62
Statistics on Forfeiture Filings	127
Speakers:	
1. Statement of Henry Hyde	3
2. Statement of Jan P. Blanton	121
3. Statement of Stefan D. Cassella	24, 110
4. Statement of James McMahon	123

## Part 2

<b>Extract of Hearing Before the House Committee on the Judiciary, June 11, 1997</b>	193
1. Statement of Henry Hyde, 1997 WL 316566	193
Text of HR 1835	194
2. Statement of Stefan D. Cassella, 1997 WL 311709	200
3. Statement of David Smith, 1997 WL 11233673	210
4. Statement of Jan P. Blanton, 1997 WL 11233602	213
5. Statement of Bobby D. Moody, 1997 WL 11233603	216

## Part 3

<b>House Report on Civil Asset Forfeiture Reform Act</b>	218
H.R. Rep. 105-358(I)	218

## Part 4

<b>House Report on Civil Asset Forfeiture Reform Act</b>	272
H.R. Rep. 106-192	272
H.R. REP. 106-193	290

## Part 5

<b>Floor Debate in the House of Representatives on H.R. 1658</b>	292
145 Cong. Rec. H4851-01, 1999 WL 419754	292

## Part 6

<b>Extract of Hearing Before Senate Subcommittee on Criminal Justice Oversight</b>	351
1. Statement of Deputy Attorney General Eric Holder, 1999 WL 20010421	351
DOJ Alternative to HR 1658	357
Analysis of DOJ Forfeiture Bill	358
2. Statement of Gilbert G. Gallegos, 1999 WL 20010425	378
3. Statement of Johnny Mack Brown, 1999 WL 20010426	380
4. Statement of Samuel J. Buffone, 1999 WL 20010428	382
5. Statement of Roger Pilon, 1999 WL 20010429	384

## Part 7

<b>S.1701 (Sessions-Schumer Bill), Introductory Statements</b>	389
--	-----

**Part 8**

<b>S.1931 (Hatch-Leahy Bill), Introductory Statements</b> .....	410
<b>HATCH/LEAHY CIVIL ASSET FORFEITURE REFORM ACT-</b>	
<b>SECTION-BY-SECTION SUMMARY</b> .....	420

**Part 9**

<b>Senate Passage of H.R. 1658</b> .....	424
--	-----

**Part 10**

<b>House Passage of H.R.1658, Floor Statements</b> .....	431
--	-----

## **Part 1**

### **Hearing Before the House Committee on the Judiciary, July 22, 1996**

# **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**

JULY 22, 1996

**Serial No. 94**



Printed for the use of the Committee on the Judiciary

U. S. GOVERNMENT PRINTING OFFICE

35-668 CC : . . . . . WASHINGTON : 1996

For sale by the U.S. Government Printing Office  
Superintendent of Documents, Congress, Sales Office, Washington, DC 20402  
ISBN 3850-5

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## CONTENTS

	HEARING DATE	Page
July 22, 1996 .....		1
TEXT OF BILL		
H.R. 1916 .....		4
OPENING STATEMENT		
Hyde, Hon. Henry J., a Representative in Congress from the State of Illinois, and chairman, Committee on the Judiciary .....		1
WITNESSES		
Blanton, Jan P., Director, Executive Office for Asset Forfeiture, Department of the Treasury .....		237
Cassella, Stefan D., Deputy Chief, Asset Forfeiture and Money Laundering Section, Criminal Division, Department of Justice .....		42
Cutkomp, King .....		18
Edwards, E.E. (Bo) III, Esq., on behalf of the National Association of Criminal Defense Lawyers .....		14, 278
Komie, Stephen M., secretary, Illinois, State Bar Association .....		27
Jones, Willie .....		12
Kappelhoff, Mark J., legislative counsel, on behalf of the American Civil Liberties Union .....		262
McMahon, James, superintendent, New York State Police, on behalf of the International Association of Chiefs of Police .....		241
Reed, Terrance G., chairperson, RICO, Forfeiture, and Civil Remedies Committee, Section of Criminal Justice, on Behalf of the American Bar Association .....		256
LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING		
Blanton, Jan P., Director, Executive Office for Asset Forfeiture, Department of the Treasury: Prepared statement .....		239
Cassella, Stefan D., Deputy Chief, Asset Forfeiture and Money Laundering Section, Criminal Division, Department of Justice: Prepared statement .....		215
Cutkomp, King: Forfeiture bill and analysis .....		43
Information concerning successful forfeiture challenges .....		248
Prepared statement .....		20
Edwards, E.E. (Bo) 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: Prepared statement .....		282
Kappelhoff, Mark J., legislative counsel, on behalf of the American Civil Liberties Union: Prepared statement .....		265
Komie, Stephen M., secretary, Illinois, State Bar Association: Prepared statement .....		33
McMahon, James, superintendent, New York State Police, on behalf of the International Association of Chiefs of Police: Prepared statement .....		243
Reed, Terrance G., chairperson, RICO, Forfeiture, and Civil Remedies Committee, Section of Criminal Justice, on Behalf of the American Bar Association: Prepared statement .....		258

## CIVIL ASSET FORFEITURE REFORM ACT

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.

## 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:

## 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(e) of title 28, United States Code, is  
9       amended—

1       2  
2       (1) by striking "law-enforcement" and inserting  
3       "law enforcement"; and  
4       (2) by inserting before the period the following:  
5       ", except that the provisions of this chapter and sec-  
6       tion 1346(b) of this title shall apply to any claim  
7       based on the negligent destruction, injury, or loss of  
8       goods or merchandise (including real property) while  
9       in the possession of any officer of customs or excise  
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 arising  
23      under section 592) brought for the forfeiture of  
24      any vessel, vehicle, aircraft, merchandise, or baggage

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

"(2) in all suits or actions brought for the recovery of the value of any vessel, vehicle, aircraft, merchandise, or baggage, because of violation of any such law;

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

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

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

**"SEC. 608. SEIZURE; CLAIMS; REPRESENTATION.**

"(a) **IN GENERAL.**—Any person claiming such vessel, vehicle, aircraft, merchandise, or baggage may at any time within 30 days from the date of the first publication of the notice of seizure file with the appropriate customs officer a claim stating his interest therein. Upon the filing of such claim, the customs officer shall transmit such claim, with a duplicate list and description of the articles seized, to the United States attorney for the district in which seizure was made, who shall proceed to a condemnation of the merchandise or other property in the manner 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 SUBSTAN-  
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 Government  
 4 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 possession  
 9 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—

7

(1) by striking out "law enforcement purposes—" in the matter preceding subparagraph (A) in paragraph (1) and inserting "purposes—";

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

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

"(II) payment of court-awarded compensation for representation of claimants pursuant to section 608(b) of the Tariff Act of 1930;"; and

(4) by striking out "(II)" in subparagraph (A) 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—

(1) in paragraph (4)(C), by striking "without the knowledge, consent, or willful blindness of the owner." and inserting "either without the knowledge of that owner or without the consent of that owner."

(2) in each of paragraphs (6) and (7), by striking "without the knowledge or consent of that owner," and inserting "either without the knowledge

88

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

3 (b) SPECIAL RULE.—

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

7        "(1) 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—

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

## 7 SEC. 9. APPLICABILITY.

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

○

**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 statement 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

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.

25

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

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.

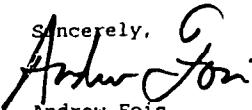
Our estimate of the impact of this proposed bill on the deficit is:

	Fiscal Years (in millions of dollars)			
	1996	1997	1998	1998
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.

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,  


Andrew Fois  
 Assistant Attorney General

26

## 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. § 1336; 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"); Denma 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. Giovannelli, 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 probable 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(l)(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 (5th 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 McCrav 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, Real Property (Box 137-Bl), 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. Seguban, 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

<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).

<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), required 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

<sup>4</sup> For a detailed discussion of all of these issues, and a legislative proposal similar to the one in this bill, see Franz, "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. See 640 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 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 it 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 the 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).

38

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, §12, 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

<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. § 1335 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. § 1335(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. Pieri, 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-Escarzega, 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(l)(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(l)(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(l) 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(l) 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, Zweierling & 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. Moffit, supra. As Moffit 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. 18 U.S.C. § 1963(d)(1)(B) & (2); 21 U.S.C. § 853(e)(1)(B) & (2). The

<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 Moya-Gomez 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(1) 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

<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.

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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-Emmanuel, 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 (FDAOCI). 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, FDAOCI 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). FDAOCI forfeiture cases under the FFDCA forfeiture statutes will simplify the process by which FDAOCI investigations lead to proceeds forfeitures.

FDAOCI does not seek forfeiture of facilitating property; nor does FDAOCI seek administrative forfeiture authority. FDAOCI 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 may 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-

<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.

95 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).

<sup>191</sup> 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.

#### SEC. 2. TABLE OF CONTENTS

##### TITLE I -- CIVIL FORFEITURE

###### Subtitle A - Administrative Forfeitures

- Sec. 101. Time for Filing Claim; Waiver of Cost Bond
- Sec. 102. Jurisdiction and Venue
- Sec. 103. Judicial Review of Administrative Forfeitures
- Sec. 104. Judicial Forfeiture of Real Property
- Sec. 105. Preservation of Arrested Real Property
- Sec. 106. Amendment to Federal Tort Claims Act Exceptions
- Sec. 107. Pre-Judgment Interest

###### Subtitle B - Judicial Forfeitures

- Sec. 121. Judicial Forfeiture Proceedings
- Sec. 122. Time for Filing Claim and Answer
- Sec. 123. Uniform Innocent Owner Defense

Sec. 124. Stays  
 Sec. 125. Application of Forfeiture Procedures  
     Subtitle C - Seizures and Investigations  
 Sec. 131. Seizure Warrant Requirement  
 Sec. 132. Civil Investigative Demands  
 Sec. 133. Access to Records in Bank Secrecy Jurisdictions  
 Sec. 134. Access to Other Records  
 Sec. 135. Currency Forfeitures  
     TITLE II -- CRIMINAL FORFEITURE  
 Sec. 201. Standard of Proof for Criminal Forfeiture  
 Sec. 202. Non-Abatement of Forfeiture When Defendant Dies Pending Appeal  
 Sec. 203. Repatriation of Property Placed Beyond the Jurisdiction of the Court  
 Sec. 204. Motion and Discovery Procedures for Ancillary Proceedings  
 Sec. 205. Pre-Trial Restraint of Substitute Assets  
 Sec. 206. Defenses Applicable to Ancillary Proceedings in Criminal Cases  
 Sec. 207. Uniform Procedures for Criminal Forfeiture  
 Sec. 208. Criminal Seizure Warrants  
 Sec. 209. Forfeitable Property Transferred to Third Parties  
 Sec. 210. Right of Third Parties to Contest Forfeiture of Substitute Assets  
 Sec. 211. Hearings on Pre-trial Restraining Orders; Assets Needed to Pay Attorneys Fees  
 Sec. 212. Availability of Criminal Forfeiture  
 Sec. 213. Appeals in Criminal Forfeiture Cases  
 Sec. 214. Discovery Procedure For Locating Forfeited Assets

Sec. 215. Scope of Criminal Forfeiture  
     TITLE III -- PROPERTY SUBJECT TO FORFEITURE  
 Sec. 301. Forfeiture of Proceeds of Federal Crimes  
 Sec. 302. Uniform Definition of Proceeds  
 Sec. 303. Forfeiture of Firearms Used in Crimes of Violence and Felonies  
 Sec. 304. Forfeiture of Proceeds Traceable to Facilitating Property in Drug Cases  
 Sec. 305. Forfeiture for Alien Smuggling  
 Sec. 306. Forfeiture of Proceeds of Certain Foreign Crimes  
 Sec. 307. Forfeiture of Property Used to Facilitate Foreign Drug Crimes  
 Sec. 308. Forfeiture for Violations of Section 6050I  
 Sec. 309. Criminal Forfeiture for Money Laundering Conspiracies  
 Sec. 310. Seizure of Vehicles with Concealed Compartments Used for Smuggling  
 Sec. 311. Forfeiture of the Instrumentalities of Terrorism, Telemarketing Fraud and Other Offenses  
 Sec. 312. Forfeiture of Vehicles Used for Gun Running  
 Sec. 313. Forfeiture of Criminal Proceeds Transported in Interstate Commerce  
 Sec. 314. Forfeiture of Proceeds of Federal Food, Drug, and Cosmetic Act Violations  
 Sec. 315. Summary Destruction of Explosives Subject to Forfeiture  
 Sec. 316. Archeological Resources Protection Act  
     TITLE IV -- MISCELLANEOUS AND MINOR AND TECHNICAL AMENDMENTS  
 Sec. 401. Use of Forfeited Funds to Pay Restitution to Crime Victims and Regulatory Agencies  
 Sec. 402. Enforcement of Foreign Forfeiture Judgment  
 Sec. 403. Minor and Technical Amendments Relating to 1992 Forfeiture Amendments

Sec. 404. Civil Forfeiture of Coins and Currency in Confiscated Gambling Devices  
 Sec. 405. Drug Paraphernalia Technical Amendments  
 Sec. 406. Authorization to Share Forfeited Property with Cooperating Foreign Governments.  
 Sec. 407. Forfeiture of Counterfeit Paraphernalia  
 Sec. 408. Closing of Loophole to Defeat Forfeiture Through Bankruptcy  
 Sec. 409. Statute of Limitations for Civil Forfeiture Actions  
 Sec. 410. Assets Forfeiture Fund and Property Disposition  
 Sec. 411. Clarification of 21 U.S.C. § 877  
 Sec. 412. Certificate of Reasonable Cause  
 Sec. 413. Conforming Treasury and Justice Funds  
 Sec. 414. Disposition of Property Forfeited Under Customs Laws  
 Sec. 415. Technical Amendments Relating to Obliterated Motor Vehicle Identification Numbers  
 Sec. 416. Fugitive Disentitlement  
 Sec. 417. Admissibility of Foreign Business Records  
 Sec. 418. Amendment to Financial Institutions Reform and Recovery Act of 1989  
 Sec. 419. Prospective Application

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 of 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 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)

60

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(l) 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(l) 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(l)(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(l) 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."

06

(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".

92  
(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, TELEMARKETING 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".

68  
 (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,

consspiracy, 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 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

103 (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-

105

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.-- The 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".

601

**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):

<b>FY92</b>	<b>FY93</b>	<b>FY94</b>	<b>FY95</b>	<b>FY96</b>
\$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 claim is 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

<sup>2</sup> For a detailed discussion of all of these issues, and a legislative proposal similar to the one in this bill, see Franz, "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. Ali 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, \_\_\_ U.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.

111

17

**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

18

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.

120

- 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

- 19 -

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. Atiq Hussain 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.

- 20 -

- 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):

121 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.

In just a few very 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 anti-drug and violence presentations to elementary schoolchildren by police officers in California's Orange County, would not be as far along as they are today were it not for the support of 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 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 unlabeled 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.

Perhaps because of its 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 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 desireable 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 need 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. McMahon 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. McMahon 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. McMahon 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

Washington, DC 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.

<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:

PY	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 Fois  
Assistant Attorney General

cc. The Honorable John Conyers, Jr.  
The Honorable Barney Frank

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.

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.

177

-22-

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.]

## Part 2

### Extract of Hearing Before the House Committee on the Judiciary, June 11, 1997

#### 1. Statement of Henry Hyde, 1997 WL 316566

June 11, 1997

Good morning, everyone. I appreciate your coming to this very important hearing.

Our musty civil asset forfeiture laws, enacted at the dawn of our republic to protect the nation's customs revenues from the depredations of smugglers, have been recruited in the war against drugs. This I find wholly proper. The federal government is taking in hundreds of millions of dollars a year in cash intended for drug buys, from the sale of cars and boats and homes used by drug traffickers in their business dealings, and in the proceeds of drug sales. This money is being plowed back into law enforcement.

It is indeed a delicious irony that, as former Attorney General Dick Thornburgh said, "it is now possible for a drug dealer to serve time in a forfeiture-financed prison, after being arrested by agents driving a forfeiture-provided automobile, while working in a forfeiture funded sting operation."

Unfortunately, I think I can say that our civil asset seizure laws are being used in terribly unjust ways, are depriving innocent citizens of their property with nothing that can be called due process. This is wrong, and it must be changed.

Please enter with me the Kafkaesque world of civil asset forfeiture. I advise you never to buy a airplane ticket at an airport with cash. This behavior may cause the ticket agent to alert police as to a possible "drug dealer." You will be searched, and if you are carrying large amounts of cash it will be confiscated. Unfortunately for you, fit a "drug profile."

But say you are carrying no drugs. The money was to be used at an auction of antique cars where business is done in cash only. It doesn't matter. Agents can seize your money based on "probably cause" that it is intended for use in a drug transaction. OH, don't worry, you probably won't be arrested. You will likely be courteously sent on your way, but sans cash. If you want to get it back, your troubles have just begun.

Civil asset forfeiture is a relic of a medieval English practice whereby an object responsible for an accidental death was forfeited to the king, who would provide the proceeds for masses to be said for the good of the dead man's soul. It is the inanimate object itself that is "guilty" of wrongdoing. Thus, you never have to be convicted of a crime to lose your property. You never have to be charged with any crime. In fact, even if you are acquitted by a jury of criminal charges, your property can be seized.

In attempting to get your property back, you have available few of the procedural safeguards of the criminal law. All the government need show to justify a seizure is probable cause that the property is subject to forfeiture. Then you must prove that the property is "innocent."

What are some of the other roadblocks you will face in getting your property back? You are not entitled to an attorney if indigent. You must provide a 10% bond for the privilege of contesting the government's seizure. You have a quite short period of time to file a claim. Under some forfeiture statutes, property can be forfeited even if the property owner is completely innocent -- and either did not know of others' illegal use of his property or called the police to try to put a stop to it. Even if you somehow prevail, the government is not liable for any damage caused by its negligent handling or storage of your property. And if your property is your livelihood, you might be bankrupt by the time you get it back.

This is terribly unjust. In a democracy means can be as important as ends. If more money is needed for the war on drugs, Congress should appropriate it. I am certainly prepared to. However, we cannot continue to unjustly take assets from property owners unlucky enough to be caught up in civil forfeiture proceedings. Nothing less than the sanctity of private property is at stake here. The current situation is unjust--it is abusive--and it must be addressed.

The Civil Asset Forfeiture Reform Act proposes seven commonsense changes in current asset seizure laws. 1) It puts the burden of proof where it belongs--with the government; 2) it allows for the appointment of counsel for indigents; 3) it makes clear that property owners who take reasonable steps to prevent others from using their property for illegal purposes

can't lose their property; 4) it eliminates the cost bond requirement; 5) it gives a property owner a reasonable time period to file a claim contesting a forfeiture; 6) it allows property owners to sue the federal government for negligence in its handling or storage of property; and 7) it allows property to be returned to the owner pending final disposition of a case if substantial hardship would otherwise result.

I look forward to today's hearing and to the compelling stories of forfeiture abuse we will hear. I now recognize the ranking minority member, Mr. Conyers, for an opening statement.

HENRY J. HYDE  
Congressman  
**1997 WL 316566 (F.D.C.H.)**

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1997 CQ US HR 1835  
105th Congress, 1st Session

Congressional Quarterly's Washington Alert--Text of Bills  
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(Introduced in House)

### **HR 1835**

To provide a more just and uniform procedure for Federal civil forfeitures.

Date Introduced: 06/10/97

Version Date: 06/10/97

Version type: Introduced in House

Sponsor: Hyde (R-IL)

Committees: COMMITTEE ON THE JUDICIARY, COMMITTEE ON WAYS AND MEANS

#### **SECTION 1. SHORT TITLE.**

#### **SEC. 2. CREATION OF GENERAL RULES RELATING TO CIVIL FORFEITURE PROCEEDINGS.**

#### **SEC. 3. CONFORMING AMENDMENTS TO TITLE 28, TO RULES OF PROCEDURE, AND TO THE CONTROLLED SUBSTANCES ACT.**

#### **SEC. 4. CONFORMING AMENDMENTS TO REVENUE LAWS.**

#### **SEC. 5. COMPENSATION FOR DAMAGE TO SEIZED PROPERTY.**

#### **SEC. 6. PREJUDGMENT AND POSTJUDGMENT INTEREST.**

#### **SEC. 7. APPLICABILITY.**

105TH CONGRESS  
1ST SESSION

### **H. R. 1835**

To provide a more just and uniform procedure for Federal civil forfeitures.

IN THE HOUSE OF REPRESENTATIVES  
June 10, 1997

Mr. HYDE (for himself, Mr. McDERMOTT, Mrs. KELLY, Mr. HAYWORTH, Mr. STARK, Ms. DEGETTE, Ms. JACKSON-LEE of Texas, Mr. CONYERS, Mr. FRANK of Massachusetts, Mr. BARR of Georgia, Mrs. MEEK of Florida, Mr. MARTINEZ, Ms. LOFGREN, Mr. WICKER, Mr. GRAHAM, Mr. MANZULLO, Mr. SCHIFF, Mr. CLAY, Mr. EVANS, Mr. FOLEY, Mr. FOGLIETTA, Mr. PARKER, Mr. DELLUMS, Mr. BLILEY, Mr. BROWN of Ohio, Mr.

WATT of North Carolina, Mr. BERMAN, Mr. BAKER, and Mr. CUMMINGS) 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 provide a more just and uniform procedure for Federal civil forfeitures.

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

**SECTION 1. SHORT TITLE.**

This Act may be cited as the "Civil Asset Forfeiture Reform Act".

**SEC. 2. CREATION OF GENERAL RULES RELATING TO CIVIL FORFEITURE PROCEEDINGS.**

Section 981 of title 18, United States Code, is amended--(1) by inserting after subsection (i) the following:

"(j)(1)(A) In any nonjudicial civil forfeiture proceeding under a civil forfeiture statute, with respect to which the agency conducting a seizure of property must give written notice to interested parties, such notice shall be given as soon as practicable and in no case more than 60 days after the later of the date of the seizure or the date the identity of the interested party is first known or discovered by the agency, except that the court may extend the period for filing a notice for good cause shown.

"(B) A person entitled to written notice in such proceeding to whom written notice is not given may on motion void the forfeiture with respect to that person's interest in the property, unless the agency shows--

"(i) good cause for the failure to give notice to that person; or

"(ii) that the person otherwise had actual notice of the seizure.

"(C) If the government does not provide notice of a seizure of property in accordance with subparagraph (A), it shall return the property and may not take any further action to effect the forfeiture of such property.

"(2)(A) Any person claiming such seized property may file a claim with the appropriate official after the seizure.

"(B) A claim under subparagraph (A) may not be filed later than 30 days after--

"(i) the date of final publication of notice of seizure; or

"(ii) in the case of a person entitled to written notice, the date that notice is given.

"(C) The claim shall state the claimant's interest in the property.

"(D) Not later than 90 days after a claim has been filed, the Attorney General shall file a complaint for forfeiture in the appropriate court or return the property, except that a court in the district in which the complaint will be filed may extend the period for filing a complaint for good cause shown or upon agreement of the parties.

"(E) If the government does not file a complaint for forfeiture of property in accordance with subparagraph (D), it shall return the property and may not take any further action to effect the forfeiture of such property.

"(3)(A) If the person filing a claim is financially unable to obtain representation by counsel, the court may appoint counsel to represent that person with respect to the claim.

"(B) In determining whether to appoint counsel to represent the person filing the claim, the court shall take into account--

"(i) the nature and value of the property subject to forfeiture, including the hardship to the claimant from the loss of the property seized, compared to the expense of appointing counsel;

"(ii) the claimant's standing to contest the forfeiture; and

"(iii) whether the claim appears to be made in good faith or to be frivolous.

"(C) The court shall set the compensation for that representation, which shall–

"(i) be equivalent to that provided for court-appointed representation under section 3006A of this title, and

"(ii) be paid from the Justice Assets Forfeiture Fund established under section 524 of title 28, or in a case under the jurisdiction of the Treasury Department, from the Customs Forfeiture Fund established under section 613A of the Tariff Act of 1930.

"(4) In all suits or actions (other than those arising under section 592 of the Tariff Act of 1930) brought for the civil forfeiture of any property, the burden of proof is on the United States Government to establish, by clear and convincing evidence, that the property is subject to forfeiture.

"(5)(A) An innocent owner's interest in property shall not be forfeited under any civil forfeiture statute.

"(B) With respect to a property interest in existence at the time the illegal conduct giving rise to forfeiture took place, the term 'innocent owner' means an owner who–

"(i) did not know of the conduct giving rise to forfeiture; or

"(ii) upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property.

"(C) With respect to a property interest acquired after the conduct giving rise to forfeiture has taken place, the term 'innocent owner' means a person who, at the time that person acquired the interest in the property, did not know–

"(i)(I) of the conduct giving rise to the forfeiture; and

"(II) that the property was involved in, or the proceeds of, that conduct; or

"(ii) that the Government was seeking forfeiture of that property.

"(6) For the purposes of paragraph (5) of this subsection–

"(A) a person may show that such person did all that reasonably can be expected, among other ways, by demonstrating that such person, to the extent permitted by law–

"(i) gave timely notice to an appropriate law enforcement agency of information that led the person to know the conduct giving rise to a forfeiture would occur or has occurred; and

"(ii) in a timely fashion revoked permission for those engaging in such conduct to use the property or took reasonable actions in consultation with a law enforcement agency to discourage or prevent the illegal use of the property; and

"(B) in order to do all that can reasonably be expected, a person is not required to take steps that the person reasonably believes would be likely to subject the person to physical danger.

"(7) As used in this section, the term 'civil forfeiture statute' means any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense.

"(k)(1) A claimant under subsection (j) is entitled to immediate release of seized property if–

"(A) the claimant has a possessory interest in the property;

"(B) the continued possession by the United States Government pending the final disposition of forfeiture proceedings will cause substantial hardship to the claimant, such as preventing the functioning of a business, preventing an individual from working, or leaving an individual homeless; and

"(C) the claimant's likely hardship from the continued possession by the United States Government of the seized property outweighs the risk that the property will be destroyed, damaged, lost, concealed, or transferred if it is returned to the claimant during the pendency of the proceeding.

"(2) A claimant seeking release of property under this subsection must request possession of the property from the appropriate official, and the request must set forth the basis on which the requirements of paragraph (1) are met.

"(3) If within 10 days after the date of the request the property has not been released, the claimant may file a motion or complaint in any district court that would have jurisdiction of forfeiture proceedings relating to the property setting forth-

"(A) the basis on which the requirements of paragraph (1) are met; and

"(B) the steps the claimant has taken to secure release of the property from the appropriate official.

"(4) If a motion or complaint is filed under paragraph (3), the district court shall order that the property be returned to the claimant, pending completion of proceedings by the United States Government to obtain forfeiture of the property, if the claimant shows that the requirements of paragraph (1) have been met. The court may place such conditions on release of the property as it finds are appropriate to preserve the availability of the property or its equivalent for forfeiture.

"(5) The district court shall render a decision on a motion or complaint filed under paragraph (3) no later than 30 days after the date of the filing, unless such 30-day limitation is extended by consent of the parties or by the court for good cause shown."; and (2) by redesignating existing subsection (j) as subsection (l).

### **SEC. 3. CONFORMING AMENDMENTS TO TITLE 28, TO RULES OF PROCEDURE, AND TO THE CONTROLLED SUBSTANCES ACT.**

(a) USE OF ASSETS FORFEITURE FUND FOR ATTORNEY FEES.--Section 524(c) of title 28, United States Code, is amended--

(1) by striking out "law enforcement purposes--" in the matter preceding subparagraph (A) in paragraph (1) and inserting "purposes--";

(2) by redesignating the final 3 subparagraphs in paragraph (1) as subparagraphs (J), (K), and (L), respectively;

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

"(H) payment of court-awarded compensation for representation of claimants pursuant to section 981 of title 18;

"(I) payment of compensation for damages to property under section 5(b) of the Civil Asset Forfeiture Reform Act;"; and

(4) by striking out "(H)" in subparagraph (A) of paragraph (9) and inserting "(I)".

(b) IN REM PROCEEDINGS.--Paragraph (6) of Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims to the Federal Rules of Civil Procedure (28 U.S.C. Appendix) is amended by striking "10 days" and inserting "30 days".

(c) CONTROLLED SUBSTANCES ACT.--Section 518 of the Controlled Substances Act (21 U.S.C. 888) is repealed.

### **SEC. 4. CONFORMING AMENDMENTS TO REVENUE LAWS.**

(a) IN GENERAL.--Section 615 of the Tariff Act of 1930 (19 U.S.C. 1615) is amended to read as follows:

### **SEC. 615. APPLICATION OF TITLE 18, UNITED STATES CODE TO FORFEITURE PROCEEDINGS.**

"Those portions of section 981 of title 18, United States Code, that apply generally to civil forfeiture procedures apply also to any civil forfeiture proceeding relating to the condemnation or forfeiture of property for violation of the customs laws.".

(b) CONFORMING REPEAL.--Section 608 of the Tariff Act of 1930 (19 U.S.C. 1608) is repealed.

(c) TIME FOR FILING CLAIMS.--Section 609(a) of the Tariff Act of 1930 (19 U.S.C. 1609) is amended--

(1) by striking "twenty" and inserting "30"; and

(2) by striking "or bond".

(d) TREATSURY ASSET FORFEITURE FUND.--Section 613A(a)(3) of the Tariff Act of 1930 (19 U.S.C. 1613b(a)(3)) is amended--

- (1) by striking "and" at the end of subparagraph (E);
- (2) by striking the period at the end of subparagraph (F) and inserting ";" and"; and
- (3) by adding at the end the following:

"(G) payment of court-awarded compensation for representation of claimants pursuant to section 981 of title 18, United States Code.".

(e) FORFEITURE OF PERSONAL PROPERTY.--Section 7325 of the Internal Revenue Code of 1986 is amended--

(1) in paragraph (2), by striking "for 3 weeks" through "such notice" and inserting "in accordance with section 981(j)(1) of title 18, United States Code";

(2) in paragraph (3), by amending the head to read "Filing of claim" and by striking "stating his interest in the articles seized" through "description of the goods seized," and inserting "stating such person's interest in the articles seized. Such person shall transmit a duplicate list or description of the goods seized"; and

(3) in paragraph (4), by amending the heading to read "Sale" and by striking "and no bond is given within the time above specified".

## **SEC. 5. COMPENSATION FOR DAMAGE TO SEIZED PROPERTY.**

(a) TORT CLAIMS ACT.--Section 2680(c) of title 28, United States Code, is amended--

- (1) by striking "law-enforcement" and inserting "law enforcement"; and
- (2) by inserting before the period the following:

", except that the provisions of this chapter and section 1346(b) of this title do apply to any claim based on the negligent destruction, injury, or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if the property was seized for the purpose of forfeiture but the interest of the claimant is not forfeited".

(b) DEPARTMENT OF JUSTICE.--

(1) IN GENERAL.--With respect to a claim that cannot be settled under chapter 171 of title 28, United States Code, the Attorney General may settle, for not more than \$50,000 in any case, a claim for damage to, or loss of, privately owned property caused by an investigative or law enforcement officer (as defined in section 2680(h) of title 28, United States Code) who is employed by the Department of Justice acting within the scope of his or her employment.

(2) LIMITATIONS.--The Attorney General may not pay a claim under paragraph (1) that--

(A) is presented to the Attorney General more than 1 year after it occurs; or\

(B) is presented by an officer or employee of the United States Government and arose within the scope of employment.

## **SEC. 6. PREJUDGMENT AND POSTJUDGMENT INTEREST.**

Section 2465 of title 28, United States Code, is amended--

- (1) by inserting "(a)" before "Upon"; and
- (2) adding at the end the following:

"(b) INTEREST.--

"(1) POST-JUDGMENT.--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.

"(2) PRE-JUDGMENT.--The United States shall not be liable for prejudgment interest, except that in cases involving currency, other negotiable instruments, or the proceeds of an interlocutory sale, the United States shall disgorge to the claimant any funds representing--

"(A) 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; and

"(B) for any period during which no interest is actually paid, an imputed amount of interest that such currency, instruments, or proceeds would have earned at the rate described in section 1961.

"(3) LIMITATION ON OTHER PAYMENTS.--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.".

## **SEC. 7. APPLICABILITY.**

(a) IN GENERAL.--Unless otherwise specified in this Act, the amendments made by this Act apply with respect to claims, suits, and actions filed on or after the date of the enactment of this Act.

(b) EXCEPTIONS.--

(1) The standard for the required burden of proof set forth in section 981 of title 18, United States Code, as amended by section 2, shall apply in cases pending on the date of the enactment of this Act.

(2) The amendment made by section 6 shall apply to any judgment entered after the date of enactment of this Act.

1997 CQ US HR 1835

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## **2. Statement of Stefan D. Cassella, 1997 WL 311709 (F.D.C.H.)**

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Testimony  
June 11, 1997

House of Representatives  
Judiciary

### **Civil Asset Forfeiture**

STATEMENT OF STEFAN D. CASSELLA ASSISTANT CHIEF ASSET FORFEITURE AND MONEY LAUNDERING SECTION CRIMINAL DIVISION BEFORE THE COMMITTEE ON THE JUDICIARY UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING H.R. 1835 THE CIVIL ASSET FORFEITURE REFORM ACT PRESENTED ON JUNE 11, 1997

Mr. Chairman and Members of the Committee, I appreciate the opportunity to appear-before you today on behalf of the Department of Justice to comment on H.R. 1835, the "Civil Asset Forfeiture Reform Act" ("the Act"), a bill to revise the asset forfeiture laws.

The Department of Justice supports revisions to the asset forfeiture laws to ensure that they provide due process to property owners. We also think that the current laws can be enhanced to provide law enforcement with a more effective crime-fighting tool. A comprehensive forfeiture bill can do both.

In this regard, we have had a number of constructive meetings with the Committee staff over the last few weeks in which we discussed the provisions of the Act as well as the provisions of H.R. 1745, the forfeiture reform bill that was drafted by the Department of Justice and introduced by Rep. Schumer. We hope these talks continue, and we look forward

to working with you in the effort to produce a bill that addresses both the concerns of citizens and property owners and the needs of our law enforcement agencies. But the Department of Justice is strongly opposed to H.R. 1835 in its present form.

- **The Asset Forfeiture Program**

Before commenting on the specific provisions of H.R. 1835, I would like to provide the Committee with some background on the asset forfeiture program.

Asset forfeiture has become one of the most powerful and important tools that federal law enforcement can employ against all manner of criminals and criminal organizations -- from drug dealers to terrorists to white collar criminals who prey on the vulnerable for financial gain. Derived from the ancient practice of forfeiting vessels and contraband in Customs and Admiralty cases, forfeiture statutes are now found throughout the federal criminal code.

*Why do forfeiture?*

Federal law enforcement agencies use the forfeiture laws for a variety of reasons, both time-honored and new. Like the statutes the First Congress enacted in 1789, the modern laws allow the government to seize contraband -- property that it is simply unlawful to possess, such as illegal drugs, unregistered machine guns, pornographic materials, smuggled goods and counterfeit money.

Forfeiture is also used to abate nuisances and to take the instrumentalities of crime out of circulation. If drug dealers are using a "crack house" to sell drugs to children as they pass by on the way to school, the building is a danger to the health and safety of the neighborhood. Under the forfeiture laws, we can shut it down. If a boat or truck is being used to smuggle illegal aliens across the border, we can forfeit the vessel or vehicle to prevent its being used time and again for the same purpose. The same is true for an airplane used to fly cocaine from Peru into Southern California, or a printing press used to mint phony \$100 bills.

The government also uses forfeiture to take the profit out of crime, and to return property to victims. No one has any right to retain the money gained from bribery, extortion, illegal gambling, or drug dealing. With the forfeiture laws, we can separate the criminal from his profits -- and any property traceable to it -- thus removing the incentive others may have to commit similar crimes tomorrow. And if the crime is one that has victims -- like carjacking or fraud -- we can use the forfeiture laws to recover the property and restore it to the owners far more effectively than the restitution statutes permit.

Finally, forfeiture undeniably provides both a deterrent against crime and a measure of punishment for the criminal. Many criminals fear the loss of their vacation homes, fancy cars, businesses and bloated bank accounts far more than the prospect of a jail sentence. In fact, in many cases, prosecution and incarceration are not needed to achieve the ends of justice. Not every criminal act must be answered with the slam of the jail cell door. Sometimes, return of the property to the victim and forfeiture of the means by which the crime was committed will suffice to ensure that the community is compensated and protected and the criminal is punished.

- **Recent examples of effective use of asset forfeiture**

This Committee plans to hear today from witnesses who are critical of the asset forfeiture program. But there are two sides to the story. In the vast majority of cases, the asset forfeiture laws are applied fairly, effectively and for the benefit of both law enforcement and the public at large. The following are some recent examples of ways in which the forfeiture laws have been used for the benefit of victims and communities.

*Marijuana grower's land becomes retreat for KIDS ESCAPING DRUGS*

(Western District of New York).-- Carmen Farbo used 24 acres of forested land near Chautauqua Lake in Western New York to grow marijuana. Farbo was convicted by State authorities and the property was civilly forfeited to the United States. In April 1997, the property was transferred to KIDS ESCAPING DRUGS, an organization that treats children addicted to drugs and alcohol in the City of Buffalo. The rural property provides a setting to be used as both a retreat for children who are successful in the first phase of their treatment and as a location to conduct parent/child workshops. An open house and a public ceremony are being planned for June for the grand opening of the facility.

*Crack House Transferred to Gospel Rescue Ministries*

(District of Columbia).--- The Fulton Hotel in Northwest Washington, D.C. was being operated as a crack house by a secretive and ruthless network of drug dealers. In 1994, the hotel was civilly forfeited to the United States, and on March 7, 1997, it was transferred to Gospel Rescue Ministries, a nonprofit organization, to use as a no-cost residence for women undergoing drug treatment at a nearby drug treatment center. The converted hotel will provide housing for 16 women at a time.

*Restitution to victims of \$318 million bank fraud*

(Eastern District of Virginia).-- Edward Reiners perpetrated a \$316 million bank fraud against a number of banks in Richmond, Virginia and around the world. Reiners, posing as an employee of Philip Morris Companies, obtained loans from the banks to conduct "secret research" on cigarettes. In reality, he used most of the money to play the stock market and spent some of it to acquire expensive properties including a condominium at the Trump Tower in New York. When the scheme came to light in 1996, the government used the asset forfeiture laws to freeze the assets before Reiners could transfer them overseas. The \$225 million that was recovered will be turned over to the victim banks within the next few weeks.

*Walls of a drug house come tumbling down*

(Western District of New York).-- The United States Marshals Service recently completed the demolition of a forfeited drug house in the City of Buffalo under the Weed and Seed Initiative. The demolition rid the community of property that was the site of numerous kilo-weight cocaine sales and had become a dangerous menace. The entire neighborhood looked on as the National Guard bulldozers crashed into the home, and broke into cheers and applause as the walls came tumbling down. The vacant land will be transferred to the city.

*Land annexed to federal wildlife refuge*

(Eastern District of Michigan).--- The children of wealthy parents inherited a mansion and land that was across the Saginaw River from a federal wildlife refuge. When they used the land to grow marijuana and distribute cocaine, it was forfeited to the United States. The refuge then bought the land and annexed it to the pre-existing refuge, resulting in a significant increase in the total acreage of the preserve and a significant enhancement in the habitat value of the refuge.

*Telemarketer's money used to pay restitution to elderly victims*

(Western District of New York).- Rocco Guadagna was the owner and operator of one of the largest fraudulent telemarketing companies in the country. Using the civil forfeiture laws, the government seized the bank accounts that were used to defraud the elderly victims, and held the money until Guadagna was convicted and the money was criminally forfeited. When the case is complete, nearly \$256,000 will be available to the victims as restitution. If it were not for the civil forfeiture provisions at the early stages of the investigations, the monies would not have been available for restitution by the time the defendant was indicted and convicted. Drug dealer's property becomes "safe house" for victims of domestic violence

(Eastern District of California).--- In the hamlet of Volcano, California, the United States forfeited a 3-bedroom house and forested acreage that was the center of a large marijuana cultivation operation. The property was transferred to the Amador County Sheriff's office to use as a "safe house" for victims of domestic violence.

*Land preserved as open space on the Housatonic River*

(District of Connecticut).--- A parcel of land in Sherman, Connecticut was slated for a multi-million development by the corrupt Bank of Credit and Commerce International (BCCI). When BCCI was convicted of racketeering, the land was forfeited to the United States. After paying the back taxes on the land to the Town of Sherman, the U.S. Marshals are negotiating a sale of the property to a land preservation group that has pledged to preserve it as open space along the scenic Housatonic River.

*Forfeited radio station will become drug treatment center in Tucson*

(District of Arizona).-- The U.S. Attorney in Tucson, Arizona convicted a father and son of laundering drug money through a radio station that they owned. The radio station was forfeited in October, 1996, and transferred to the Gateway Foundation, a private non-profit organization that provides alcoholism and drug treatment services to indigent adult and adolescent men and women. Gateway will use the forfeited radio station facility to house their administrative offices and provide out-patient, counseling and training services. Gateway handles about 2000 individuals a year in their detoxification and short term residential services and moves successful clients to independent productivity in the Tucson community.

*"The Champagne Lady" is forfeited by a corrupt government employee*

(District of South Carolina).-- A corrupt federal employee stole hundreds of thousands of dollars from a Treasury agency in North Carolina and laundered the money by buying a yacht called "The Champagne Lady" for his girlfriend in Myrtle Beach. Using the civil forfeiture laws, the government forfeited the yacht from the girlfriend and will sell it to reimburse the taxpayers for the loss.

---

*\$600,000 taken from Iranian arms dealer thwarts chemical warfare scheme*

(District of Oregon).-- Manfred Felber, an Iranian arms dealer, traveled to the United States to purchase equipment to be used in chemical warfare. The scheme was quashed when the government used the asset forfeiture laws to seize \$605,000 that Felber transferred from banks in Germany, Austria and Switzerland to the United States to buy chemical agent monitors.

*Fraud proceeds used to reimburse Victims in Denver*

(District of Colorado).- Geoffrey Chris Clement ran a fraud scheme in which he convinced victims that for a "advance fee, he could obtain financing for large loans and could make high yield, low risk investments on behalf of his customers. He then used the money taken from the victims to buy property in the Denver area. When Clement was convicted of wire fraud in February, 1997, the property -- worth approximately \$340,000 -- was forfeited and sold, with the proceeds used to reimburse the victims.

*The U.S. and foreign governments use civil forfeiture to fight international money laundering*

(Eastern District of Texas).-- Two and a half million dollars in drug proceeds were laundered for members of the Cali Cartel by converting the proceeds of cocaine street sales into money orders that were shipped to banks in the Cayman Islands. The money was then wire transferred to Panama, Mexico, Columbia, Germany and England. When the money in England was frozen by the British government, the United States filed a civil forfeiture action to forfeit it under U.S. law. No criminal forfeiture was possible because the defendant who owned the drug proceeds resides in Cali, Columbia and could not be extradited to face trial. The money will be shared with the United Kingdom and the Cayman Islands to foster future cooperation in the fight against international drug trafficking and money laundering.

*Gold Bars Unearthed in Mother's Backyard*

(District of Rhode Island).- In 1993, international money launderer Stephen Saccoccia was sentenced to a 660-year prison term and ordered to forfeit \$136.3 million in drug money, but only a fraction of the money was recovered. Four years later, in 1997, federal agents using the discovery powers in the asset forfeiture laws found 83 gold bars buried in Saccoccia's mother's backyard and seized them.

*Forfeiture of money concealed from bankruptcy court leads to reimbursement of victims*

(District of Oregon).-- Eric Randolph concealed at least \$1 million of assets from a bankruptcy court by transferring the assets to overseas accounts in Switzerland. When the scheme was discovered, the government used the forfeiture laws to force Randolph to repatriate \$225,000, which will be turned over to a bankruptcy trustee and restored to the victims of the bankruptcy fraud.

*Civil forfeiture rids motel of drug dealers and prostitutes in Wichita*

(District of Kansas).-- Motel owners in Wichita rented their rooms to hookers and drug dealers, charging a fee based on the amount of traffic in and out of each room. For an additional charge, the owners would call the rooms and warn the occupants when the police came into the parking lot, making it impossible for the police to enforce the law despite being called to the scene 600 times in a two-year period. Finally, the case was referred to the U.S. Attorney who filed a civil forfeiture action that put an end to the illegal activity.

*\$170,000 returned to elderly victims of telemarketing fraud*

(Northern District of New York).-- More than \$170,000 has been seized and forfeited and is in the process of being returned to two hundred victims, mostly elderly, of a telemarketing fraud scheme. The victims were told that they had won a large cash prize, but that in order to collect, they had first to pay a fee (usually described as a tax). Some victims were convinced to dip into their retirement savings, while others were induced to take cash advances on high interest rate credit cards. No one received any "prize money." The money was recovered under the civil forfeiture laws because the perpetrator of the fraud resides in Canada and has not yet been extradited.

*Neighborhood "Block Watch" leads to forfeiture of crack house*

(Eastern District of Washington).- Neighbors involved in a Block Watch Program in Spokane, Washington, observed that a residence in a high crime area was being used for the sale of crack cocaine. One neighbor expressed her reluctance to let her children out of the house because of gun fire coming from the property. In October 1996, the information provided by the neighbors was used by the U.S. Attorney to obtain a civil forfeiture order shutting down the drug operation and taking control of the property.

*Tavern used for drug trafficking on Indian land becomes a youth center*

(Eastern District of Washington).- The government initiated civil forfeiture proceedings against a tavern located on the Colville Tribal Reservation in Washington State. The tavern had long been known as a location for drug transactions, with the knowledge and consent of the owner. The tavern was forfeited in April 1997 and is in the process of being transferred to the Colville Confederated Tribes for use as a youth center, pursuant to the Weed and Seed Initiative.

*Restraint of forfeitable assets leads to capture of fugitive*

(Northern District of Ohio).-- Perry Kiraly was the leader of a ring that burglarized large discount stores, such as Home Depot, Lowes, Sam's Club and many others in six states, with losses in excess of \$1.5 million. After the FBI discovered his identity and involvement in the crimes, Kiraly became a fugitive, but his bank accounts were restrained under the forfeiture laws. When Kiraly attempted to obtain access to his money while remaining a fugitive, he gave away his location and was captured. Kiraly's funds were eventually forfeited in his criminal case and the money was used to compensate the victims of his crimes.

*Forfeiture used to recover proceeds of Medicaid fraud scheme*

(District of New Jersey).-- A New Jersey pharmacist, Festus Nwankwo, defrauded the Medicaid program by fraudulently obtaining Medicaid numbers and prescription slips and then falsely billing federal and state medical assistance programs for prescription items that were never dispensed. Using the forfeiture procedures available in money laundering cases, the government has recovered \$4.5 million in fraud proceeds that Nwankwo laundered through various bank and investment accounts.

*Civil forfeiture used to recover proceeds of Medicaid fraud from fugitive doctor*

(Western District of Louisiana).- Dr. Camran Adly was a psychiatrist in Lafayette, Louisiana, whose practice consisted almost entirely of Medicaid patients. When he was charged with Medicaid fraud, he wire transferred over \$900,000 in fraud proceeds to a bank account in Amsterdam and fled to Iran, his native country. Dr. Adly remains a fugitive, but using the civil forfeiture laws, the government recovered the fraud proceeds, including the funds in the Amsterdam account.

- **Response to criticisms of the forfeiture laws**

Last year, when I testified before this Committee, I acknowledged that the proliferation of forfeiture into new areas has been controversial. When laws that were designed to seize pirate ships from privateers are applied to the seizure of homes, cars, businesses and bank accounts, there are a lot of issues to sort out. How do we protect innocent property owners? What procedures afford due process? When does forfeiture go too far, in violation of the Excessive Fines Clause of the Eighth Amendment?

The Executive and Judicial Branches of government have been very active in this sorting out process. First, the Department of Justice has issued detailed policy guidelines governing the use of the administrative, civil judicial, and criminal forfeiture laws by all agencies of the Department. See Department of Justice Asset Forfeiture Policy Manual (1996). The Treasury Department has issued similar guidelines. Together, these guidelines insure that the forfeiture-laws are administered fairly and effectively, with all appropriate consideration given to the rights of property owners. moreover, we have conducted an intensive series of training sessions for law enforcement agents and federal prosecutors, including detailed instruction on how to incorporate forfeiture into criminal cases instead of relying exclusively on the civil forfeiture laws.

The courts have been extraordinarily active in this area as well. Ten forfeiture cases have been decided by the Supreme Court in the last five years, and hundreds of cases dealing with all aspects of forfeiture procedure have been decided by the lower courts. These cases have given much needed clarity and definition to the forfeiture laws and the rights of property owners, but they have also left loopholes and ambiguities that only Congress can resolve through legislation.

The cumulative effect of these efforts is evident. Criticisms of the forfeiture program have dropped dramatically. Procedures are better defined; guidelines are rigorously enforced. More than 80 percent of all forfeitures take place in conjunction with a related arrest or prosecution. And as a result of the emphasis on criminal forfeiture since 1994, more than half of all contested forfeiture actions are now undertaken as part of criminal cases.

- **Drop in receipts into the Forfeiture Fund**

Reform of the forfeiture laws -- both through policy initiatives and case law -- has not been without cost. The statistics kept by the Department of Justice regarding the receipts deposited into the Assets Forfeiture Fund show that adverse court decisions and other factors have resulted in a dramatic decline in the amount of property confiscated from criminals since 1993. See chart appended as Exhibit 1.

The following statistics show the change in receipts and the corresponding drop in the amount of money available to fund law enforcement programs at the state and local level.

	1994	1995	1996	1997*
Total Receipts (millions)	\$549.9	\$487.5	\$338.1	\$110.0
Sharing with State and local law enforcement	\$228.8	\$217.3	\$163.4	\$35.1

\* first quarter

It is important to keep these facts in mind when considering what additional legislative reform of the forfeiture laws is needed. Legislation to protect the rights of property owners must be balanced with legislation that restores and enhances law enforcement's ability to use asset forfeiture to fight crime and restore property to victims. In short, we must not cross the line that separates legislation designed to insure fairness -- a goal we all share -- from legislation that provides relief to criminals; and we must not miss this opportunity to resolve ambiguities and close loopholes in the law that present an unnecessary impediment to effective law enforcement.

- **Guaranteeing due process**

In our testimony last year we said that asset forfeiture was an effective law enforcement tool, and the examples I have given of recent cases illustrate that point. But we recognized that "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." It is for that reason that we have supported efforts to revise the forfeiture laws to ensure fairness and procedural due process.

We said before and we say again that the burden of proof in civil forfeiture cases should be on the government. If the government is trying to forfeit a person's house, it should have to prove that a crime was committed and that the property was involved in that crime, the property owner should not have to prove the negative. We said before and we say again that there should be a uniform innocent owner defense available to claimants in all civil forfeiture cases. The Supreme Court may have held in *Bennis v. Michigan* that an innocent owner defense is not mandated by the Due Process Clause of the Fifth Amendment, but that does not mean Congress cannot enact such protection by statute. We think it should.

In addition, we have said before and we say again that the time limits for filing claims should be extended to insure that everyone has an adequate opportunity to obtain his or her day in court; that there should be relief for citizens whose property is damaged while in government custody; and that the government should disgorge any interest it earns on money that it seizes and later has to return.

All of these protections for the rights of citizens and property owners are included in H.R. 1745, the forfeiture bill introduced by Rep. Schumer. We fully support them and think that they should be included in whatever legislation this Committee produces on the forfeiture issue. A section-by-section analysis of H.R. 1745 is appended to this testimony, and we ask that it be made a part of the hearing record.

- **Specifics of the Civil Asset Forfeiture Reform Act**

H.R. 1835 also contains provisions that address these issues, and we applaud the efforts of Chairman Hyde to focus the attention of Congress on this important subject. But the bill, as currently drafted, crosses the line between providing due process and giving unintended relief to drug dealers, money launderers, and other criminals who prey on the elderly and the vulnerable in our society. Let me give a few examples.

- **Innocent owner defense**

As I said, we support the enactment of a uniform innocent owner defense. A person who does not know that her property is being used illegally, or who becomes aware of the illegal use but takes all reasonable steps to try to stop it, should not suffer the loss of the property through forfeiture. But H.R. 1835 goes beyond that. In its attempt to protect the rights of innocent third parties, it inadvertently allows criminals to insulate their property from forfeiture by transferring it to their spouses, minor children and other friends and associates.

Section 2 of the bill defines an innocent owner as, among other things, a person who acquires an interest in property after the commission of the underlying crime without knowing that the property was involved in any illegal conduct. It does

not matter how the person acquires the property: it could be a gift, transfer, inheritance, divorce settlement, or many other things. As long as the new owner is "innocent," he would get to keep the property.

That, however, is precisely the problem. A drug dealer could transfer his drug proceeds to his children's college fund and the children would get to keep it, because they would be "innocent owners." A con artist could buy his girlfriend a yacht with the money he stole from an elderly widow in a telemarketing scheme, and the girlfriend would get to keep it, while the elderly victim gets nothing. This problem has already arisen in the Third Circuit under current law, where the court held that the head of the Philadelphia organized crime syndicate could transfer his Rolls Royce to his lawyer, and the lawyer could keep it, because he was an innocent owner. See *United States v. One 1973 Rolls Royce*, 43 F.3d 794 (3d Cir. 1994).

In that 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." But instead of rectifying this problem, the Act would codify it.

We understand that criminals have families -- children to feed and educate, spouses who need clothing and shelter. We do not think, however, that the families of criminals deserve priority over the victims of crime. We do not think that drug dealers should be allowed to use drug money to send their sons and daughters to Harvard, while the children of honest, hardworking Americans must struggle to find the resources for higher education. Money stolen from elderly citizens should be returned to the victims, not used to build a mansion in Malibu for some fraud artist's friend or associate.

The solution to this problem is to provide, as the criminal forfeiture statute has provided since 1984, that persons who acquire property derived from, or used to commit, a criminal act are protected only if they are bona fide purchasers for value. See 21 U.S.C. 9853(n)(6)(B); *United States v. Sokolow*, 1996 WL 32113 (E.D. Pa. 1996) (wife and daughter have no right to defendant's fraud proceeds because they are not purchasers; money forfeited by the government will be restored to the victims). That is, if someone, in good faith, buys property from a criminal without knowing that it is subject to forfeiture, he should be protected, but if the criminal tries to insulate the property from forfeiture by transferring it to his wife, children, girlfriend or other third party who gives nothing in return, the law should say "no!" The innocent owner defense in section 202 of H.R. 1745 is the appropriate way to address this concern.

#### • **Returning property to criminals**

H.R. 1835 also contains a provision that would require the government to return seized property to criminals pending trial in the forfeiture case in order to avoid a "hardship." We understand that there may be instances where a truly innocent person's property is seized from a wrongdoer and held pending trial -- undoubtedly to the inconvenience of the innocent claimant. But in thousands of cases every year, property such as cars, airplanes, cash and other easily disposable items seized from drug dealers, gamblers, pornographers and money launderers. It makes no sense to write into law a provision that allows such people to retain possession of the seized property pending trial. You cannot give a pile of cash back to a drug courier just because he claims some "hardship" will befall him. No matter what guidelines are written into the statute, the property will simply disappear.

When we seize a flashy car from a notorious drug dealer, we send a strong message to the community that crime will not pay. If that same car is back on the street a week later because the owner claimed some hardship, we would send the opposite message -- that law enforcement is a paper tiger, and criminals can flaunt the spoils of their trade without fear of consequences.

When we seize vessels, vehicles and aircraft used in drug trafficking and other smuggling offenses, we prevent the criminal from using the property again to commit new crimes while the forfeiture case goes to trial. But if a person who uses his truck three days a week to transport illegal aliens, and four days a week to transport vegetables, can recover the truck pending trial because the seizure results in a "hardship" to the vegetable business, we will lose the most effective tool we have of depriving criminals of the instrumentalities of crime.

As this last example illustrates, the release-of-property provision will cause enormous problems for the Immigration and Naturalization Service, which seizes 9,000 automobiles a year, mostly along the Southwest Border, as part of its enforcement program against the transportation and smuggling of illegal aliens. To say the least, illegal aliens and smugglers have a poor track record when it comes to appearing for trial with their property ready for forfeiture. If the cars, trucks, vessels and other conveyances seized by the INS have to be returned to the smugglers to avoid a "hardship," there will be little left of the anti-smuggling program.

Yet, in any case in which INS refused to release the vehicle, section 2 of the Act would permit the claimant to apply immediately to federal court for an order forcing the agency to do so, and the court would have to rule on the request within 30 days! The Courts along the Southwest Border are already overwhelmed with civil and criminal cases related to border interdiction. See *Washington Post*, May 15, 1997, page A1. To add 19,000 more cases, each of which would have to be

resolved within 30 days, to the dockets of those courts would overwhelm the judiciary and threaten to bring justice to a standstill.

As long as H.R. 1835 contains a provision that requires the government to give a seized airplane back to a drug dealer, or seized photocopy equipment back to a counterfeiter -- supposedly to avoid a "hardship" pending trial -- it crosses the line between a measure designed to ensure fairness, and a measure that simply provides a windfall for criminals. We think this provision should be dropped from the bill.

- **Clear and convincing evidence**

In addition to shifting the burden of proof to the government, H.R. 1835 would elevate the standard of proof from "preponderance of the evidence" to "clear and convincing evidence." Placing that burden on the government is appropriate, but elevating the standard is uncalled for. Indeed, at last year's hearing, Chairman Hyde agreed with us on that point. See, Transcript of hearing before the Committee on the Judiciary on H.R. 1916, the "Civil Asset Forfeiture Reform Act," 104th Cong., 2d Sess., July 22, 1996, at 234.

If the standard of proof is "clear and convincing evidence," there will be cases where the government is able to establish by the weight of the evidence that the property constitutes criminal proceeds, yet the criminal will be able to keep it. That makes no sense. If we establish by the weight of the evidence that money in a bank account was obtained in a Medicare fraud scheme, the money should go back to the taxpayers, not left in the pockets of the dishonest health care provider. If we prove by the weight of the evidence that a gold chain was purchased with the money stolen in a telemarketing scheme, the gold should be forfeited and sold so that the victims can be reimbursed. But the Act would let the doctor who defrauded Medicare keep the money, and it would let the telemarketer keep the gold chain, if the evidence merely met the "preponderance" standard and not the higher standard of "clear and convincing evidence."

The greatest adverse impact of the clear and convincing standard is certain to be felt in cases involving sophisticated international money laundering on behalf of the South American drug cartels. Such schemes invariably involve shadowy transactions through bank secrecy jurisdictions conducted by shell corporations claiming to be in the travel, import/export or money remitting business. In such cases, the evidence linking the money to drug trafficking may be entirely circumstantial: it will be difficult enough to continue to prosecute such cases successfully with the burden of proof on the government. Under a "clear and convincing" standard, however, such cases would become close to impossible to win. The American people certainly want fairness in the forfeiture laws, but they do not want to grant immunity to the financial henchmen of the drug lords. If anything, the law should preserve our ability to combat international money laundering by giving law enforcement new tools to gather evidence from overseas, and by giving the government the benefit of presumptions based on certain conduct typical of these schemes that will enable the prosecutor to satisfy his burden of proof.

Statutes requiring the government to meet a "clear and convincing" standard are extremely rare. See e.g. 18 U.S.C. 93524(e)(1) (stripping non-custodial parent of visitation rights with child when custodial parent is relocated as a protected witness). In civil cases, such as those filed under the False Claims Act, 31 U.S.C. § 3729, and the bank fraud statutes, 12 U.S.C. § 1833a, to give just two examples, the "preponderance" standard is routinely applied. If that standard is adequate to protect the rights of defense contractors, health care providers and bankers, it is hard to understand why a higher standard is needed to protect the rights of drug dealers, money launderers, pornographers, gamblers and others subject to the asset forfeiture laws.

- **Remedy for failure to give notice of administrative forfeiture**

The vast majority of forfeiture cases are uncontested. These are cases in which the government seizes property and sends notice of the forfeiture to the property owner, but no one files a claim. Such cases, which account for 50 to 85 percent of all Justice Department forfeitures, are called administrative forfeitures.

Under current law, the seizing agency, pursuant to Justice Department internal guidelines must send notice of the forfeiture action to potential claimants within 60 days of the seizure, unless the time limit is waived for good cause by a supervising official. Also under current law, if the government fails to make a reasonable effort to give notice of the forfeiture to potential claimants, and a person who did not receive notice later claims an interest in the property, a federal judge may order that the forfeiture action be started over again. *United States v. Woodall*, 12 F.3d 791, 793 (8th Cir. 1993). Such claims are almost invariably filed by federal prisoners who assert that they did not receive the forfeiture notice because the seizing agency sent it to the wrong place of incarceration as the prisoner was moved throughout the corrections system. See e.g. *United States v. Clark*, 84 F.3d 378 (10th Cir. 1996); *United States v. Franklin*, 897 F. Supp. 1301, 1303 (D. Or. 1995); *Hong v. United States*, 920 F. Supp. 311 (E.D.N.Y. 1996); *Concepcion v. United States*, 938 F. Supp. 134 (E.D.N.Y. 1996); *Scott v. United States*, 1996 WL 748426 (D.D.C. 1996).

H.R. 1835 would change this process in two significant ways. First, it would codify the 60-day guideline and require the seizing agency to go to court to get a waiver instead of getting it from a supervising official within the Department --

another process certain to burden the judiciary unnecessarily, given the 30,000 seizures per year made by Justice Department agencies. Second, it would change the remedy for the failure to provide notice by allowing the claimant simply to, void the forfeiture," and bar the government ever from re- initiating the forfeiture action.

Again, this issue is one that arises almost always in the context of a federal prisoner who did not receive notice through the prison system. It is laudable to recognize that prisoners, like everyone else, have due process rights. But it makes no sense to give prisoners a windfall by allowing them to "void a forfeiture" anytime the Bureau of Prisons is unable to deliver notice of administrative forfeiture of property to the current prison address. If H.R. 1835 were enacted, instead of having judges order that forfeiture proceedings start again by returning to the status quo ante in such cases, we would be subjected to the check presentation ceremonies in which prisoners serving long terms of incarceration for drug dealing, money laundering and other crimes are presented with reimbursement checks for seized funds to spend while enjoying the comforts of the federal penitentiary.

If current law needs to be changed at all, it should be in the other direction -- to require that any claims filed by persons asserting lack of notice be filed within two years of the seizure of the property. That would cut off claims by persons, such as federal prisoners, with lots of time on their hands who are inclined to file claims as much as five and six years after the date when they were arrested and the property was seized. Section 103 of H.R. 1745 addresses this problem.

- **Appointment of counsel**

One other provision of H.R. 1835 that deserves special note is the one providing for court-appointed counsel in civil forfeiture cases. The principle that no person should be denied the means to seek redress in the courts against unreasonable government action is recognized in the Equal Access to Justice Act ("EAJA"). That statute provides that any person who prevails against the government in a case in which the government action was not "substantially justified" is entitled to recover attorneys fees. See *Creative Electric v. United States*, 1997 WL 151779 (N.D.N.Y. 1997) (if claimant, after filing claim and cost bond, has to go to court to force government either to file complaint or return property, claimant is entitled to EAJA fees).

Given the availability of EAJA fees, there is no need to authorize the court to appoint counsel in civil forfeiture cases.

Such authority is only going to encourage attorneys looking for court appointments to file frivolous claims. Indeed, with tens of thousands of forfeiture seizures taking place every year, the burden on the courts just to hear the motions for appointment of counsel is likely to be enormous. Moreover, this provision is likely to be enormously expensive. The Act would pay for the costs of court- appointed counsel out of the Assets Forfeiture Fund. in other words, money that now is ear-marked for use by state and local law enforcement agencies would instead be used to line the pockets of criminal defense attorneys. As mentioned previously, the Assets Forfeiture Fund has already been reduced by over \$200 million since 1994, and money available for local police departments dropped by \$65 million in the last year alone. H.R. 1835 would reduce the remaining money available to state and local law enforcement to nothing. in our view, such a result would be contrary to the important principle that, although taxpayers generally do bear the costs of law enforcement, such costs should, where possible, be borne by the criminals who are responsible for creating them. Enactment of this provision of H.R. 1835 would be akin to sticking a siphon into the Fund and draining the remaining money into the coffers of the defense lawyers , guild- As a policy choice, we think that would be wrong.

- **Provisions that should be added to the Civil Asset Forfeiture Reform Act**

Equally important, we are concerned that H.R. 1835 fails to include provisions that are needed to make the asset forfeiture laws more effective as law enforcement tools. The most important element of any asset forfeiture reform legislation must be a sense of balance, but the Act fails to contain any provision that addresses the concerns of law enforcement.

For example, it is right to put the burden of proof on the government in civil forfeiture cases, but it is wrong to omit provisions that allow the government to gather the evidence needed to meet its evidentiary burden. H.R. 1835 should contain provisions allowing attorneys for the government to issue subpoenas for evidence in civil forfeiture cases in the same way that they are issued in federal health care cases, anti-trust cases, bank fraud cases and civil RICO cases. And it should let the government's civil attorneys have access to the grand jury material already in the possession of its criminal prosecutors.

Also, if we are revising the civil forfeiture laws, we should address the problem that arises when claims are filed by fugitives. Before 1996, the federal courts employed a rule, known as the fugitive disentitlement doctrine, that barred a fugitive from justice from attempting to hide behind his fugitive status while contesting a civil forfeiture action against his property. See *United State v. Eng*, 951 F-2d 461, 464 (2d Cir. 1991) ("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").

But last year, the Supreme Court held in *Degen v. United States*, 116 S. Ct. 1777 (1996), that as a judge-made rule, the sanction of absolute disentitlement goes too far. Instead, it is up to Congress to enact a statute that, as the Court described it, avoids "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." *Degen*, 116 S. Ct. at 1778. We think that the codification of the fugitive disentitlement doctrine should be part of the Act.

The most serious omission is that H.R. 1835 does not contain any of the provisions needed to enhance the criminal forfeiture laws. The recent shift to criminal forfeiture in the federal courts has revealed numerous deficiencies in the criminal laws that have hampered our ability to make full use of those statutes. Nothing would do more to encourage the use of criminal forfeiture and to decrease the government's reliance on civil forfeiture than to enact comprehensive reform of the criminal forfeiture laws.

In particular, the law should allow the government to pursue criminal forfeiture any time a statute authorizes civil forfeiture; and it should allow the government to restrain property subject to forfeiture pre-trial, so that the property doesn't disappear while the criminal case is pending. Title V of H.R. 1745 contains these and a comprehensive set of other proposals that would make the criminal forfeiture statutes the equal of their civil counterparts as effective crime-fighting tools. Those provisions should be made a part of the Act.

Finally, and most importantly, once the perceived procedural deficiencies of the civil forfeiture laws are addressed, there is no reason not to expand forfeiture into new areas where it can be used to combat sophisticated and serious criminal activity. From telemarketing to terrorism to counterfeiting to violations of the food and drug laws, the remedy of asset forfeiture should be applied. Indeed, unless someone can name a crime for which the offender should be allowed to retain the proceeds, the forfeiture laws should be extended to reach the proceeds of all crimes in the federal criminal code. Title III of H.R. 1745 contains numerous provisions designed to achieve this goal.

- **Conclusion**

At the conclusion of my testimony a year ago, I said that a balanced forfeiture bill would ensure that "the forfeiture laws of the U. S. will be tough but fair -- tough but fair -- which is exactly what the American people have a right to expect." I still very much believe that. Working together, we can craft a balanced set of forfeiture laws that combine fairness with effective law enforcement. In our conversations over the past weeks, we have made a start. We should continue. We have a long way to go, but a balanced bill that law enforcement can support is within our grasp.

STEFAN D. CASSELLA

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United States Department of Justice

**1997 WL 311709 (F.D.C.H.)**

**3. Statement of David Smith, 1997 WL 11233673**

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Wednesday, June 11, 1997

**Civil Asset Forfeiture**  
**David B. Smith**

Statement of David B. Smith on behalf of National Association of Criminal Defense Lawyers before Committee on the Judiciary, U.S. House of Representatives Regarding Bi-Partisan Bill to Provide a More Just and Uniform Procedure for Federal Civil Asset Forfeitures ("Civil Asset Forfeiture Reform Act of 1997") presented on June 11, 1997.

Chairman Hyde, Mr. Conyers, Other Distinguished Co-Sponsors of this bill and Members of the Committee:

On behalf of the National Association of Criminal Defense Lawyers (NACDL), I thank you for inviting me to speak at this hearing. Also appearing before this Committee today, and at its hearing last July is my fellow co-chair of our Forfeiture Abuse Task Force, E.E. (Bo) Edwards. And appearing beside me too is our President-Elect, also an asset forfeiture expert, Gerald B. Lefcourt.

NACDL is the preeminent organization in the United States advancing the mission of ensuring justice and due process for persons accused of crime. A non-profit, non-partisan, professional bar association formed in 1958, among our 9,000 direct members and 22,000 state and local affiliate members are private criminal defense lawyers, public defenders, judges and law professors committed to preserving fairness within the American justice system.

It would be difficult to imagine a more egregious deviation from the American commitment to the rule of law, or one more dangerous to citizen rights and liberties, than the civil asset forfeiture statutes. I want to emphasize our deep appreciation to you, Chairman Hyde, Mr. Conyers, and the other members of the Committee who have taken the lead on forfeiture reform.

## **I. INTRODUCTION**

I am the author of the leading treatise on forfeiture law, *Prosecution and Defense of Forfeiture Cases*. I was the deputy chief of the Asset Forfeiture Office of the Criminal Division when it was first set up in 1983. I helped draft the forfeiture provisions of Comprehensive Crime Control Act of 1994, which did so much to make forfeiture a powerful weapon in the fight against crime. Back then it was hard to get agents and prosecutors to use forfeiture. It was something most of them weren't familiar with. Certainly, no one then anticipated the widespread use, and frequent abuse, of forfeiture powers we see today.

Reform of the civil forfeiture laws is long overdue. Even most prosecutors and agents I speak with recognize that – privately, anyway.

For your convenience, I have attached our thorough statement from the hearing of July 22, 1996, with its attachments A and B: section by section critiques of the DOJ's proposal (introduced at the urging of DOJ just a couple weeks ago by Congressman Schumer). There is much more in the DOJ and Treasury proposals and our criticism of them than can be addressed in this hearing. But believe me, their proposals are deeply troubling. I hope you will analyze them, and our critiques of them, very carefully.

As our prepared statement from last July's hearing continues to state our position on forfeiture reform, I will make this statement brief. I'll simply update our previous statement and re-emphasize the importance of what I see as four especially key provisions of this praiseworthy bipartisan bill:

- \* placing the burden of proof on the government, where it belongs, and by an appropriate standard -- clear and convincing evidence;
- \* providing a mechanism for the court to appoint counsel for indigent claimants;
- \* establishing a uniform "innocent owner" defense for all civil forfeitures.
- \* establishing time limits for providing notice of a seizure and for filing a civil forfeiture complaint in court.

## **II. FOUR KEY PROVISIONS OF THE BILL -- SPECIFICALLY**

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## A. Burden of Proof

I'll never forget a speech I heard Judge Stephen Trott give a large group of prosecutors at the DOJ in the mid-1980s. Judge Trott was the Assistant Attorney General in charge of the Criminal Division at the time. (He is now a federal judge on the Ninth Circuit, appointed in 1988 by President Reagan.) He had served for many years as a deputy district attorney in Los Angeles. When he became U.S. Attorney for the Central District of California, Judge Trott discovered federal civil forfeiture. He was simply amazed, he told us, that you could confiscate someone's property merely by showing probable cause for forfeiture. It seemed unbelievable to him coming from the California state system.

And indeed it is amazing that a statutory burden of proof so out of line with current notions of due process could have survived this long. Yet, it has. But with your reform efforts, finally, we hope we are on the verge of correcting this abusive anomaly in American law.

Thanks to years of efforts, congressional, litigation, and journalistic, now even the DOJ concedes that the burden of proof must be raised. The Treasury Department still demurs, at least with respect to the specific forfeiture statutes it administers. But its position is increasingly untenable. See e.g., *United States v. One Parcel of Property at 194 Quaker Farms Road*, 85 F.3d 985, 989 (2d Cir. 1996) ("after [the U.S. Supreme Court's decision in] *Austin*, it is now an open question whether 21 U.S.C. 881(a)(7) warrants civil or criminal due process protections, or possibly some hybrid of the two"; suggesting that burden of proof may be unconstitutional); *United States v. Leasehold Interest in 121 Nostrand Ave.*, 760 F. Supp. 1015, 1032 (E.D.N.Y. 1991) (government should be required to prove case under 881(a)(7) by clear and convincing evidence); *United States v. \$12,390.00*, 956 F.2d 801, 807-12 (8th Cir. 1992) (Bearn, J., dissenting) (questioning constitutionality of burden of proof under 19 U.S.C. 1615); *United States v. \$191,910.00 U.S. Currency*, 16 F.3d 1051, 1069 (9th Cir. 1994) (disparity between government's and claimant's burdens "involves a serious risk that an innocent person will be deprived of his property"); *Department of Law Enforcement v. Real Property*, 588 So.2d 957 (Fla. 1991) (landmark decision striking down Florida's forfeiture law and holding that due process requires state to prove its civil forfeiture case by clear and convincing evidence); *Wohlstrom v. Buchanan*, 884 P.2d 687, 692 (Ariz. 1994) ("Forfeiture statutes have increasingly been criticized for threatening due process rights by allowing the government to establish probable cause under a lesser standard of proof, and thereafter shifting the ultimate burden to claimants."); *State v. Spooner*, 520 So. 2d 336 (La. 1998) (state constitutional guarantee of due process requires that government prove its forfeiture case by at least a preponderance of evidence as property owner is entitled to a presumption of innocence similar to that in a criminal case; some members of Court would require clear and convincing evidence or proof beyond a reasonable doubt).

The bill's proposal to raise the bar to clear and convincing evidence is supported not only by due process considerations, but also by state law precedent. Some of our nation's largest states -- including California, New York- and Florida -- rightly require clear and convincing evidence by the State to support a civil forfeiture of a citizen's property.

## B. Appointed Counsel

Nor is the bill's proposal to give the district judge discretion to appoint counsel for indigent claimants a radical departure from current law. But it is an important improvement to the current law. Once again, fundamental due process considerations strongly support the provision. In the U.S. Supreme Court case, *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), for example, concerning a parental termination proceeding, the Court held that where the government seeks to deprive a citizen of an important non-liberty (e.g., property) interest, due process may very well require appointment of counsel for an indigent defendant. In fact, courts have already held that, under *Lassiter* there is a due process right to appointed counsel in a civil forfeiture case, at least in some circumstances. See e.g., *United States v. Forfeiture, Property, All Appurtenances*, 803 F. Supp. 1194 (N.D.Tex. 1992); *Commonwealth v. \$9,847.00 U.S. Currency*, 637 A.2d 736 (Pa. Cmwlth. 1994).

District judges currently have authority to appoint pro bono counsel for an indigent prisoner claimants, under 28 U.S.C. 1915(d). See e.g., *Onwubiko v. United States*, 969 F.2d 1392, 1399 (2d Cir. 1992). However, they rarely do so. See 1 David B. Smith, *Prosecution and Defense of Forfeiture Cases*, 11.02, 11-12 (1996). This suggests that they will not make inappropriate appointments of counsel under the similar appointment provision in this bill. On the other hand, the explicit provision in the bill for reasonable attorney compensation should result in a much-needed increase in the number of appointments for civil asset forfeiture cases as compared with the experience under 1915(d).

It is important in this respect to remember that counsel appointed under the Criminal Justice Act (CJA), to represent a criminal defendant may also represent that defendant in a related civil forfeiture proceeding under current law. 18 U.S.C. 3006A(c) states that once counsel is appointed under CJA, he is to represent his client "at every stage of the proceedings... including ancillary matters appropriate to the proceeding[s]." See e.g., the Guide to Judiciary Policies and Procedure, Vol. VII, Chapter 2, specifically indicating that representation in a civil forfeiture proceeding or on a motion for return of property pursuant to Rule 41(e) is appropriate under section 3006A(c). [1]

All this bill would do is extend the same authority to appoint counsel for indigent civil forfeiture claimants who do not face related criminal charges. Representation should not depend on the "fortuity" of whether one faces a related criminal case.

No matter how fair the formal civil forfeiture procedures are, the process can never really be fair if a claimant is forced to represent herself. This is a critical provision that must be in the final bill.

[1] Guidelines 2.01(F)(5)(v) and (vi), reprinted as an appendix to *United States v. One 1985 BMW 318I*, 691 F.Supp. 1074 (N.D.Ill.1987). (However, in this case, the court held that it was without authority under the Criminal Justice Act to appoint counsel to represent the wife of a CJA defendant who was contesting the forfeiture of her property.)

The Government's primary objection to this provision is that the cost of providing counsel would be paid from the DOJ and Treasury Asset Forfeiture Funds -- that is the funds that are derived from forfeited property from which the agencies seizing the property now derive a direct pecuniary benefit. But the question of where the money comes from is an issue that should remain entirely separate from the merits of this provision. NACDL is not necessarily opposed to a different funding mechanism if that is what it takes to get this badly needed provision enacted. However, we have concerns about deploying the much less certain annual CJA appropriations- At the very least, if that mechanism is to be used, the Administration must commit itself to using its ample influence to help ensure an adequate increase in the annual CJA appropriations- I must stress, though, that NACDL's position is that the current CJA appropriations are, and have been for several years, quite inadequate to cover current demands. And rather than placing a new tax burden on Americans, it would seem much more economical and fair, and certain, to have the appointment dollars come the Asset Forfeiture Fund now the essentially exclusive till of the government seizers.

### **C. Innocent Owner Provision**

The third key pillar of the bill in my opinion is the uniform provision for an innocent property owner defense to forfeiture. You might well ask: Who could argue with that, especially when the defense provided merely tracks current law under 21 U.S.C. 881 and 18 U.S.C. 981? But somehow, the Government nonetheless opposes even this modest provision.

The DOJ says it favors a uniform innocent owner defense, but then says it wants a defense that is much narrower than the one currently provided under the two main federal civil forfeiture statutes! That is not civil asset forfeiture reform. Clearly, the purpose of the worthy reform effort reflected in the bill is to make it harder for the Government to confiscate the property of innocent persons, not easier.

Meanwhile, the Treasury Department is opposed to adding any kind of innocent owner defense to the many statutes it enforces -- even a defense as unreasonably narrow as the one the DOJ supports. This is an especially outrageous position.

In his concurring opinion in the unfortunate 5-4 Supreme Court decision in *Bennis v. Michigan* 516 U.S. 116 S.Ct. 994 (1996), Justice Thomas actually urged Congress to take the responsibility he did not think the courts could properly take (i.e., without being unduly activist), for protecting innocent property owners. See *Bennis* 116 S.Ct. at 1002. And his call to Congress has been echoed by every editorial writer and commentator writing about *Bennis* See e.g., Nation's Founders Would Gasp at Court's Stance, USA Today, March 5, 1996 (in "an appallingly unfair decision" Court has "given police the go-ahead to prey on and plunder innocents"); George F. Will, Mrs. Bennis' Car Washington Post, March 10, 1996 at C7 ("So it is time for the political branches of state governments and the federal government to act on the clear signals from [Justice] Thomas and others concerning the need to protect innocent persons who cannot reasonably be considered negligent concerning the misuse of their property").

Treasury simply has its head stuck in the sand, Its adamant opposition to any innocent owner defense with respect to "its" forfeiture statutes, certainly speaks volumes about the unreasonableness of Treasury's views on the whole subject of forfeiture.

### **D. Enforceable Time Limitations for Notice and Commencement of Forfeiture Suit**

The final critical pillar of the bi-partisan bill is its establishment of enforceable time limits for the government to provide notice and commence a forfeiture suit. First, the measure establishes a much-needed, 60 day time limit for the government to provide notice of the seizure and its intent to forfeit the property. Second, if a person files a claim letter with the seizing agency, the U.S. Attorney would then have to file a civil forfeiture claim within 90 days of the receipt of the claim letter.

These time limits give the government ample time to initiate the forfeiture action. In fact, they provide much more time than most state forfeiture statutes allow. Moreover, the time limits are flexible. The government may ask a court to extend them for good cause.

Although the time limits in the bill are flexible, they do have necessary teeth. If the government fails to comply with the time limits and fails to obtain an extension of time for good cause shown, it may not proceed with the forfeiture action. The same remedy is found in most state forfeiture statutes. And it is found in the federal code, at 21 U.S.C. § 888(c). However, Section 888 covers only conveyances seized for drug-related offenses.[2] The same protection against government foot-dragging should be afforded to all property owners, and not just alleged drug dealers.

### III. CONCLUSION

I would like those members of the Committee who may still be reluctant to get behind this bi-partisan forfeiture reform bill to know that NACDL and this Committee's staff counsel have made every effort to accommodate the Administration's concerns and objections and to craft a bill that the law enforcement agencies can support. But we simply cannot accede to demands to support a "compromise" bill that fails to ensure that the procedures by which property gets forfeited are fundamentally fair. We cannot endorse any bill that "compromises" away American liberties.

[2] Interestingly too, sec. 888 (c) gives the government only 60 days to file a complaint. This bill gives the government an extra 30 days to do that.

We are greatly concerned that while leaders of this Committee have been working to reform the civil asset forfeiture laws, DOJ has been vigorously lobbying Congress and the U.S. Judicial Conference Committee on Rules of Practice and Procedure for extreme changes to our nation's criminal forfeiture laws. These criminal forfeiture laws are also in need of reform, though not as critically as the civil forfeiture laws. But the DOJ's proposals in this area are not those of reform. The DOJ's proposals include for example a radical diminution of the historic American right to trial by jury. Indeed, they would do away with the right to any trial at all on the issue of forfeiture.[3]

We would hate to see this Committee's worthy civil forfeiture reform efforts negated by another bill turning criminal forfeiture into just another, even worse instrument of oppression.

The DOJ's criminal forfeiture efforts, including its encouragement of the power-wishlist recently introduced by Representative Schumer, strike me as completely inconsistent with the DOJ's claim that it favors forfeiture reform.

[3] Rather, the DOJ wants to wrongly treat criminal forfeiture as a simple sentencing matter -- just like a sentencing guidelines issue.

I urge the DOJ to reconsider those proposals. And I respectfully urge Mr. Schumer, and every member of the Committee, to review NACDL's very detailed critiques of the DOJ and Treasury civil and criminal forfeiture proposals, in the Statement of July 22, 1996 before the Committee, attached to this Statement, at Attachments A and B.[4] If the DOJ succeeds in turning this bill into a law enforcement Christmas Tree, it will be worse than no reform.

NACDL's legislative director, Leslie Hagen, is available at any time in our Washington, D.C. office. And my office is right across the river in Alexandria, Virginia. We would be happy to meet with any Member of their staff at any time to discuss this bill or the larger subject of forfeiture reform at greater length than we can do here.

Once again, Mr. Chairman, thank you for the opportunity to testify on this important matter, and for your leadership in bringing forward this vital reform bill. I am pleased to see it already enjoys such strong bi-partisan support.

[4] Please see also the second attachment to this Statement, also contained in the July 22, 1996 Hearing Report. This is a detailed 21 page letter I wrote on behalf of NACDL to Stefan D. Cassella, on September 5, 1996. That letter also sets forth our views on some of the DOJ's most objectionable criminal forfeiture proposals, as well as its civil forfeiture proposals.

### 4. Statement of Jan P. Blanton, 1997 WL 11233602

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Wednesday, June 11, 1997

**Civil Asset Forfeiture**  
**Jan P. Blanton**

Text as Prepared for Delivery  
June 11, 1997

TREASURY EXECUTIVE OFFICE FOR ASSET FORFEITURE DIRECTOR JAN P. BLANTON  
HOUSE JUDICIARY COMMITTEE

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 views on H.R. 1835 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.

When I was last privileged to appear before your committee almost a year ago to speak to the merits of a bill aimed at reforming civil asset forfeiture, I took as my theme the reasoned progress that the Congress and law enforcement together have made over the years in crafting and applying the forfeiture authorities we have today. That cooperative effort has put federal law enforcement in a position where it can go after the proceeds and instrumentalities of crime.

It has empowered us to be able to strike at the very core of criminal organizations. It has become a pivotal element in our overall enforcement strategy. And it has even benefitted the too often forgotten victims of criminal activity. In FY 1996, our Treasury Forfeiture Fund alone oversaw the return of over \$50 million to the victims of financial fraud. In the current fiscal year, we likewise expect to return over 30 million taxpayer dollars recovered from a Medicare fraud scheme. Financial fraud and health care fraud-just two of the areas in which federal forfeiture helps the victimized.

We are neither unaware of nor insensitive to concerns that forfeiture law can and should be further refined. The citizens of the United States will be comfortable with federal forfeiture authorities as long as they have faith in the integrity of the program. That faith is best secured by the legislature's enactment of needed statutory changes and by the executive's development of program policies and guidance that reflect America's sense of fair play.

We have taken important measures in a number of areas to ensure that we will fulfill our end of this responsibility. In the last five years since the establishment of the Treasury Forfeiture Fund, we have listened attentively to the criticisms of forfeiture programs. While some of this has been directed to programs at the state and local level, we have heeded the valid complaints and we have tightened up our program. We have stressed comprehensive training for all Treasury forfeiture personnel-from our special agents and their supervisors to our seized property managers. We have underscored the importance of considered and responsible seizures and the need for pre-seizure planning that makes these possible. We have emphasized quality in seized property management so that value, whether it be forfeited or returned, is never carelessly diminished. And recognizing that justice delayed is often justice denied, we have directed Treasury law enforcement to keep on top of their forfeiture caseloads, especially with regard to the adjudication of administrative forfeitures.

We are doing whatever it takes to ensure that Treasury's forfeiture program always affords due process-that it strives to notify all affected parties, that it invites arguments against the intention to forfeit, that it accommodates the indigent and that it offers opportunities to achieve just resolutions short of forfeiture in appropriate cases. In short, we are striving not for advantage but for fairness.

How best to fulfill the other end of that responsibility for the public's faith in federal forfeiture authority is what we are here today to consider. Forfeiture law should ensure its recognition of basic protections afforded property rights. For instance, we share your support of the concept of a uniform innocent owner provision and of shifting [sic] the burden of proof in certain cases. But we must register our reservations about H.R. 1835.

These reservations center first upon how this bill would amend several sections of the Tariff Act of 1930, codified in Title 19 USC, by:

\* raising the standard of proof from probable cause to clear and convincing evidence; and by,

\* eliminating cost bonds to pursue a civil judicial proceeding.

We also have other reservations about how this bill would affect forfeiture authorities beyond Title 19 by:

\* providing for appointment of counsel in any and all civil forfeiture actions;

\* providing for the release of seized property prior to forfeiture if the seizure causes substantial hardship on a claimant; and

\* providing for a cause of action to release property pending the completion of the forfeiture proceeding.

With regard to Title 19 civil forfeiture authorities, it is important to keep in mind that these involve statutes concerning national self-protection. The Customs forfeiture laws served as a template for much of the expanded criminal forfeiture authorities enacted during the last two decades. If the application of the Title 19 forfeiture model to other titles of the code has left some of these more recent forfeiture laws in need of changes, it is not because of inadequacies in the Title 19 model. Let's reform what needs to be fixed and not weaken the ability of the Treasury Department to protect the American public and hamstring federal law enforcement in its fight against drug trafficking, fraud and illegal arms trafficking at the border. Amending Title 19 is not the way to implement civil forfeiture reform. We submit that reform is best accomplished through our cooperative, measured efforts to implement changes in the appropriate body of statutes.

While we can appreciate the overall reform intentions of H.R. 1835, we fear that its changes to Title 19 authorities will have a significant adverse impact on Treasury forfeiture activities. Customs laws codified in Title 19 are designed to prohibit the introduction of contraband items into the United States, protect intellectual property rights along with the public health and safety, facilitate trade and expedite the collection of import duties. In addition, at the border, our Customs Service stands in the place of numerous other federal agencies, enforcing hundreds of provisions of law protecting the well being of America's citizens.

It must be recognized that at the border Customs officers routinely detect goods being imported or exported in violation of law. Many of these violations make the goods subject to seizure and forfeiture. In such cases, Customs generally is not aware of all the facts and circumstances surrounding the importation or exportation, though it does have probable cause for the seizure and forfeiture. The Customs laws are designed around the fact that in this border environment owners of the goods are in the best position to come forward with an explanation of the transaction giving rise to the seizure. Accordingly, these laws require that in a judicial proceeding the government must establish probable cause for the forfeiture; only then does the claimant (who, again is in the best position to explain the facts surrounding the importation or exportation) have the burden of proving that the goods are not subject to forfeiture. Given that the time frame between seizure and forfeiture in these cases is very short, it is all the more important for the owners to come forward with exculpatory information as any other rule places the government at a tremendous disadvantage in border enforcement. The changes proposed by H.R. 1835 would compromise the ability of the United States Customs Service to fulfill its vital responsibilities, many of which include key support of our foreign policy and national security. Not only will this bill make it more difficult for the United States to deprive criminal violators of their ill-gotten proceeds but it will also directly diminish the ability of the Customs Service to enforce restrictions and prohibitions at the border.

We believe any bill must retain probable cause as the standard of proof under the Customs laws when they are applied to traditional Customs cases. Without that standard, Customs will be unable to accomplish the following seizures:

- \* rocket fuel from going to Iran
- \* vehicles carrying tungsten stolen from a bonded and sealed freight car from Canada
- \* 20,000 pairs of knock-off blue jeans illegally bearing a registered U.S. trademark
- \* dangerous food products
- \* adulterated or unlicensed drugs
- \* images of sexually exploited children
- \* illegal firearms
- \* unsafe consumer products
- \* the products of convict and slave labor
- \* hazardous substances
- \* pirated intellectual properties

All of these items threaten the safety, security and prosperity of the American people. International trafficking in them undermines the benefits to be realized from an increasingly open world economy. With free market economies proliferating and free trade agreements expanding, this is not the time to disarm critical law enforcement authorities at the border. Should such an unintended consequence of H.R. 1835 be permitted to occur, the green light to fair and honest progress in international trade would be a green light also to the unscrupulous and the corrupt.

Needed refinements today should not be allowed to obstruct the longstanding record of effectiveness in serving the best interests of American citizens. We are available to work with the Committee to help it strike a well-balanced reform that continues to ensure the faith of Americans in the fairness of our federal forfeiture program.

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.

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**5. Statement of Bobby D. Moody, 1997 WL 11233603**

Wednesday, June 11, 1997

**Civil Asset Forfeiture**  
**Bobby D. Moody**

Testimony of Bobby D. Moody

Chief of Police Marietta, Georgia, Police Department and First Vice President International Association of Chiefs of Police before the Committee on the judiciary U.S. House of Representatives concerning Asset Forfeiture Reform June 11, 1997

Chairman Hyde and members of the Committee. My name is Bobby Moody, Chief Of Police in Marietta, Georgia. First, I would like to thank you for inviting me here today to testify on proposed reforms to the Federal Asset Forfeiture Statutes. I intentionally will be quite brief and believe that I will be most effective answering your questions.

To give you a little of my background, I have been a sworn police officer in the State of Georgia for over 23 years, serving as Chief in two cities, Covington and now Marietta, for over 20 years.

Last year you extended a similar invitation to James McMahon, Superintendent of the New York State Police. On July 22, 1996, Jim indicated how valuable asset forfeiture was to law enforcement agencies by saying (and I quote)

"We have been able to remove from criminals, the proceeds of their activities, as well as the instrumentality they have used to commit 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 other than to be sold to users on the streets. The drugs are impure and contaminated, and they can easily 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 trafficking."

What Jim said about state police agencies applies equally well to local law enforcement agencies like the ones I have been responsible for. The federal asset forfeiture laws' as I will describe in a minute, have been an invaluable tool to me personally in my agency's attempts to control illicit drug trafficking in our communities.

Last year Jim went through the various sections of your proposed legislation, H.R. 1916, and discussed each individually. I will not do that this year because our position remains the same and has adequately been stated by Mr. Cassella of the Department of Justice. We stated last year, and maintain this year that the legislation under consideration today would effectively make the asset forfeiture laws of little value. Criminals would soon realize that through a series of procedural moves they could shield their ill-gotten property from forfeiture. The legislation being considered today, if enacted as is, would clearly work to the detriment of victims, prosecutors and law enforcement,

I am not saying that law enforcement is not willing to address those elements of the forfeiture laws that may lead to abuse and rectify those situations. You should know that representatives of the IACP, including both Superintendent McMahon and me have met with members of the Department of Justice staff over the past three years in an attempt to work out acceptable reforms. We believe that we have reached acceptable compromises and have had discussions with your staff about our proposals. We believe that those discussions should continue.

As we have been developing our asset forfeiture reform package, as Mr. Cassella points out, there have been a number of cases concerning asset forfeiture considered by the Supreme Court, and the Department of Justice has instituted new procedures to comply with those rulings. The status of asset forfeiture proceedings is not the same

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today as it was five years ago. When considering incidents of alleged abuse, it is important to consider when they occurred.

I will close with two examples of how my departments have been able to use the asset forfeiture laws to rid our community of drug trafficking situations, even though property was never actually forfeited.

In the first instance, an individual residing outside the community owned a building which had been leased to another individual who was operating a pool hall on the premises. Drug dealing at this establishment was common.. We had made several undercover drug buys at the establishment, and had a good handle on what was occurring at the location. While several arrests were made, new dealers quickly replaced those who were arrested. The person operating the pool hall was of no help and had little interest in removing the drug dealers. We informed the absentee owner-landlord that the premises were being used to distribute drugs and that he should inform his tenant to ensure that these activities were discontinued. At first, the absentee landlord responded that all this was our problem and not his. We then informed him that his property could be subject to forfeiture. After conversations with his attorney, the landlord agreed to terminate the lease and not allow the property to be used for a similar use. The drug nuisance abated and no property was forfeited.

In the second instance, a similar situation was ongoing. An absentee landlord was leasing a piece of land to an individual who was running a trailer park. The land was located directly across a highway from a school. The proprietor of the park was also dealing drugs from the premises and using at least a portion of the proceeds to pay the landlord the monthly rent for the land. After repeated assistance requests to the landlord to remove this illegal activity, our city attorneys again indicated that the land could be subject to forfeiture.

Again, after discussions with his attorney, the landlord terminated the lease, the trailers were removed, and the land was used for other purposes.

I mention these two examples simply to illustrate how valuable a tool these laws can be. In neither instance was there any lost cash or property- the only benefit to the police department was in the elimination of criminal activity - The people who benefited the most were the residents Who now had a more drug-free environment in which to raise their children.

I would be happy to answer any questions.

## Part 3

### House Report on Civil Asset Forfeiture Reform Act

H.R. Rep. 105-358(I), 105TH Cong., 1st Sess. 1997, 1997 WL 677201 (Leg. Hist.)

**Civil Asset Forfeiture Reform Act  
HOUSE REPORT NO. 105-358(I)**

October 30, 1997

Mr. Hyde, from the Committee on the Judiciary, submitted the following  
R E P O R T

**[To accompany H.R. 1965]**

The Committee on the Judiciary, to whom was referred the bill (H.R. 1965) to provide a more just and uniform procedure for Federal civil forfeitures, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

#### **TABLE OF CONTENTS**

	<b>Page</b>
The Amendment .....	2
Purpose and Summary .....	19
Background and Need for the Legislation .....	20
Hearings .....	36
Committee Consideration .....	36
Vote of the Committee .....	36
Committee Oversight Findings .....	37
Committee on Government Reform and Oversight Findings .....	37
New Budget Authority and Tax Expenditures .....	37
Congressional Budget Office Cost Estimate .....	37
Constitutional Authority Statement .....	41
Section-by-Section Analysis and Discussion .....	41
Changes in Existing Law Made by the Bill, as Reported .....	72

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

#### **SECTION 1. SHORT TITLE AND TABLE OF CONTENTS.**

**(a) Short Title.**-This Act may be cited as the "Civil Asset Forfeiture Reform Act".

**(b) Table of Contents.**-The table of contents of this Act is as follows:

- Sec. 1. Short title and table of contents.
- Sec. 2. Creation of general rules relating to civil forfeiture proceedings.
- Sec. 3. Compensation for damage to seized property.
- Sec. 4. Prejudgment and postjudgment interest.
- Sec. 5. Seizure warrant requirement.
- Sec. 6. Access to records in bank secrecy jurisdictions.
- Sec. 7. Access to other records.
- Sec. 8. Disclosure of grand jury information to Federal prosecutors.
- Sec. 9. Use of forfeited funds to pay restitution to crime victims and regulatory agencies.
- Sec. 10. Enforcement of foreign forfeiture judgment.
- Sec. 11. Admissibility of foreign business records.
- Sec. 12. Conforming amendments to title 28, to Rules of Procedure, and to the Controlled Substances Act.
- Sec. 13. Inapplicability of the customs laws.

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- Sec. 14. Applicability.
- Sec. 15. Jurisdiction and venue in forfeiture cases.
- Sec. 16. Minor and technical amendments relating to 1992 forfeiture amendments.
- Sec. 17. Drug paraphernalia technical amendments.
- Sec. 18. Certificate of reasonable cause.
- Sec. 19. Authorization to share forfeited property with cooperating foreign governments.
- Sec. 20. Forfeiture of property used to facilitate foreign drug crimes.
- Sec. 21. Forfeiture of proceeds traceable to facilitating property in drug cases.
- Sec. 22. Forfeiture of proceeds of certain foreign crimes.
- Sec. 23. Civil forfeiture of coins and currency in confiscated gambling devices.
- Sec. 24. Clarification of judicial review of forfeiture.
- Sec. 25. Technical amendments relating to obliterated motor vehicles identification numbers.
- Sec. 26. Statute of limitations for civil forfeiture actions.
- Sec. 27. Destruction or removal of property to prevent seizure.
- Sec. 28. In personam judgments.
- Sec. 29. Uniform procedures for criminal forfeiture.
- Sec. 30. Availability of criminal forfeiture.
- Sec. 31. Discovery procedure for locating forfeited assets.
- Sec. 32. Criminal forfeiture for money laundering conspiracies.
- Sec. 33. Correction to criminal forfeiture provision for alien smuggling and other immigration offenses.
- Sec. 34. Repatriation of property placed beyond the jurisdiction of the court.
- Sec. 35. Right of third parties to contest forfeiture of substitute assets.
- Sec. 36. Archeological Resources Protection Act.
- Sec. 37. Forfeiture of instrumentalities of terrorism, telemarketing fraud, and other offenses.
- Sec. 38. Forfeiture of criminal proceeds transported in interstate commerce.
- Sec. 39. Forfeitures of proceeds of Federal Food, Drug, and Cosmetic Act violations.
- Sec. 40. Forfeiture of counterfeit paraphernalia.
- Sec. 41. Closing of loophole to defeat criminal forfeiture through bankruptcy.
- Sec. 42. Collection of criminal forfeiture judgment.
- Sec. 43. Criminal forfeiture of property in Government custody.
- Sec. 44. Delivery of property to the Marshals Service.
- Sec. 45. Forfeiture for odometer tampering offenses.
- Sec. 46. Pre-trial restraint of substitute assets.
- Sec. 47. Hearings on pre-trial restraining orders; assets needed to pay attorney's fees.

## **SEC. 2. CREATION OF GENERAL RULES RELATING TO CIVIL FORFEITURE PROCEEDINGS.**

(a) In General.—Chapter 46 of title 18, United States Code, is amended by inserting the following new section after section 982:

**"S 983. Civil forfeiture procedures**

"(a) **Administrative Forfeitures.**—(1)(A) In any nonjudicial civil forfeiture proceeding under a civil forfeiture statute, with respect to which the agency conducting a seizure of property must send written notice of the seizure under section 607(a) of the Tariff Act of 1930 (19 U.S.C. 1607(a)), such notice together with information on the applicable procedures shall be sent not later than 60 days after the seizure to each party known to the seizing agency at the time of the seizure to have an ownership or possessory interest, including a lienholder's interest, in the seized article. If a party's identity or interest is not determined until after the seizure but is determined before a declaration of forfeiture is entered, such written notice and information shall be sent to such interested party not later than 60 days after the seizing agency's determination of the identity of the party or the party's interest.

"(B) If the Government does not provide notice of a seizure of property in accordance with subparagraph (A), it shall return the property pending the giving of such notice.

"(2) The Government may apply to a Federal magistrate judge (as defined in the Federal Rules of Criminal Procedure) in any district where venue for a forfeiture action would lie under section 1335(b) of title 28 for an extension of time in which to comply with paragraph (1)(A). Such an extension shall be granted based on a showing of good cause.

"(3) A person with an ownership or possessory interest in the seized article who failed to file a claim within the time period prescribed in subsection (b) may, on motion made not later than 2 years after the date of final publication of notice of seizure of the property, move to set aside a declaration of forfeiture entered pursuant to section 609 of the Tariff Act of 1930 (19 U.S.C. 1609). Such motion shall be granted if—

"(A) the Government failed to take reasonable steps to provide the claimant with notice of the forfeiture; and

"(B) the person otherwise had no actual notice of the seizure within sufficient time to enable the person to file a timely claim under subsection (b).

"(4) If the court grants a motion made under paragraph (3), it shall set aside the declaration of forfeiture as to the moving party's interest pending forfeiture proceedings in accordance with section 602 et seq. of the Tariff Act of 1930 (19 U.S.C. 1602 et seq.), which proceedings shall be instituted within 60 days of the entry of the order granting the motion.

"(5) If, at the time a motion under this subsection is granted, the forfeited property has been disposed of by the Government in accordance with law, the Government shall institute forfeiture proceedings under paragraph (4). The property which will be the subject of the forfeiture proceedings instituted under paragraph (4) shall be a sum of money equal to the value of the forfeited property at the time it was disposed of plus interest.

"(6) The institution of forfeiture proceedings under paragraph (4) shall not be barred by the expiration of the statute of limitations under section 621 of the Tariff Act of 1930 (19 U.S.C. 1621) if the original publication of notice was completed before the expiration of such limitations period.

"(7) A motion made under this subsection shall be the exclusive means of obtaining judicial review of a declaration of forfeiture entered by a seizing agency.

"(b) Filing a Claim.-

(1) Any person claiming such seized property may file a claim with the appropriate official after the seizure.

"(2) A claim under paragraph (1) may not be filed later than 30 days after-

"(A) the date of final publication of notice of seizure; or

"(B) in the case of a person receiving written notice, the date that such notice is received.

"(3) The claim shall set forth the nature and extent of the claimant's interest in the property.

"(c) Filing a Complaint.-  
(1) In cases where property has been seized or restrained by the Government and a claim has been filed, the Attorney General shall file a complaint for forfeiture in the appropriate court in the manner set forth in the Supplemental Rules for Certain Admiralty and Maritime Claims, or shall include a forfeiture count in a criminal indictment or information, or both, not later than 90 days after the claim was filed, or return the property pending the filing of a complaint or indictment. By mutual agreement between the Government and the claimants, the 90-day filing requirement may be waived.

"(2) The Government may apply to a Federal magistrate judge (as defined in the Federal Rules of Criminal Procedure) in any district where venue for a forfeiture action would lie under section 1335(b) of title 28 for an extension of time in which to comply with paragraph (1). Such an extension shall be granted based on a showing of good cause. If the reason for the extension is that the filing required by paragraph (1) would jeopardize an ongoing criminal investigation or prosecution or court-authorized electronic surveillance, the application may be made ex parte.

"(3) Upon the filing of a civil complaint, the claimant shall file a claim and answer in accordance with the Supplemental Rules for Certain Admiralty and Maritime Claims.

"(d) Appointment of Counsel.-  
(1) If the person filing a claim is financially unable to obtain representation by counsel and requests that counsel be appointed, the court may appoint counsel to represent that person with respect to the claim. In determining whether to appoint counsel to represent the person filing the claim, the court shall take into account-

"(A) the nature and value of the property subject to forfeiture, including the hardship to the claimant from the loss of the property seized, compared to the expense of appointing counsel;

"(B) the claimant's standing to contest the forfeiture; and

"(C) whether the claim appears to be made in good faith or to be frivolous.

"(2) The court shall set the compensation for that representation, which shall be the equivalent to that provided for court-appointed representation under section 3006A of this title, and to pay such cost, there are authorized to be appropriated such sums as are necessary as an addition to the funds otherwise appropriated for the appointment of counsel under such section.

"(3) The determination of whether to appoint counsel under this subsection shall be made following a hearing at which the Government shall have an opportunity to present evidence and examine the claimant. The testimony of the claimant at such hearing shall not be admitted in any other proceeding except in accordance with the rules which govern the admissibility of testimony adduced in a hearing on a motion to suppress evidence. Nothing in this paragraph shall be construed to prohibit the admission of any evidence that may be obtained in the course of civil discovery in the forfeiture proceeding or through any other lawful investigative means.

"(e) Burden of Proof.-In all suits or actions brought for the civil forfeiture of any property, the burden of proof at trial is on the United States to establish, by a preponderance of the evidence, that the property is subject to forfeiture. If the Government proves that the property is subject to forfeiture, the claimant shall have the burden of establishing any affirmative defense by a preponderance of the evidence.

"(f) Innocent Owners.-(1) An innocent owner's interest in property shall not be forfeited in any civil forfeiture action.

"(2) With respect to a property interest in existence at the time the illegal conduct giving rise to the forfeiture took place, the term 'innocent owner' means an owner who-

"(A) did not know of the conduct giving rise to the forfeiture; or

"(B) upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property.

"(3)(A) With respect to a property interest acquired after the conduct giving rise to the forfeiture has taken place, the term 'innocent owner' means a person who, at the time that person acquired the interest in the property, was a bona fide purchaser for value and was at the time of the purchase reasonably without cause to believe that the property was subject to forfeiture.

"(B) Except as provided in paragraph (4), where the property subject to forfeiture is real property, and the claimant uses the property as his or her primary residence and is the spouse or minor child of the person who committed the offense giving rise to the forfeiture, an otherwise valid innocent owner claim shall not be denied on the ground that the claimant acquired the interest in the property-

"(i) in the case of a spouse, through dissolution of marriage or by operation of law, or

"(ii) in the case of a minor child, as an inheritance upon the death of a parent, and not through a purchase. However, the claimant must establish, in accordance with subparagraph (A), that at the time of the acquisition of the property interest, the claimant was reasonably without cause to believe that the property was subject to forfeiture, and was an owner of the property, as defined in paragraph (6).

"(4) Notwithstanding any provision of this section, no person may assert an ownership interest under this section-

"(A) in contraband or other property that it is illegal to possess; or

"(B) in the illegal proceeds of a criminal act unless such person was a bona fide purchaser for value who was reasonably without cause to believe that the property was subject to forfeiture.

"(5) For the purposes of paragraph (2) of this subsection a person does all that reasonably can be expected if the person takes all steps that a reasonable person would take in the circumstances to prevent or terminate the illegal use of the person's property. There is a rebuttable presumption that a property owner took all the steps that a reasonable person would take if the property owner-

"(A) gave timely notice to an appropriate law enforcement agency of information that led to the claimant to know the conduct giving rise to a forfeiture would occur or has occurred; and

"(B) in a timely fashion, revoked permission for those engaging in such conduct to use the property or took reasonable steps in consultation with a law enforcement agency to discourage or prevent the illegal use of the property.

The person is not required to take extraordinary steps that the person reasonably believes would be likely to subject the person to physical danger.

"(6) As used in this subsection-

"(A) the term 'civil forfeiture statute' means any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

"(B) the term 'owner' means a person with an ownership interest in the specific property sought to be forfeited, including a lien, mortgage, recorded security device, or valid assignment of an ownership interest. Such term does not include-

"(i) a person with only a general unsecured interest in, or claim against, the property or estate of another;

"(ii) a bailee unless the bailor is identified and the bailee shows a colorable legitimate interest in the property seized; or

"(iii) a nominee who exercises no dominion or control over the property;

"(C) a person shall be considered to have known that the person's property was being used or was likely to be used in the commission of an illegal act if the person was willfully blind.

"(7) If the court determines, in accordance with this subsection, 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-

"(A) severing the property;

"(B) 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

"(C) 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, that will permit the Government to realize its forfeitable interest if the property is transferred to another person.

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.

"(8) An innocent owner defense under this subsection is an affirmative defense.

"(g) Motion To Suppress Seized Evidence.-At any time after a claim and answer are filed in a judicial forfeiture proceeding, a claimant with standing to contest the seizure of the property may move to suppress the fruits of the seizure in accordance with the normal rules regarding the suppression of illegally seized evidence. If the claimant prevails on such motion, the fruits of the seizure shall not be admitted into evidence as to that claimant at the forfeiture trial. However, a finding that evidence 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 in which the governing standard is probable cause, the court may accept and consider hearsay otherwise inadmissible under the Federal Rules of Evidence.

"(i) 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.

"(j) 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 in the manner set forth in section 413(e) 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.

"(k) Excessive Fines.-

(1) At the conclusion of the trial and following the entry of a verdict of forfeiture, or upon the entry of summary judgment for the Government as to the forfeitability of the property, 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.

"(2) The claimant may not object to the forfeiture on Eighth Amendment grounds other than as set forth in paragraph (1), except that a claimant may, at any time, file a motion for summary judgment asserting that even if the property is subject to forfeiture, the forfeiture would be excessive. The court shall rule on such motion for summary judgment only after the Government has had an opportunity-

"(A) to conduct full discovery on the Eighth Amendment issue; and

"(B) to place such evidence as may be relevant to the excessive fines determination before the court in affidavits or at an evidentiary hearing.

"(l) Pre-Discovery Standard.-In a judicial proceeding on the forfeiture of property, the Government shall not be required to establish the forfeitability of the property before the completion of discovery pursuant to the Federal Rules of Civil Procedure, particularly Rule 56(f) as may be ordered by the court or if no discovery is ordered before trial.

"(m) Applicability.-The procedures set forth in this section apply to any civil forfeiture action brought under any provision of this title, the Controlled Substances Act, or the Immigration and Naturalization Act.".

(b) Conforming Amendment.-Section 274(b)(5) of the Immigration and Naturalization Act (8 U.S.C. 1324(b)(5)) is amended-

(1) by striking "the burden of proof shall lie upon such claimant, except that probable cause shall be first shown for the institution of such suit or action. In determining whether probable cause exists,"; and

(2) by adding after and below subparagraph (C) the following:

"The procedures set forth in chapter 46 of title 18, United States Code, shall govern judicial forfeiture actions under this section."

(c) Striking Superseded Provisions.- (1) Section 981(a) of title 18, United States Code, is amended by-

(A) striking paragraph (2); and

(B) striking "Except as provided in paragraph (2), the" and inserting "The".

(2) Paragraphs (4), (6), and (7) of section 511(a) of the Controlled Substances Act (21 U.S.C. 881(a)) are each amended by striking ", except that" and all that follows, each time it appears and inserting a period.

(3) Paragraphs (2) and (3) of section 2254(a) of title 18, United States Code, are each amended by striking ", except that" and all that follows, each time it appears and inserting a period.

(4) Section 274(b)(1) of the Immigration and Naturalization Act (8 U.S.C. 1324(b)(1)) is amended by striking ", except that" and all that follows and inserting a period.

(d) Release of Property.-Chapter 46 of title 18, United States Code, is amended to add the following section after section 984:

"S 985. Release of property to avoid hardship

"(a) A person who has filed a claim under section 983 is entitled to release pursuant to subsection (b) of seized property pending trial if-

"(1) the claimant has a possessory interest in the property sufficient to establish standing to contest forfeiture and has filed a nonfrivolous claim on the merits of the forfeiture action;

"(2) the claimant has sufficient ties to the community to provide assurance that the property will be available at the time of the trial;

"(3) the continued possession by the United States Government pending the final disposition of forfeiture proceedings will cause substantial hardship to the claimant, such as preventing the claimant from working, leaving the claimant homeless, or preventing the functioning of a business;

"(4) the claimant's hardship outweighs the risk that the property will be destroyed, damaged, lost, concealed, diminished in value or transferred if it is returned to the claimant during the pendency of the proceeding; and

"(5) none of the conditions set forth in subsection (c) applies;

"(b)(1) The claimant may make a request for the release of property under this subsection at any time after the claim is filed. If, at the time the request is made, the seizing agency has not yet referred the claim to a United States Attorney pursuant to section 608 of the Tariff Act of 1930 (19 U.S.C. 1608), the request may be filed with the seizing agency; otherwise the request must be filed with the United States Attorney to whom the claim was referred. In either case, the request must set forth the basis on which the requirements of subsection (a)(1) are met.

"(2) If the seizing agency, or the United States Attorney, as the case may be, denies the request or fails to act on the request within 20 days, the claimant may file the request as a motion for the return of seized property in the district court for the district represented by the United States Attorney to whom the claim was referred, or if the claim has not yet been referred, in the district court that issued the seizure warrant for the property, or if no warrant was issued, in any district court that would have jurisdiction to consider a motion for the return of seized property under Rule 41(e), Federal Rules of Criminal Procedure. The motion must set forth the basis on which the requirements of subsection (a) have been met and the steps the claimant has taken to secure the release of the property from the appropriate official.

"(3) The district court must act on a motion made pursuant to this subsection within 30 days or as soon thereafter as practicable, and must grant the motion if the claimant establishes that the requirements of subsection (a) have been met. If the court grants the motion, the court must enter any order necessary to ensure that the value of the property is maintained while the forfeiture action is pending, including permitting the inspection, photographing and inventory of the property, and the court may take action in accordance with Rule E of the Supplemental Rules for Certain Admiralty and Maritime Cases. The Government is authorized to place a lien against the property or to file a lis pendens to ensure that it is not transferred to another person. The Government, in responding to a motion under this subsection, may, in appropriate cases, submit evidence ex parte in order to avoid disclosing any matter relating to an ongoing criminal investigation or pending trial.

"(4) If property returned to the claimant under this section is lost, stolen, or diminished in value, any insurance proceeds shall be paid to the United States and such proceeds shall be subject to forfeiture in place of the property originally seized.

"(c) This section shall not apply if the seized property-

"(1) is contraband, currency or other monetary instrument, or electronic funds unless such currency or other monetary instrument or electronic funds constitutes the assets of a business which has been seized,

"(2) is evidence of a violation of the law,

"(3) by reason of design or other characteristic, is particularly suited for use in illegal activities; or

"(4) is likely to be used to commit additional criminal acts if returned to the claimant.

"(d) Once a motion for the release of property under this section is filed, the person filing the motion may request that the motion be transferred to another district where venue for the forfeiture action would lie under section 1335(b) of title 28 pursuant to the change of venue provisions in section 1404 of title 28."

(e) Chapter Analysis.-The table of sections for chapter 46 of title 18, United States Code, is amended-

(1) by inserting after the item relating to section 982 the following:

"983. Civil forfeiture procedures."; and

(2) by inserting after the item relating to section 984 the following:

"985. Release of property to avoid hardship.".

(f) Civil Forfeiture of Proceeds.-Section 981(a)(1) of title 18, United States Code, is amended-

(1) in subparagraph (C) by inserting before the period the following: "or any offense constituting 'specified unlawful activity' as defined in section 1956(c)(7) of this title or a conspiracy to commit such offense"; and

(2) by striking subparagraph (E).

(g) Criminal Forfeiture of Proceeds.-Section 982(a)(2) of title 18, United States Code, is amended by-

(1) striking "or" at the end of subparagraph (A);

(2) inserting "or" after the comma at the end of subparagraph (B); and

(3) inserting the following after subparagraph (B):

"(C) any offense constituting 'specified unlawful activity' as defined in section 1956(c)(7) of this title,".

(h) Uniform Definition of Proceeds.-(1) Section 981(a) of title 18, United States Code, as amended by subsection (c), is amended-

(A) in paragraph (1), by striking "gross receipts" and "gross proceeds" wherever those terms appear and inserting "proceeds"; and

(B) by adding the following after paragraph (1):

"(2) For purposes of paragraph (1), the term 'proceeds' means property of any kind obtained, directly or indirectly, as the result of the commission of the offense giving rise to forfeiture, and any property traceable thereto, and is not limited to the net gain or profit realized from the commission of the offense. In a case involving the forfeiture of proceeds of a fraud or false claim under paragraph (1)(C) involving billing for goods or services part of which are legitimate and part of which are not legitimate, the court shall allow the claimant a deduction from the forfeiture for the amount obtained in exchange for the legitimate goods or services. In a case involving goods or services provided by a health care provider, such goods or services are not 'legitimate' if they were unnecessary.

"(3) For purposes of the provisions of subparagraphs (B) through (H) of paragraph (1) which provide for the forfeiture of proceeds of an offense or property traceable thereto, where the proceeds have been commingled with or invested in real or personal property, only the portion of such property derived from the proceeds shall be regarded as property traceable to the forfeitable proceeds. Where the proceeds of the offense have been invested in real or personal property that has appreciated in value, whether the relationship of the property to the proceeds is too attenuated to support the forfeiture of such property shall be determined in accordance with the excessive fines clause of the Eighth Amendment.".

(2) Section 982 of title 18, United States Code, is amended-

(A) in subsection (a), by striking "gross receipts" and "gross proceeds" wherever those terms appear and inserting "proceeds"; and

(B) in subsection (b), by adding at the end the following:

"(3) For purposes of subsection (a), the term 'proceeds' has the meaning set forth in section 981(a)(2).".

### **SEC. 3. COMPENSATION FOR DAMAGE TO SEIZED PROPERTY.**

(a) Tort Claims Act.-Section 2680(c) of title 28, United States Code, is amended-

(1) by striking "law-enforcement" and inserting "law enforcement"; and

(2) by inserting before the period the following: ", except that the provisions of this chapter and section 1346(b) of this title do apply to any claim based on the negligent destruction, injury, or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if the property was seized for the purpose of forfeiture but the interest of the claimant is not forfeited".

(b) Department of Justice.-

(1) In general.-With respect to a claim that cannot be settled under chapter 171 of title 28, United States Code, the Attorney General may settle, for not more than \$50,000 in any case, a claim for damage to, or loss of, privately owned property caused by an investigative or law enforcement officer (as defined in section 2680(h) of title 28, United States Code) who is employed by the Department of Justice acting within the scope of his or her employment.

(2) Limitations.-The Attorney General may not pay a claim under paragraph (1) that-

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- (A) is presented to the Attorney General more than 1 year after it occurs; or
- (B) is presented by an officer or employee of the United States Government and arose within the scope of employment.

#### **SEC. 4. PREJUDGMENT AND POSTJUDGMENT INTEREST.**

Section 2465 of title 28, United States Code, is amended-

- (1) by inserting "(a) In General.-" before "Upon"; and
- (2) adding at the end the following:

"(b) Interest.-

"(1) Post-judgment.-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.

"(2) Pre-judgment.-The United States shall not be liable for prejudgment interest, except that in cases involving currency, proceeds of an interlocutory sale, or other negotiable instruments, the United States shall disgorge to the claimant any funds representing-

"(A) 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; and

"(B) for any period during which no interest is actually paid, an imputed amount of interest that such currency, proceeds, or instruments would have earned.

The United States shall provide the court with an accounting of the amount actually earned or the amount that would have been earned had the funds been invested in obligations of, or guaranteed by, the United States.

"(3) Limitation on other payments.-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.".

#### **SEC. 5. 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 subsection (a) 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-

"(A) a complaint for forfeiture has been filed in the United States district court and the court has issued an arrest warrant in rem pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims;

"(B) the seizure 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 another exception to the Fourth Amendment warrant requirement would apply; or

"(C) the property was lawfully seized by a State or local law enforcement agency and has been transferred to a Federal agency in accordance with State law.

"(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) 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 subsection (a) or under the Controlled Substances Act, the Attorney General may apply to any Federal judge or magistrate judge in the district where the property is located 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 at a hearing conducted in the manner provided in Rule 43(e) of the Federal Rules of Civil Procedure. 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.

"(5) Once a motion for the return of seized property under Rule 41(e) is filed, the person filing the motion may request that the motion be transferred to another district where venue for the forfeiture action would lie under section 1335(b) of title 28 pursuant to the change of venue provisions in section 1404 of title 28.".

(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.".

## **SEC. 6. ACCESS TO RECORDS IN BANK SECRECY JURISDICTIONS.**

Section 986 of title 18, United States Code, is amended by adding at the end the following:

"(d) Access to Records Located Abroad.-In any civil forfeiture case, or in any ancillary proceeding in any criminal forfeiture case governed by 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 the claimant's rights under such secrecy laws or to obtain the records, 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. 7. ACCESS TO OTHER RECORDS.**

Section 6103(i)(1) of the Internal Revenue Code of 1986 (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. 8. DISCLOSURE OF GRAND JURY INFORMATION TO FEDERAL PROSECUTORS.**

Section 3322(a) of title 18, United States Code, is amended-

(1) by striking "civil forfeiture under section 981 of title 18, United States Code, of property described in section 981(a)(1)(C) of such title" and inserting "any civil forfeiture provision of Federal law"; and

(2) by striking "concerning a banking law violation".

## **SEC. 9. USE OF FORFEITED FUNDS TO PAY RESTITUTION TO CRIME VICTIMS AND REGULATORY AGENCIES.**

Section 981 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".

## **SEC. 10. ENFORCEMENT OF FOREIGN FORFEITURE JUDGMENT.**

(a) In General.-Chapter 163 of title 28, United States Code, is amended by inserting the following new section:

**"S 2466. Enforcement of foreign forfeiture judgment**

"(a) Definitions.-As used in this section:

"(1) The term 'foreign nation' shall mean a country that has become a party to the United Nations 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) The term 'value-based confiscation judgment' shall mean a final order of a foreign nation compelling a defendant, as a consequence of the defendant's 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 the Attorney General's 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 the defendant 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 the Attorney General's designee.

The Attorney General or the Attorney General's designee, in consultation with the Secretary of State or the Secretary of State's designee, shall determine whether to certify the request, and such decision shall be final and not subject to either judicial review or review under chapter 7 of title 5, United States Code.

"(c) Jurisdiction and Venue.-Where the Attorney General or the Attorney General's 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 United States 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.-The United States 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:

"(1) 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.

"(2) The foreign court had personal jurisdiction over the defendant.

"(3) The foreign court had jurisdiction over the subject matter.

"(4) The defendant in the proceedings in the foreign court received notice of the proceedings in sufficient time to enable the defendant to defend.

"(5) 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 United States 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 table of sections for chapter 163, title 28, United States Code, is amended by inserting the following at the end:

"2466. Enforcement of foreign forfeiture judgment.".

## **SEC. 11. 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:

"S 2467. 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 date 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.-The table of sections for chapter 163 of title 28, United States Code, is amended by inserting the following at the end:

"2467. Foreign records.".

## **SEC. 12. CONFORMING AMENDMENTS TO TITLE 28, TO RULES OF PROCEDURE, AND TO THE CONTROLLED SUBSTANCES ACT.**

(a) In General.-Section 524(c) of title 28, United States Code, is amended-

(1) by striking out "law enforcement purposes-" in the matter preceding subparagraph (A) of paragraph (1) and inserting "purposes-";

(2) by striking out "(H)" in the first sentence after the last subparagraph in paragraph (1) and in subparagraph (A) of paragraph (8) and inserting "(I)"; and

(3) by striking the last subparagraph (I) in paragraph (1) and inserting after and below subparagraph (I) the following: "After all reimbursements and program related expenses have been met at the end of fiscal year 1989, the Attorney General may transfer deposits from the Fund to the building and facilities account of the Federal prison system for the construction of correctional institutions.".

(b) In Rem Proceedings.-Paragraph (6) of Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims to the Federal Rules of Civil Procedure (28 U.S.C. Appendix) is amended by striking "10 days" and inserting "20 days".

(c) Controlled Substances Act.-Section 518 and the item relating to section 518 in the table of contents of the Controlled Substances Act (21 U.S.C. 888) are repealed.

## **SEC. 13. INAPPLICABILITY OF THE CUSTOMS LAWS.**

(a) Title 18, United States Code.-Section 981(d) of title 18, United States Code, is amended by inserting after the first sentence the following: "However, the cost bond provision of section 608 of the Tariff Act of 1930 (19 U.S.C. 1608) and the burden of proof provision of section 615 of the Tariff Act of 1930 (19 U.S.C. 1615) shall not apply to any forfeiture governed by the procedures set forth in this chapter.".

(b) Controlled Substances Act.-Section 511(d) of the Controlled Substances Act (21 U.S.C. 881(d)) is amended by inserting after the first sentence the following: "However, the cost bond provision of section 608 of the Tariff Act of 1930 (19 U.S.C. 1608) and the burden of proof provision of section 615 of the Tariff Act of 1930 (19 U.S.C. 1615) shall not apply to any forfeiture governed by the procedures set forth in chapter 46 of title 18, United States Code.".

(c) Libel in Admiralty.-Section 2461(b) of title 28, United States Code, is amended-

(1) by striking "may be enforced by libel in admiralty" and inserting "may be enforced under the procedures set forth in chapter 46 of title 18 and libel in admiralty if not in conflict with such procedures, except that only the libel in admiralty procedures shall apply to forfeitures under the customs laws"; and

(2) by striking "may be enforced by a proceeding by libel which shall conform as near as may be to proceedings in admiralty" and inserting "may be enforced under the procedures set forth in chapter 46 of title 18 and by a proceeding by libel, if not in conflict with such procedures, which shall conform as near as may be to proceedings in admiralty, except that only such proceeding by libel shall apply to forfeitures under the customs laws".

## **SEC. 14. APPLICABILITY.**

(a) In General.-Unless otherwise specified in this Act, the amendments made by this Act apply to forfeiture proceedings commenced on or after the date of the enactment of this Act.

(b) Administrative Forfeitures.-The amendments in this Act relating to seizures and administrative forfeitures shall apply to seizures and forfeitures occurring on or after the 60th day after the date of the enactment of this Act.

(c) Civil Judicial Forfeitures.-The amendments in this Act relating to 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 date of the enactment of this Act.

(d) Substantive Law.-The amendments in this Act expanding substantive forfeiture law to make property subject to civil or criminal forfeiture which was not previously subject to civil or criminal forfeiture shall apply to offenses occurring after the date of the enactment of this Act.

## **SEC. 15. JURISDICTION AND VENUE IN FORFEITURE CASES.**

(a) Administrative Forfeitures.-Section 608 of the Tariff Act of 1930 (19 U.S.C. 1608) is amended by striking "to the United States Attorney for the district in which seizure was made" and inserting "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)".

(b) Judicial Forfeitures.-Section 610 of the Tariff Act of 1930 (19 U.S.C. 1610) is amended by striking "to the United States attorney for the district in which the seizure was made" and inserting "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)".

(c) 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 section 1355 of title 28 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. 16. MINOR AND TECHNICAL AMENDMENTS RELATING TO 1992 FORFEITURE AMENDMENTS.**

(a) Criminal Forfeiture.-Section 982 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) 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";

(2) striking "after" and inserting "before or after"; and

(3) striking the last sentence.

(c) Section 981(d) of title 18, United States Code, is amended by striking "sale of this section" and inserting "sale of such property".

## **SEC. 17. 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 "section 1822 of the Mail Order Drug Paraphernalia Control Act" and inserting "section 422".

(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. 18. CERTIFICATE OF REASONABLE CAUSE.**

Section 2465 of title 28, United States Code, is amended-

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- (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. 19. 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 (21 U.S.C. 881(e)(1)) is amended by inserting "or" at the end of subparagraph (C), by striking ";" or" at the end of subparagraph (D) and inserting a period, and by striking subparagraph (E).

## **SEC. 20. 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 such offense" at the end before the period.

## **SEC. 21. 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 by inserting ", and any property traceable to such conveyances" after "property described in paragraph (1), (2), or (9)".

(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 title" the second time it appears.

## **SEC. 22. 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 "or (ii) any other conduct described in section 1956(c)(7)(B)" after "(as such term is defined for the purposes of the Controlled Substances Act)".

## **SEC. 23. 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. 24. CLARIFICATION OF JUDICIAL REVIEW OF FORFEITURE.**

Section 507 of the Controlled Substances Act (21 U.S.C. 877) is amended by adding at the end the following: "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. 25. 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 semicolon and inserting "is an innocent owner as defined in section 983 of this title".

## **SEC. 26. STATUTE OF LIMITATIONS FOR CIVIL FORFEITURE ACTIONS.**

Section 621 of the Tariff Act of 1930 (19 U.S.C. 1621) is amended by inserting ", or in the case of forfeiture, within 2 years after the time when the involvement of the property in the alleged offense was discovered, whichever was later" after "within five years after the time when the alleged offense was discovered".

## **SEC. 27. DESTRUCTION OR REMOVAL OF PROPERTY TO PREVENT SEIZURE.**

(a) Section 2232(a) of title 18, United States Code, is amended by-

- (1) inserting "or Seizure" after "Physical Interference With Search";
- (2) inserting ", including seizure for forfeiture," after "after seizure";
- (3) striking "searches and seizures" after "authorized to make" and inserting "searches or seizures";
- (4) striking "or" after "wares,"; and
- (5) inserting ", or other property, real or personal," after "merchandise"

(b) Section 2232(b) of title 18, United States Code, is amended by-

- (1) inserting "or Seizure" after "Notice of Search";
- (2) striking "searches and seizures" after "authorized to make" and inserting "searches or seizures";
- (3) inserting ", including seizure for forfeiture" after "likely to make a search or seizure"; and
- (4) inserting "real or personal," after "merchandise or other property,".

## **SEC. 28. IN PERSONAM JUDGMENTS.**

Section 1963(l)(1) of title 18, United States Code, and section 413(n)(1) of the Controlled Substances 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. 29. UNIFORM PROCEDURES FOR CRIMINAL FORFEITURE.**

(a) In General.-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."

(b) Conforming Amendment.-The second paragraph (6) of section 982(a), of title 18, United States Code, is amended by striking "(A)", by redesignating clauses (i) and (ii) as subparagraphs (A) and (B), respectively, by redesignating subclauses (I) and (II) as clauses (i) and (ii), respectively, by striking out "this subparagraph" and inserting "this subsection", and by striking all of subparagraph (B).

## **SEC. 30. AVAILABILITY OF CRIMINAL FORFEITURE.**

(a) In General.-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 but no specific statutory provision is made for criminal forfeiture upon conviction or the criminal forfeiture provisions contain no procedural provisions, the government may include the forfeiture in the indictment or information in accordance with the Federal Rules of Criminal Procedure and the procedures set forth in section 982 of title 18, United States Code, and upon conviction, the court shall order the forfeiture of the property."

(b) 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 the Federal Rules of Criminal Procedure," after "shall order,".

## **SEC. 31. DISCOVERY PROCEDURE FOR LOCATING FORFEITED ASSETS.**

(a) In General.-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."

(b) Bank Records.-Section 986 of title 18, United States Code, is amended-

(1) in subsection (a), by striking "in rem"; and

(2) in subsection (c), by inserting "or Criminal" after "Civil".

## **SEC. 32. 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. 33. CORRECTION TO CRIMINAL FORFEITURE PROVISION FOR ALIEN SMUGGLING AND OTHER IMMIGRATION OFFENSES.**

Section 982(a) of title 18, United States Code, as amended by section 29(b) is amended-

(1) by redesignating the second paragraph (6) as paragraph (7);

(2) by inserting "sections 274(a), 274A(a)(1), or 274A(a)(2) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1324(a), 1324A(a)(1), and 1324A(a)(2))," before "section 1425" the first time it appears;

(3) in subparagraph (A), by striking "a violation of, or a conspiracy to violate, subsection (a)" and inserting "the offense of which the person is convicted"; and

(4) in subparagraph (B)(i) and (ii), by striking "a violation of, or a conspiracy to violate, subsection (a)" through "of this title" and inserting "the offense of which the person is convicted".

## **SEC. 34. REPATRIATION OF PROPERTY PLACED BEYOND THE JURISDICTION OF THE COURT.**

(a) Order of Forfeiture.-Section 413(p) of the Controlled Substances Act (21 U.S.C. 853(p)) is 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".

(b) Pre-Trial Restraining Order.-Section 413(e) of the Controlled Substances Act (21 U.S.C. 853(e)) is amended by adding the following after paragraph (3):

"(4) 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, or an order to repatriate property under subsection (p), 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. 35. 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)), is 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 specifically 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) Conforming Amendment.-Section 413(n)(6) of the Controlled Substances Act (21 U.S.C. 853(n)(6)) is 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. 36. 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.".

## **SEC. 37. FORFEITURE OF INSTRUMENTALITIES OF TERRORISM, TELEMARKETING FRAUD, AND OTHER OFFENSES.**

(a) Civil Forfeiture.-Section 981(a)(1) of title 18, United States Code is amended by adding the following subparagraphs:

"(G)(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, 514, 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.

"(H) Any conveyance, chemicals, laboratory equipment, or other material, article, apparatus, device or thing made, possessed, fitted, used or intended to be used to commit-

"(i) an offense punishable under chapter 113B of this title (relating to terrorism);

"(ii) a violation of any of the following sections of the Federal explosives laws: subsections (a)(1) and (3), (b) through (d), and (h)(1) of section 842, and subsections (d) through (m) of section 844; or

"(iii) any other offense enumerated in section 2339A(a) of this title; 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 adding at the end the following:

"(8)(A) The court, in imposing a sentence on a person convicted of a violation of sections 513, 514, 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.

"(9) The court, in imposing a sentence on a person convicted of-

"(A) an offense punishable under chapter 113B of this title (relating to terrorism);

"(B) a violation of any of the following sections of the Federal explosives laws: subsections (a)(1) and (3), (b) through (d), and (h)(1) of section 842, and subsections (d) through (m) of section 844; or

"(C) any other offense enumerated in section 2339A(a) of this title; 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. 38. FORFEITURE OF CRIMINAL PROCEEDS TRANSPORTED IN INTERSTATE COMMERCE.**

Section 1952 of title 18, United States Code, is amended by adding the following subsection:

"(d)(1) Any proceeds distributed or intended to be distributed in 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 chapter 46 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 proceeds distributed or intended to be distributed in the commission of such offense, or any property traceable to such property, in accordance with the procedures set forth in section 982 of this title.".

## **SEC. 39. FORFEITURES OF PROCEEDS OF FEDERAL FOOD, DRUG, AND COSMETIC ACT VIOLATIONS.**

Chapter III of the Federal Food, Drug, and Cosmetic Act is amended by adding at the end the following:

### **"CIVIL FORFEITURE OF PROCEEDS OF FEDERAL FOOD, DRUG, AND COSMETIC ACT VIOLATIONS**

"Sec. 311. (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 this Act 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.

### **"CRIMINAL FORFEITURE OF PROCEEDS OF FEDERAL FOOD, DRUG, AND COSMETIC ACT VIOLATIONS**

"Sec. 312. (a) Any person convicted of a violation of, or a conspiracy to violate, a provision of this Act 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 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. 40. 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. 41. CLOSING OF LOOPHOLE TO DEFEAT CRIMINAL FORFEITURE THROUGH BANKRUPTCY.**

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. 42. COLLECTION OF CRIMINAL FORFEITURE JUDGMENT.**

Section 413 of the Controlled Substances Act (21 U.S.C. 853) is amended by redesignating subsection (q) as subsection (r) and by adding after subsection (p) the following:

"(q) In addition to the authority otherwise provided in this section, an order of forfeiture may be enforced-

"(1) in the manner provided for the collection and payment of fines in subchapter B of chapter 229 of title 18, United States Code; or

"(2) in the same manner as a judgment in a civil action.".

#### **SEC. 43. CRIMINAL FORFEITURE OF PROPERTY IN GOVERNMENT CUSTODY.**

Section 413(f) of the Controlled Substances Act (21 U.S.C. 853(f)) is amended by adding the following at the end: "If property subject to criminal forfeiture under this section is already in the custody of the United States or any agency thereof, it shall not be necessary to seize or restrain the property for the purpose of criminal forfeiture.".

#### **SEC. 44. DELIVERY OF PROPERTY TO THE MARSHALS SERVICE.**

Section 413(j) of the Controlled Substances Act (21 U.S.C. 853(j)) is amended by inserting ", and Rule C(5) of the Supplemental Rules for Certain Admiralty and Maritime Claims," before "shall apply to a criminal forfeiture".

#### **SEC. 45. FORFEITURE FOR ODOMETER TAMPERING OFFENSES.**

(a) Criminal Forfeiture.-Section 982(a)(5) of title 18, United States Code, is amended-

(1) by striking "or" at the end of subparagraph (D);

(2) by inserting "or" after the semicolon at the end of subparagraph (E);

(3) by inserting the following after subparagraph (E), as amended:

"(F) section 32703 of title 49, United States Code (motor vehicle odometer tampering);"; and

(4) by adding the following after the last period: "If the conviction was for a violation described in subparagraph (F), the court shall also order the forfeiture of any vehicles or other property involved in the commission of the offense.".

(b) Civil Forfeiture.-Section 981(a)(1)(F) of title 18, United States Code, is amended-

(1) by striking "or" at the end of clause (iv);

(2) by striking the period at the end of clause (v) and inserting ";" or";

(3) by inserting the following after clause (v), as amended:

"(vi) section 32703 of title 49, United States Code (motor vehicle odometer tampering)."; and

(4) by adding the following after the last period: "In the case of a violation described in clause (vi), any vehicles or other property involved in the commission of the offense shall also be subject to forfeiture."

## **SEC. 46. PRE-TRIAL RESTRAINT OF SUBSTITUTE ASSETS.**

Section 413(e)(1) of the Controlled Substances Act (21 U.S.C. 853(e)(1)) is amended-

(1) by striking "(a)" and inserting "(a) or (p)"; and

(2) by adding at the end the following:

"To the extent that property forfeitable only pursuant to subsection (p) is restrained under this paragraph, the court shall afford the defendant a prompt post-restraint hearing and shall exempt from such restraint such property as may reasonably be needed by the defendant to pay attorney's fees, other necessary cost-of-living expenses, and expenses of maintaining restrained assets pending the entry of judgment in the criminal case.".

## **SEC. 47. HEARINGS ON PRE-TRIAL RESTRAINING ORDERS; ASSETS NEEDED TO PAY ATTORNEY'S FEES.**

Section 413(e) of the Controlled Substances Act (21 U.S.C. 853(e)) is amended by adding the following new paragraph:

"(5)(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) 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.".

## **PURPOSE AND SUMMARY**

H.R. 1965, as reported by the Committee, would create general rules relating to federal civil forfeiture proceedings, expand procedural protections for property owners in such proceedings, extend the availability of civil and criminal forfeiture to additional federal crimes, and make miscellaneous changes to federal civil and criminal forfeiture statutes.

## **BACKGROUND AND NEED FOR THE LEGISLATION**

### **I. ANTECEDENTS OF CIVIL ASSET FORFEITURE**

Civil asset forfeiture is based on the legal fiction that an inanimate object can itself be "guilty" of wrongdoing, regardless of whether the object's owner is blameworthy in any way. This concept descends from a medieval English practice whereby an object responsible for an accidental death was forfeited to the king, who "would provide the [proceeds, the 'deodand'] for masses to be said for the good of the dead man's soul ... or [would] insure that the dead was put to charitable uses." [FN1]

The immediate ancestor of modern civil forfeiture law is English admiralty law. As Oliver Wendell Holmes noted, "a ship is the most living of inanimate things.... [E]very one gives a gender to vessels.... It is only by supposing the ship to have been treated as if endowed with personality, that the arbitrary seeming peculiarities of the maritime law can be made intelligible." [FN2]

Justice Holmes used this example:

A collision takes place between two vessels, the *Ticonderoga* and the *Melampus*, through the fault of the *Ticonderoga* alone. That ship is under a lease at the time, the lessee has his own master in charge, and the owner of the vessel has no manner of control over it. The owner, therefore, is not to blame, and he cannot even be charged on the ground that the damage was done by his servants. He is free from personal liability on elementary principle. Yet it is perfectly settled that there is a lien on his vessel for the amount of the damage done, and this means that the vessel may be arrested and sold to pay the loss in any admiralty court whose process will reach her. If a livery-stable keeper lets a horse and wagon to a customer, who runs a man down by careless driving, no one would think of claiming a right to seize the horse and the wagon. [FN3]

Holmes then provided the rationale:

The ship is the only security available in dealing with foreigners, and rather than send one's own citizens to search for a remedy abroad in strange courts, it is easy to seize the vessel and satisfy the claim at home, leaving the foreign owners to get their indemnity as they may be able. [FN4]

## **II. FEDERAL CIVIL ASSET FORFEITURE STATUTES**

Since early in the nation's history, ships and cargo violating the customs laws were made subject to federal civil forfeiture. [FN5] Forfeiture was once vital to the federal treasury, with customs duties constituting over 80% of federal revenues. [FN6]

Today, there are scores of federal forfeiture statutes, both civil and criminal. [FN7] They range from the forfeiture of gamecocks used in cockfighting, [FN8] to cigarettes seized from smugglers, [FN9] to property obtained from violations of the Racketeer Influenced and Corrupt Organizations Act. [FN10]

The Comprehensive Drug Abuse Prevention and Control Act of 1970 made civil forfeiture a weapon in the war against drugs. The Act provides for the forfeiture of:

[a]ll controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter ... [a]ll raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing ... delivering, importing, or exporting any controlled substance[s] ... in violation of this subchapter ... [a]ll property which is used, or intended for use, as a container for [such controlled substances, raw materials, products or equipment] ... [a]ll conveyances, including aircraft, vehicles or vessels, which are used, or intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment [of such controlled substances, raw materials, products or equipment]. [FN11]

In 1978, the Act was amended to provide for civil forfeiture of:

[a]ll moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter.... [FN12]

In 1984, the Act was amended to provide for the forfeiture of:

[a]ll real property ... which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment.... [FN13]

## **III. THE SUCCESS-AND ABUSE-OF FORFEITURE**

Before 1984, the monies realized from federal forfeitures were deposited in the general fund of the United States Treasury. Now they primarily go to the Department of Justice's Assets Forfeiture Fund [FN14] and the Department of the Treasury's Forfeiture Fund. [FN15] The money is used for forfeiture-related expenses and various law enforcement purposes. [FN16]

In recent years, enormous revenues have been generated by federal forfeitures. The amount deposited in Justice's Assets Forfeiture Fund (from both civil and criminal forfeitures) increased from \$27 million in fiscal year 1985 to \$556 million in 1993 and then decreased to \$338 million in 1996. [FN17] Of the amount taken in 1996, \$250 million was in cash and \$74 million was in proceeds of forfeitable property; \$163 million of the total was returned to state and local law enforcement agencies that participated in investigations. [FN18]

Federal forfeiture has been a great monetary success. As former Attorney General Richard Thornburgh said: "[I]t is truly satisfying to think that it is now possible for a drug dealer to serve time in a forfeiture-financed prison, after being arrested by agents driving a forfeiture-provided automobile, while working in a forfeiture-funded sting operation." [FN19]

The purposes of federal forfeiture were set out by Stefan Cassella, Assistant Chief, Asset Forfeiture and Money Laundering Section, Criminal Division, U.S. Department of Justice, in testimony before this Committee: [FN20]

Asset forfeiture has become one of the most powerful and important tools that federal law enforcement can employ against all manner of criminals and criminal organizations—from drug dealers to terrorists to white collar criminals who prey on the vulnerable for financial gain....

Federal law enforcement agencies use the forfeiture laws for a variety of reasons, both time-honored and new.... [They] allow the government to seize contraband-property that it is simply unlawful to possess, such as illegal drugs, unregistered machine guns, pornographic materials, smuggled goods and counterfeit money.

Forfeiture is also used to abate nuisances and to take the instrumentalities of crime out of circulation. If drug dealers are using a "crack house" to sell drugs to children as they pass by on the way to school, the building is a danger to the health and safety of the neighborhood. Under the forfeiture laws, we can shut it down. If a boat or truck is being used to smuggle illegal aliens across the border, we can forfeit the vessel or vehicle to prevent its being used time and again for the same purpose. The same is true for an airplane used to fly cocaine from Peru into Southern California, or a printing press used to mint phony \$100 bills.

The government also uses forfeiture to take the profit out of crime, and to return property to victims. No one has any right to retain the money gained from bribery, extortion, illegal gambling, or drug dealing. With the forfeiture laws, we can separate the criminal from his profits—and any property traceable to it—thus removing the incentive others may have to commit similar crimes tomorrow. And if the crime is one that has victims—like car jacking or fraud—we can use the forfeiture laws to recover the property and restore it to the owners far more effectively than the restitution statutes permit.

Finally, forfeiture undeniably provides both a deterrent against crime and a measure of punishment for the criminal. [FN21] Many criminals fear the loss of their vacation homes, fancy cars, businesses and bloated bank accounts far more than the prospect of a jail sentence.

However, a number of years ago, as forfeiture revenues were approaching their peaks, some disquieting rumblings were heard. The Second Circuit stated that "[w]e 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." [FN22] Newspaper and television exposés appeared alleging that innocent property owners were having their property taken by federal and local law enforcement officers with nothing that could be called due process. [FN23]

Congress investigated these charges through a series of hearings held by the House Committee on Government Operations Subcommittee on Legislation and National Security under then Chairman John Conyers [FN24] and then by this Committee. [FN25]

The stories of two of the witnesses at the Judiciary Committee hearings provide a sampling of the types of abuses that have surfaced. Willie Jones (and his attorney E.E. (Bo) Edwards III) testified before the Judiciary Committee on July 22, 1996. Mr. Jones' testified as follows: [FN26]

Mr. Hyde: 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.

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. 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. Jones. So we proceeded to go out of the airport.... 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? [FN27]

Mr. Jones: Yes, sir.

Mr. Hyde. Therefore, they kept the money?

Mr. Jones. They kept the money.

Mr. Hyde. Did they let you go?

Mr. Jones. They 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.

Willie Jones did not challenge the forfeiture under the normal mechanism provided by law [FN28] because he could not afford to post the required 10% cost bond. [FN29] He instead filed suit in federal district court alleging that his Fourth Amendment right to be secure against unreasonable searches and seizures had been violated. [FN30] The court ruled that the "frisk" that produced the \$9,000 in currency was an unconstitutional search, [FN31] and that the subsequent seizure of the money was made without probable cause and therefore illegal. [FN32]

The court's final comments gave rise for pause:

The Court also observes that the statutory scheme as well as its administrative implementation provide substantial opportunity for abuse and potentiality for corruption. [Drug Interdiction Unit] personnel encourage airline employees as well as hotel and motel employees to report "suspicious" travelers and reward them with a percentage of the forfeited proceeds. The forfeited monies are divided and distributed by the Department of Justice among the Metropolitan Nashville Airport and the Metropolitan Nashville Police Department partners in the DIU and itself. As to the local agencies, these monies are "off-budget" in that there is no requirement to account to legislative bodies for its receipt or expenditure. Thus, the law enforcement agency has a direct financial interest in the enforcement of these laws. The previous history in this country of an analogous kind of financial interest on the part of law enforcement officers-i.e., salaries of constables, sheriffs, magistrates, etc., based on fees and fines-is an unsavory and embarrassing scar on the administration of justice. The obviously dangerous potentiality for abuse extant in the forfeiture scheme should trigger, at the very least, heightened scrutiny by the courts when a seizure is contested. [FN33]

Although Mr. Jones' case had a happy ending, his case typifies the kind of case apparently that this Committee is gravely concerned about. That is, citizens innocent of any criminal wrongdoing, who happen to fit a drug courier profile, are subjected to unlawful searches and investigations. If they have large sums of cash, it is seized. They don't have to be arrested, indicted, or convicted of a crime because civil forfeiture requires no related criminal proceeding.

To seize and forfeit property, all the government has to prove is that it had probable cause to believe the property was involved in criminal activity. For property owners to get their property back, they must overcome tremendous procedural hurdles like posting cost bonds and proving that their property is "innocent" (once probable cause has been shown). The abuses can even be worse under certain state forfeiture laws. [FN34]

Billy Munnerlyn testified before the Judiciary Committee on June 11, 1997. The following is a short summary of his experience with federal civil forfeiture laws:

For years Billy Munnerlyn and his wife Karon owned and operated a successful air charter service in Las Vegas, Nevada. In October 1989, Mr. Munnerlyn was hired for a routine job-flying Albert Wright, identified as a "businessman," from Little Rock, Arkansas, to Ontario, California. When the plane landed, DEA agents seized Mr. Wright's luggage and the \$2.7 million it contained. Both he and Mr. Munnerlyn were arrested. The DEA confiscated the airplane, the \$8,500 charter fee for the flight, and all of Munnerlyn's business records. Although drug trafficking charges against Mr. Munnerlyn were quickly dropped for lack of evidence, the government refused to release his airplane (similar charges against Mr. Wright, who unbeknownst to Mr. Munnerlyn was a convicted cocaine dealer, were eventually dropped as well). Mr. Munnerlyn spent over \$85,000 in legal fees trying to get his plane back, money raised by selling his three other planes. A Los Angeles jury decided his airplane should be returned because they found Mr. Munnerlyn had no knowledge that Mr. Wright was transporting drug money; however, a U.S. District Court judge reversed the jury's verdict. Mr. Munnerlyn eventually was forced to settle with the government, paying \$7,000 to get his plane back. He then discovered that DEA agents had caused about \$100,000 of damage to the aircraft. Under federal law the agency could not be held liable for the damage. Unable to raise enough money to restart his air charter business, Mr. Munnerlyn declared bankruptcy. He is now driving a truck for a living. [FN35]

For Mr. Munnerlyn, there was no happy ending.

#### **IV. H.R. 1965, THE CIVIL ASSET FORFEITURE REFORM ACT**

H.R. 1965 is designed to make federal civil forfeiture procedures fair for property owners-to give innocent property owners the means to recover their property and make themselves whole. H.R. 1965 is not designed to emasculate federal civil forfeiture efforts. To the contrary, by making civil forfeiture fairer, this Committee is prepared to (and H.R. 1965 does) expand the reach of civil forfeiture and make it an even stronger law enforcement tool. It is the Committee's belief, however, that criminal forfeiture should be used in lieu of civil forfeiture where feasible because it has the heightened due process safeguards of the criminal law. The bill also expands the reach of federal criminal forfeiture, such as to crimes that frequently generate criminal proceeds.

##### **A. The Eight Core Reforms of H.R. 1965**

###### **1. Burden of Proof**

When a property owner goes to federal court to challenge the seizure of his property under federal civil forfeiture laws, the government is required to make an initial showing of probable cause that the property is subject to forfeiture. The property owner must then establish by a preponderance of the evidence that the property is not subject to forfeiture. [FN36] As mentioned previously, the government can meet its burden without having obtained a criminal conviction. Since the government does not have to prove its case beyond a reasonable doubt-as it would to gain a criminal conviction-even the acquittal of the owner following a criminal trial will not bar the forfeiture of his property. Probable cause-what the government needs to show-is the lowest standard of proof in the criminal law. It is the same standard required to obtain a search warrant and can be established by evidence with a low indicia of reliability such as hearsay. [FN37]

Allowing property to be forfeited upon a mere showing of probable cause can be criticized on many levels:

[T]he current allocations of burdens and standards of proof require s that the [owner] prove a negative, that the property was not used in order to facilitate illegal activity, while the government must prove almost nothing. This creates a great risk of erroneous, irreversible deprivation. "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of fact finding, is to instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *Addington v. Texas*, 441 U.S. 418, 423 ... (1979).... The allocation of burdens and standards of proof implicates similar concerns and is of greater importance since it decides who must go forward with evidence and who bears the risk of loss should proof not rise to the standard set. In civil forfeiture cases, where claimants are required to go forward with evidence and exculpate their property by a preponderance of the evidence, all risks are squarely on the claimant. The government, under the current approach, need not produce any admissible evidence and may deprive citizens of property based on the rankest of hearsay and the flimsiest evidence. This result clearly does not reflect the value of private property in our society, and makes the risk of an erroneous deprivation intolerable. [FN38]

Some federal courts have even intimated that probable cause is an unconstitutional standard:

The Supreme Court ... has recently expanded the constitutional protections applicable in forfeiture proceedings to include those of the Eighth Amendment.... We therefore agree with the Second Circuit: "Good and Austin reopen the question of whether the quantum of evidence the government needs to show in order to obtain a warrant in rem allowing seizure-probable cause- suffices to meet the requirements of due process." *United States v. One Parcel of Property Located at 194 Quaker Farms Road*, 85 F.3d 985, 990 (2nd Cir.), cert denied ... 117 S.Ct. 304 ... (1996).

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[W]e observe that allowing the government to forfeit property based on a mere showing of probable cause is a "constitutional anomaly".... As the Supreme Court has explained, burdens of proof are intended in part to "indicate the relative importance attached to the ultimate decision." ... The stakes are exceedingly high in a forfeiture proceeding: Claimants are threatened with permanent deprivation of their property, from their hard-earned money, to their sole means of transport, to their homes. We would find it surprising were the Constitution to permit such an important decision to turn on a meager burden of proof like probable cause. [FN39]

The Committee concludes that probable cause is an insufficient quantum of evidence to justify the forfeiture of property, and H.R. 1965 will therefore require proof by a preponderance of the evidence. Preponderance of the evidence is the quantum of evidence required in most civil proceedings.

Under H.R. 1965 the property owner would still have the burden of proving affirmative defenses-such as the "innocent owner" defense-by a preponderance of the evidence. Additionally, current law would be retained allowing the government to forfeit property on a showing of probable cause if the property owner elects not to challenge the forfeiture by filing a claim.

## 2. Appointment of Counsel

There is no Sixth Amendment right to appointed counsel for indigents in civil forfeiture cases, since imprisonment is not threatened. [FN40] This is undoubtedly one of the primary reasons why at least 80% of civil forfeiture cases are not 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 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." [FN41] This Committee believes that given the punitive, quasi-criminal nature of civil forfeiture proceedings, legal representation should be provided for those who are indigent in appropriate circumstances.

H.R. 1965 provides that a federal court may appoint counsel to represent an individual filing a claim in a civil forfeiture proceeding who is financially unable to obtain representation. In determining whether to appoint counsel, the court shall take into account (1) the nature and value of the property subject to forfeiture, including the hardship to the claimant from the loss of the property seized, compared to the expense of appointed counsel, (2) the claimant's standing to contest the forfeiture, and (3) whether the claim appears to be made in good faith or to be frivolous. The first consideration described

in the preceding sentence should not be a simple dollar comparison. There will be many instances in which a court should appoint counsel even if the cost of counsel will likely exceed the value of the seized property. Conversely, there will be instances in which a court should not appoint counsel even if the cost of counsel will likely be less than the value of the seized property. The court needs to consider the nature of the property and the hardship that will be caused by its loss. Compensation for appointed counsel will be equivalent to that provided for court-appointed counsel in federal felony cases. [FN42] An owner would certainly suffer great hardship where the loss of property would prevent the owner from working, leave the owner homeless, or prevent the functioning of a business. These are just illustrative examples of situations where great hardship would result from the forfeiture of property.

The court shall make the determination of whether to appoint counsel following a hearing during which the government shall have the opportunity to present evidence and examine the claimant. Of course, such evidence and examination must be relevant either to the three factors listed in S 983(d) (A) through (C) of title 18 that the court must take into account in deciding whether to appoint counsel or to whether the owner is financially unable to obtain representation. The testimony of the claimant at such a hearing shall not be admitted in any other proceeding except in accordance with the rules which govern the admissibility of testimony adduced in a hearing on a motion to suppress evidence. If the court does decide to appoint counsel, counsel may be compensated for time spent during, and in preparation for, the hearing.

### **3. Innocent Owner Defense**

Since 1974, many observers assumed that the Constitution mandated an "innocent owner" defense to a civil forfeiture action. [FN43] However, last year the Supreme Court in *Bennis v. Michigan* ruled that the defense was not mandated by either the due process clause of the Fourteenth Amendment (and presumably that of the Fifth Amendment) or the just compensation clause of the Fifth Amendment. [FN44] The Court found that "a long and unbroken line of cases holds that an owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use." [FN45]

The dissenting justices in *Bennis* argued that:

The logic of the Court's analysis would permit the States to exercise virtually unbridled power to confiscate vast amounts of property where professional criminals have engaged in illegal acts. Some airline passengers have marijuana cigarettes in their luggage; some hotel guests are thieves; some spectators at professional sports events carry concealed weapons; and some hitchhikers are prostitutes. The State surely may impose strict obligations on the owners of airlines, hotels, stadiums, and vehicles to exercise a high degree of care to prevent others from making illegal use of their property, but neither logic nor history supports the Court's apparent assumption that their complete innocence imposes no constitutional impediment to the seizure of their property simply because it provided the locus for a criminal transaction. [FN46]

Justice Thomas stated in his concurrence that: "[i]mproperly used, forfeiture could become more like a roulette wheel employed to raise revenue from innocent but hapless owners whose property is unforeseeably misused, or a tool wielded to punish those who associate with criminals, than a component of a system of justice." [FN47]

The impact of *Bennis* is limited by the fact that many federal civil forfeiture provisions contain statutory innocent owner defenses. For instance, real property used to commit or to facilitate a federal drug crime is forfeitable unless the violation was "committed or omitted without the knowledge or consent of [the] owner." [FN48] Conveyances used in federal drug crimes are not forfeitable "by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner." [FN49] Property involved in certain money laundering transactions shall not be forfeited "by reason of any act or omission established by that owner or lienholder to have been committed without the knowledge of that owner or lienholder." [FN50] Other federal civil forfeiture statutes contain no innocent owner defenses. For instance, the statute providing for forfeiture of any property, including money, used in an illegal gambling business contains no such defense. [FN51]

Not only are these statutory innocent owner defenses not uniform, but the protections of the statutes using the "committed or omitted" language have been seriously eroded by a number of federal courts ruling that qualifying owners must have had no knowledge of and provided no consent to the prohibited use of the property. [FN52] Such an interpretation means that diligent owners who try to end the illegal use by others of their property cannot make use of the defense simply because they knew about the illegal use. Many courts require that to qualify as an innocent owner, an owner have done all that reasonably could be expected to prevent the illegal use of the property. [FN53]

Believing that an innocent owner defense is required by fundamental fairness, the Committee sets out an innocent owner defense in H.R. 1965 designed to provide such a defense for federal civil forfeitures, to make that defense uniform, and to ensure it offers protection in all appropriate cases (including situations where the innocent owner knew of but could not stop the illegal use of property by others). [FN54]

With respect to a property interest in existence at the time the illegal conduct giving rise to the forfeiture took place, an owner is innocent if he did not know of the conduct giving rise to the forfeiture, or upon learning of such conduct, did all that reasonably could be expected under the circumstances to terminate such use.

The provision creates a rebuttable presumption that an owner took all the steps that a reasonable person would take if the owner (1) gave timely notice to an appropriate law enforcement agency of information that led the owner to know that the conduct giving rise to forfeiture would occur or has occurred, and (2) in a timely fashion, revoked permission for those engaging in such conduct to use the property or took reasonable steps in consultation with a law enforcement agency to discourage or prevent the illegal use. [FN55] The rebuttable presumption signifies the Committee's belief that-absent unusual circumstances-an owner has taken all steps that a reasonable person would take if he has met the terms of the presumption. Moreover, an owner-to be considered a reasonable person-should not be required to take extraordinary steps that he reasonably believes would likely subject him to physical danger.

A different formulation of the innocent owner defense is employed for an owner who acquired his interest after the offense giving rise to the forfeiture. Generally, the owner must have been a bona fide purchaser for value who at the time of purchase did not know and was reasonably without cause to believe that the property was subject to forfeiture. The term "bona fide purchaser" is derived from commercial law. It includes any person who gives money, goods or services in exchange for the property subject to forfeiture, but it does not include general unsecured creditors who acquire only a debt. Moreover, a "bona fide purchaser" must give something of value in exchange for the property. This formulation is required because much fraud could result if criminals could shield their property from forfeiture by transferring it to coconspirators, relatives or friends.

An exception is made to the bona fide purchaser rule to avoid hardship in cases involving spouses and minor children who acquire interests in property other than by purchasing them. If the property is real property, the owner is the spouse or minor child of the person who committed the offense giving rise to forfeiture, and the owner uses the property as a primary residence, a valid innocent owner claim shall not be denied because the owner acquired the interest through the dissolution of marriage or by operation of law (in the case of a spouse) or by inheritance upon the death of a parent (in the case of a minor child). To be considered an innocent owner, the spouse or minor child must have been reasonably without cause to believe that the property was subject to forfeiture at the time of the acquisition of his interest in the property.

#### **4. Return of Property Upon Showing of Hardship**

Even though a claimant may prevail in a civil forfeiture proceeding, irreparable damage can be done to his property while it is in government control. For example, if the property in question is a business, its lack of availability for the time necessary to win a victory in court could force its owner into bankruptcy. If the property is a car, the owner might not be able to commute to work until he can win it back. If the property is a house, the owner might be left temporarily homeless (unless the government lets the owner rent the house back). In such cases, even when the government's case is very weak, the owner must often settle with the government and lose a certain amount of money in order to get the property back as quickly as possible.

Customs law does allow for the release of property pending final disposition of a case upon payment of a full bond. [FN56] However, many property owners do not have the resources to make use of this provision. Therefore, in order to alleviate hardship, H.R. 1965 provides that an owner may be entitled to release of his seized property pending trial.

The owner must show that (1) he has a possessory interest in the property sufficient to establish standing to contest forfeiture and has filed a non frivolous claim on the merits of the forfeiture action, (2) he has sufficient ties to the community to provide assurance that the property will be available at the time of trial, (3) continued possession by the government will cause substantial hardship, such as preventing him from working, leaving him homeless, or preventing the functioning of a business, and (4) his hardship outweighs the risk that the property will be destroyed, damaged, lost, concealed, diminished in value or transferred if it is returned. When a court grants a motion to return property, it must enter any order necessary to ensure that the value of the property is maintained while the forfeiture action is pending, including permitting the inspection, photographing and inventory of the property, and the court may take action in accordance with Rule E of the Supplemental Rules for Certain Admiralty and Maritime Cases (such as requiring bonds). The government may place a lien against the property or file a lis pendens to ensure that it is not transferred to another person.

Certain property cannot be returned pursuant to this provision. Such property includes (1) contraband, (2) currency, monetary instruments, or electronic funds unless they constitute the assets of a business which has been seized, (3) property that is evidence of a violation of law, (4) property particularly suited for use in illegal activities, or (4) property that is likely to be used to commit additional criminal acts if returned.

#### **5. Damage to Property while in the Government's Possession**

The federal government is exempt from liability under the Federal Tort Claims Act for damage caused by the negligent handling or storage of property detained by law enforcement officers. [FN57] As the U.S. Comptroller General once stated, seized property awaiting forfeiture can be damaged:

Seized conveyances devalue from aging, lack of care, inadequate storage, and other factors while waiting forfeiture. They often deteriorate—engines freeze, batteries die, seals shrink and leak oil, boats sink, salt air and water corrode metal surfaces, barnacles accumulate on boat hulls, and windows crack from heat. On occasion, vandals steal or seriously damage conveyances. [FN58]

It is not a victory when a boat owner gets back, for example, a rusted and stripped hulk of a vessel. Therefore, H.R. 1965 amends the Federal Tort Claims Act to allow tort claims based on the negligent destruction, injury, or loss of goods, merchandise, or other property seized for the purpose of forfeiture while in the possession of any law enforcement officer. Of course, if seized property is successfully forfeited, no claim would be allowed. The Attorney General may settle certain claims for up to \$50,000.

## **6. Elimination of the Cost Bond**

Under current law, a property owner wanting to contest a seizure of property under a civil forfeiture statute must post a bond of \$5,000 or ten percent of the value of the property seized, whichever is less, but in no case less than \$250. [FN59] The bond is unconstitutional in cases involving indigents because it would deprive such claimants of access to the courts simply because of their inability to pay. [FN60] Even in cases not involving indigents, the bond should not be required. As forfeiture expert David Smith stated, it "is simply an additional financial burden on the claimant and an added deterrent to contesting the forfeiture." [FN61] H.R. 1965 eliminates the requirement that a property owner must file a cost bond to challenge a civil forfeiture.

## **7. Adequate Time to Contest Forfeiture**

Currently, a property owner has 20 days (from the date of the first publication of the notice of seizure) to file a claim in federal court challenging the government's administrative forfeiture of property. [FN62] To challenge a judicial forfeiture, the property owner has an exceedingly short 10 days after process has been executed: [FN63]

Even though these time limits sometimes are ignored in the interests of justice, failure to file a timely claim can result in judgment in favor of the government. [FN64] H.R. 1965 provides a property owner 30 days to file a claim following the final publication of notice (or, if written notice was provided, the date it was received) of an administrative forfeiture proceeding. In a judicial forfeiture proceeding, 20 days is provided after process has been executed.

## **8. Interest**

Under current law, even if a property owner prevails in a forfeiture action, he will receive no interest for the time period in which he lost use of his property. [FN65] In cases where money or other negotiable instruments were seized, or money awarded a property owner, this is manifestly unfair. H.R. 1965 provides that upon entry of judgment for the owner in a forfeiture proceeding, the United States shall be liable for post-judgment interest on any money awarded (as set forth in section 1961 of title 28). The United States shall be liable for pre-judgment interest in cases involving currency, proceeds of an interlocutory sale, or other negotiable instruments. The government must disgorge any funds representing interest actually paid to the United States or an imputed amount that would have been earned had it been invested.

# **B. Expansions of Federal Forfeiture Power**

## **1. Extension of Forfeiture to Other Crimes**

Current law limits civil forfeiture to certain enumerated federal crimes, and by doing so excludes a number of federal crimes that frequently generate criminal proceeds. Because H.R. 1965 makes civil forfeiture procedures fair, and civil forfeiture generally should be available to combat federal crimes, it makes sense to extend the availability of forfeiture to these other crimes. Rather than simply making civil forfeiture available for all federal crimes, some of which do not generate criminal proceeds, the bill would amend sections 981(a)(1) and 982(a)(2) of title 18 to extend proceeds forfeiture (both civil and criminal) to the crimes enumerated in the money laundering statute, 18 U.S.C. § 1956(c)(7).

By providing for forfeiture of the proceeds of these offenses, the bill 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 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.

## **2. Uniform Definition of Proceeds**

To enforce the age-old adage that "crime does not pay," our forfeiture laws seek to deprive criminals of both the tools they use to commit crime and the fruits-the "proceeds"-of their crime. H.R. 1965 would amend sections 981 and 982 of title 18 to clearly define the term "proceeds" in the context of civil and criminal forfeitures. Proceeds would generally mean all of property obtained, directly or indirectly, from an offense or scheme, not just the net profit. Lacking a clear definition of the term, some courts have construed "proceeds" to mean "net profits" and allowed criminals to deduct the cost of their criminal activity from the amount subject to forfeiture.

### **3. Expanded Availability of Criminal Forfeiture**

H.R. 1965 would amend section 2461 of title 28 to give the government the option of pursuing criminal forfeiture as an alternative to civil forfeiture if civil forfeiture is otherwise authorized. Under current law (28 U.S.C. § 2461(a)), if a statute provides for forfeiture without prescribing whether the forfeiture is civil or criminal, it is assumed that only civil forfeiture is authorized. In such cases, the government may not pursue forfeiture as part of the criminal prosecution, but must file a parallel civil forfeiture case in order to prosecute an individual and forfeit the proceeds of the offense. [FN66]

The vast majority of federal forfeiture statutes fall into this category. That is, the vast majority of forfeitures must be pursued civilly even if there is a related criminal prosecution. To encourage greater use of criminal forfeiture-with its heightened due process protection-this amendment would revise section 2461(a) to authorize criminal forfeiture whenever any form of forfeiture is otherwise authorized by statute.

### **C. Exemption of Traditional U.S. Customs Service Forfeitures from H.R. 1965**

H.R. 1965 would amend section 2461(b) of title 28 to exempt traditional U.S. Customs Service forfeiture cases from the bill's proposed forfeiture procedures. Traditional Customs Service cases involve the interdiction of imported merchandise and contraband in violation of the customs revenue and criminal laws. As the Supreme Court stated in *United States v. Hernandez*, [FN67] "[s]ince the founding of our Republic, Congress has granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country."

To apply the forfeiture procedures proposed in H.R. 1965 to Customs Service border operations would compromise the Service's ability to carry out its mission. The bill's proposed forfeiture procedures will apply, however, when the Customs Service steps outside of its traditional role and commences forfeiture actions pursuant to the Controlled Substances Act and the Immigration and Naturalization Act.

## **HEARINGS**

The Committee held one day of hearings on civil asset forfeiture reform on June 11, 1997. Testimony was received from Billy Munnerlyn, E.E. (Bo) Edwards III, F. Lee Bailey, Susan Davis, Gerald B. Lefcourt, Stefan D. Cassella, Deputy Chief, Asset Forfeiture and Money Laundering Section, Criminal Division, U.S. Department of Justice, Jan P. Blanton, Director, Executive Office for Asset Forfeiture, Department of the Treasury, Bobby Moody, Chief of Police, Marietta, Georgia, and 1st Vice President, International Association of Chiefs of Police., and David Smith. Additional material was submitted by Nadine Strossen, President, American Civil Liberties Organization, and Roger Pilon, Director, Center for Constitutional Studies, Cato Institute.

## **COMMITTEE CONSIDERATION**

On June 20, 1997, the Committee met in open session and ordered reported favorably the bill H.R. 1965, without amendment, by a recorded vote of 26 to 1, a quorum being present.

## **VOTE OF THE COMMITTEE**

Vote on final passage: Adopted 26 to 1.

## **CONGRESSIONAL BUDGET OFFICE COST ESTIMATE**

In compliance with clause 2(l)(3)(C) of rule XI of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 1965, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

U.S. Congress,  
Congressional Budget Office,  
Washington, DC, August 14, 1997.

Hon. Henry J. Hyde,  
Chairman, Committee on the Judiciary,

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House of Representatives,  
Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1965, the Civil Asset Forfeiture Reform Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susanne S. Mehlman, who can be reached at 226-2860.

Sincerely,

June E. O'Neill, Director.

Enclosure.

H.R. 1965-Civil Asset Forfeiture Reform Act

## **SUMMARY**

Assuming appropriation of the necessary amounts, CBO estimates that implementing H.R. 1965 would cost \$52 million over the 1998-2002 period. Because enacting the bill could affect both direct spending and receipts, pay-as-you-go procedures would apply, but CBO estimates that any such effects would not be significant.

Section 4 of the Unfunded Mandates Reform Act of 1995 (UMRA) excludes from application of that act legislative provisions that are necessary for the implementation of international treaty obligations. Because section 10 and section 20 would implement obligations of the United States under the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, they would fall within that exclusion. The remaining sections of H.R. 1965 contain no intergovernmental or private-sector mandates as defined in UMRA and would impose no costs on state, local, or tribal governments.

This bill would make numerous changes to federal asset forfeiture laws that would significantly affect the processing of about 40,000 seizures conducted each year by the Department of Justice (DOJ) and the Treasury Department. (The Treasury Department makes an additional 50,000 seizures annually that would not be affected by this bill.) Provisions that would have significant budgetary effects include section 2, which would allow federal courts to appoint counsel for indigent claimants who want to contest civil asset forfeiture proceedings, and section 13, which would eliminate the cost bond requirement, whereby claimants have to post a bond in the amount of 10 percent of the value of the seized property to preserve the right to contest the forfeiture. Other provisions in the bill, such as shifting the burden of proof to the government, would make proving cases more difficult and time-consuming for the federal government. Enacting H.R. 1965 also would expand the government's forfeiture authority to certain criminal cases.

In addition, H.R. 1965 would hold the federal government liable for any negligent destruction of property held in government custody. Any judgment rendered against the government would be paid out of the Claims, Judgments, and Relief Acts account and would be considered direct spending.

## **ESTIMATED COST TO THE FEDERAL GOVERNMENT**

CBO estimates that implementing H.R. 1965 would increase discretionary spending for defender services and U.S. Attorneys by \$52 million over the 1998-2002 period, subject to appropriation of the necessary amounts. We estimate that any changes in spending from the Claims, Judgments, and Relief Acts account and in spending and receipts of the Assets Forfeiture Fund would not be significant. The following table summarizes the estimated budgetary impact of the bill.

## **TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE**

The costs of this legislation fall within budget function 750 (administration of justice).

## **BASIS OF ESTIMATE**

### **• Spending Subject to Appropriation**

For the purposes of this estimate, CBO assumes that the bill will be enacted by October 1, 1997, and that the necessary funds will be appropriated by the beginning of each fiscal year.

Because H.R. 1965 would allow for court-appointed counsel and would eliminate the cost bond requirement, CBO anticipates that enacting this bill would make it easier for people whose assets have been seized to challenge the forfeiture

of such assets. Based on information from DOJ, we estimate that the number of contested civil cases would increase from 3,000 annually to about 3,750 in fiscal year 1998. As the defense bar becomes increasingly aware of and more familiar with the provisions of H.R. 1965, CBO expects that the number of contested civil cases would increase to about 4,500 each year by fiscal year 2000. While the decision to appoint counsel would be at the discretion of the judge assigned to each case, various legal experts expect that court-appointed counsel would be provided in at least 20 percent of contested civil cases. In addition, because forfeiture cases involve property, it is possible that the courts may have to appoint more than one attorney to represent multiple claimants in the same case. Historical data suggest an average of 1.5 claims per case.

According to the Administrative Office of the United States Courts (AOUSC), a court appointed attorney spends an average of 100 hours on a criminal case at an average cost of \$66 per hour (in 1997 dollars and including overhead costs). Because a forfeiture case is usually less time-consuming and complicated than a criminal case, CBO estimates that a court-appointed attorney would spend about 50 hours on a civil forfeiture case. Additional court-appointed attorneys could be required to represent claimants in court proceedings held to determine a claimant's eligibility for court-appointed counsel in the civil forfeiture proceedings. CBO assumes that eligibility hearings would be held in 90 percent of contested cases and that a court-appointed attorney would spend 2 hours, on average, on an eligibility hearing. We therefore estimate that additional defender services related to civil asset forfeiture proceedings would cost about \$27 million over the next five years.

CBO expects that the various changes to forfeiture laws contained in H.R. 1965 would increase the workload for federal attorneys, especially for the assistant U.S. Attorneys, who are responsible for working on the contested civil cases. Contested cases, in particular, could be subject to numerous court proceedings if this bill is enacted. Moreover, in contested cases where free legal counsel would be provided, claimants would have less incentive to settle and more incentive to pursue all available legal avenues. Based on information from DOJ, and assuming the historical average claims-to-cases ratio of 1.5, CBO estimates that the provisions of this bill would necessitate assistant U.S. Attorneys spending about 15 additional hours on each contested case. CBO estimates that additional assistant U.S. Attorneys required to meet this increase in workload would cost about \$25 million over the next five years. This amount includes overhead costs and takes into account the usual six-month process for hiring assistant U.S. Attorneys.

CBO also expects that the federal court system could require additional resources in the future if additional cases are brought to trial and the number of court proceedings per case increase. CBO cannot predict the amount of such additional costs, but we expect that such costs would not be significant.

#### • **Direct Spending and Revenues**

Enacting H.R. 1965 could affect both direct spending and governmental receipts (revenues). But CBO estimates that any such changes would be less than \$500,000 a year.

Based on information from various legal experts, CBO does not expect that a significant number of claims alleging property damage would be filed against the government. Therefore, any direct spending from the Claims, Judgments, and Relief Acts account is not likely to be significant. Also, based on information from DOJ, CBO estimates that enacting H.R. 1965 would result in little or no net change in the amount of receipts deposited in the Assets Forfeiture Fund. While fewer receipts may be realized because certain cases may be harder to win, the fund could realize additional receipts as a result of the expanded forfeiture authority provided to the government under this bill. We expect that any such changes in receipts are likely to roughly offset each other. Hence, the net change in receipts would probably be insignificant, as would the corresponding change in spending from the Assets Forfeiture Fund.

#### **PAY-AS-YOU-GO CONSIDERATIONS**

The Balanced Budget and Emergency Deficit Control Act of 1985 specifies pay-as-you-go procedures for legislation affecting direct spending or receipts through fiscal year 2007.

Although H.R. 1965 could affect both direct spending and receipts, CBO estimates that any such effects would be less than \$500,000 a year.

#### **INTERGOVERNMENTAL AND PRIVATE-SECTOR IMPACT**

Section 4 of UMRA excludes from application of that act legislative provisions that are necessary for the implementation of international treaty obligations. Because section 10 and section 20 would implement obligations of the United States under the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, they would fall within that exclusion. The remaining sections of H.R. 1965 contain no intergovernmental or private-sector mandates.

Estimate prepared by: Susanne S. Mehlman (226-2860).

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Estimate approved by: Robert A. Sunshine, Deputy Assistant Director for Budget Analysis.

## CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to Rule XI, clause 2(l)(4) of the Rules of the House of Representatives, the Committee finds the authority for this legislation in Article I, section 8 of the Constitution.

## SECTION-BY-SECTION ANALYSIS

### Sec. 1. Short title and table of contents

Section 1 contains the Short Title of the bill.

### Sec. 2. Creation of general rules relating to civil forfeiture proceedings

Section 2 contains a comprehensive revision of the procedures governing administrative and judicial civil forfeiture actions.

Subsection 2(a) enacts a new statute, 18 U.S.C. S 983, that will set forth the procedures governing a civil forfeiture case. In some cases, the new statute simply codifies existing procedures that have been developed in the case law; in those cases, the case law would continue to apply to the new statute. In other instances, however, section 983 is intended to depart from existing practice.

Subsection (a) of section 983 imposes on the government a set of procedural requirements in administrative forfeiture proceedings. These requirements are imposed in addition to, and not in place of, the requirements set forth in the Customs laws, 19 U.S.C. § 1602, et seq. To the extent that the procedures are inconsistent, the procedures in section 983 will apply.

First, subsection (a) requires that the government send notice of an administrative forfeiture action to all interested persons, [FN68] within 60 days of the seizure of the property. As is the case under current law, the government is not required to give actual notice of the forfeiture proceeding, but only to takes steps "reasonably calculated" to apprise interested parties of the pendency of the action. [FN69]

If the government fails to send the notice within the 60-day period, it must return the property to the person from whom it was seized pending further forfeiture action. However, the statute provides that the government may obtain an extension of the 60-day time limit from a judge for "good cause." For example, the court should grant an extension of time if the government showed that the sending of notice would start an administrative forfeiture proceeding prematurely, and thus jeopardize an ongoing criminal investigation. Because the request for an extension of time would always arise before any claim was filed, the request would necessarily be made to the court *ex parte*.

Subsection (a) also provides a mechanism whereby a person who did not file a claim in the administrative forfeiture proceeding because he did not receive adequate notice could seek to reopen the case.

In general, administrative forfeitures are generally not subject to judicial review. [FN 70] 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. [FN71] The new statute would not change the law in this regard.

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 and if not, to allow the claimant to file a claim in accordance with section 1608 notwithstanding the expiration of the claims period. [FN72]

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. § 1336; and the Fourth and Fifth Amendments to the Constitution. [FN73] This has led to widespread confusion as different procedures are applied in different cases, including different statutes of limitations depending on the statute employed. [FN74]

Paragraphs (3) through (7) of subsection (a) establish a uniform procedure for litigating due process issues in accordance with the leading cases. 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. [FN75]

If the property itself has already been disposed of, the claim would be made against a sum of money of equivalent value. [FN76] 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.

The claimant could not 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. [FN77]

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.

Subsection (b) of section 983 modifies the procedures in the Customs laws governing the filing of the claim that transforms an administrative forfeiture action into a judicial action. In particular, subsection (b) overrides the provision in 19 U.S.C. § 1608 regarding the timing of the filing of a claim. Under the subsection, the claimant would have 30 days from the last date of publication of the notice of forfeiture. In the alternative, a person receiving written notice would have 30 days from the receipt of that notice to file the claim. If the government sends notice but it is never received, for whatever reason, the claimant would have to file the claim within 30 days of the last date of publication. Also, the subsection dispenses with the cost bond requirement in 19 U.S.C. § 1608.

In filing the claim, the claimant will have to describe the nature and extent of the claimant's ownership interest in the property. 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.

Subsection (c) of section 983 codifies the existing practice under 28 U.S.C. § 2461(b) which makes the Supplemental Rules for Certain Admiralty and Maritime Cases applicable to civil judicial forfeiture actions. As is the case under current law, the government would have to file a civil judicial forfeiture complaint in accordance with the Admiralty Rules. [FN78] The new statute modifies current practice, however, by creating a 90-day time limit on the filing of the complaint in cases where the government has seized or restrained the property subject to forfeiture. Under the Customs laws, no fixed time limit applies.

The statute also modifies current practice in that it gives the Attorney General the option of complying with the 90-day time limit by filing either a civil complaint or by including a forfeiture count in a criminal indictment or information, or both. Current law requires the government to file a civil complaint.

Subsection (c) also provides a mechanism whereby the government may request an extension of time from a federal judge or magistrate. In cases where the reason for the delay does not require secrecy, notice of the request for the delay would have to be served on the person filing the claim. But where the reason relates to the government's concern that filing the complaint will jeopardize a criminal investigation or prosecution, the request may be made ex parte. In particular, the court should grant an extension of time where the filing of the complaint, which is required to recite the factual basis in some detail, [FN79] would reveal facts concerning a pending investigation, undercover operation, or court-authorized electronic surveillance, or would jeopardize government witnesses. Also, the court could grant the extension to allow the government to include the forfeiture in a criminal indictment, and thus avoid the necessity of initiating parallel civil and criminal forfeitures. However, an extension should not be granted merely to allow the government additional time to conduct its investigation. In all such cases, when the 90-day time limit expires, the claimant would be entitled to know that the court granted the government an extension of time, but the claimant would not be entitled to know the reasons for the extension.

By granting an extension of time, the court would make it unnecessary for the government, as it often must under current law, to file a complaint and then immediately request a stay under Rule 26, Federal Rules of Civil Procedure, or under other statutory authority, [FN80] to avoid jeopardizing a criminal case.

Finally, subsection (c) codifies the existing rule that requires a claimant to respond to a civil forfeiture complaint by filing a claim and answer in accordance with the Admiralty Rules.

Subsection (d) of section 983 grants district courts the discretion to appoint counsel for a claimant in a civil forfeiture proceeding. See Background and Need for Legislation for a discussion of this subsection.

Subsection (e) of section 983 places the burden on the government to prove by a preponderance of the evidence that the property is subject to forfeiture. See Background and Need for Legislation for a discussion of this subsection.

Subsection (f) of section 983 creates a uniform innocent owner defense. See Background and Need for Legislation for a discussion of this subsection.

Subsection (g) of section 983 establishes rules regarding motions to suppress seized evidence. It recognizes that a claimant must be afforded a 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 Fourth Amendment violation. [FN81] 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. [FN82]

Subsection (h) of section 983 authorizes the use of hearsay at pre-trial hearings in which the governing standard is probable cause. This is consistent with the present rule regarding criminal forfeitures. [FN83] 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) of section 983, 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 (j) of section 983 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. [FN84]

Subsection (k) of section 983 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* [FN85] and *Alexander v. United States* (holding that Excessive Fines Clause of the Eighth Amendments may apply to civil and criminal forfeitures respectively). [FN86]

The subsection provides that the Eighth Amendment determination is to be made after return of the verdict of forfeiture, or the entry of summary judgment for the government. 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. [FN87] It also makes sense because it is premature to make excessiveness determination before the court determines if, and to what extent, property is forfeitable. [FN88]

In the interest of conserving judicial resources, the subsection provides a mechanism for resolving a case on excessiveness grounds without having to address the forfeitability issues. The statute recognizes, however, that excessiveness determinations under *Austin* are fact-intensive. Thus, though the claimant might stipulate to the forfeitability of the property, the court would not be able to rule on the excessive fines issues until the government had the opportunity to conduct full discovery on those issues and to place the relevant evidence before the court.

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. [FN89] Eighth Amendment determinations, by contrast, are made by the court alone, generally after the jury has been discharged. This is consistent with the view that constitutional issues generally present questions of law for resolution by the court.

Finally, the subsection provides that, where an Eighth Amendment violation is found, the court should adjust the forfeiture to meet constitutional standards. Again, this provision is consistent with Eighth Amendment case law. [FN90]

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 (l) of section 983 provides that the government need not meet its burden of proving forfeitability by a preponderance of the evidence until the completion of discovery, or until trial (if no discovery is ordered). Of course, pursuant to the Fourth Amendment, the government must have probable cause at the time it seizes property. In a judicial forfeiture action, a claimant may always move to suppress evidence if he believes that the government has violated the Fourth Amendment. However, with the exception of a motion to suppress, the claimant may not move the court for a preliminary hearing on the status of the government's evidence. Additionally, the claimant may not move to dismiss the case for lack of evidence pre-trial. However, the claimant may move to dismiss alleging that the complaint is facially deficient pursuant to Rule E of the Supplemental Rules for Certain Admiralty and Maritime Claims. See e.g., *United States v. Two Parcels of Real Property Located in Russell County, Alabama*, 92 F.3d 1123, 1126 (11th Cir. 1996) ("To satisfy this specificity requirement [Rule E(2)(a)], the complaint 'must allege sufficient facts to provide a reasonable belief that the property is subject to forfeiture . . . .'") (bracketed material added). 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 (m) of section 983 provides that this section's forfeiture procedures apply to any civil forfeiture action brought under title 18 U.S.C. § 1 et seq., the Controlled Substances Act, or the Immigration and Naturalization Act.

Subsection (b) of section 2 of the bill is a conforming amendment that applies the procedures of 18 U.S.C. § 983 to civil forfeiture actions brought under the Immigration and Naturalization Act.

Subsection (c) of section 2 of the bill makes additional conforming amendments striking the existing innocent owner provisions in the Immigration and Naturalization Act, the Controlled Substances Act, and in title 18.

Subsection (d) of section 2 of the bill creates a new statute, to be codified at 18 U.S.C. §985, that addresses the need for a mechanism to permit the release of seized property back to the claimant pending trial in order to avoid a hardship. See Background and Need for Legislation for a discussion of this subsection.

Subsection (e) of section 2 of the bill makes two technical amendments to the chapter analysis of chapter 46 of title 18.

Subsection (f) of section 2 of the bill makes the proceeds of any crime constituting "specified unlawful activity" for purposes of the money laundering statute, 18 U.S.C. §1956(c)(7), subject to civil forfeiture.

Subsection (g) of section 2 of the bill makes a parallel amendment to the criminal forfeiture statute. Neither amendment is intended to override more specific provisions authorizing forfeiture of facilitating property and instrumentalities of crime under existing forfeiture statutes. [FN91]

By providing for forfeiture of the proceeds of these 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 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.

Subsection (h) of section 2 of the bill is intended to replace the conflicting and inconsistent terms used to describe "proceeds" subject to forfeiture with a uniform definition. Sections 981 and 982 of title 18 were amended and expanded in 1988, 1989, 1990, 1992 and 1996 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.

Moreover, the amendment defines "proceeds" to mean all of the property derived, directly or indirectly, from an offense or scheme, not just the net profit. This point is important. Lacking a clear definition of "proceeds" some courts have construed "proceeds" to mean "net profits" and have thus allowed criminals to deduct the cost of their criminal activity from the amount subject to forfeiture. [FN92]

This makes no sense. A person committing a fraud on a financial institution has no right to recover the money he invested in the fraud scheme; nor does a drug dealer have any right to recover his overhead expenses when ordered to forfeit the proceeds of drug trafficking. However, in an overbilling scheme, where the defendant provided some legitimate goods and services but billed for more than the amount actually provided, the court would be required to exempt from the forfeiture the amount of proceeds that the defendant established was traceable to the legitimate goods and services.

Subsection (h) also enacts a new paragraph (3) of section 981(a) to address a different concern regarding the scope of the forfeiture of criminal proceeds. Several provisions of section 981(a)(1) authorize the forfeiture of proceeds or "property traceable thereto." There are two issues regarding the meaning of "traceable" property.

First, the statute codifies the existing case law holding that if forfeitable proceeds are invested or commingled with real or personal property, only the portion of that property derived from the criminal proceeds is considered to be "traceable to" the criminal proceeds for purposes of forfeiture. [FN93] However, once the government makes a *prima facie* case that the property was illegally acquired, the burden is on the opposing party to show what part, if any, was legitimately acquired. [FN94]

Thus, for example, if a person invests \$5,000 in a fraud scheme that results in his acquisition of \$50,000 in money from his victims, the entire \$50,000 is forfeitable as proceeds; as provided in section 981(a)(2), no credit is given for the \$5,000 originally invested in the scheme. But if the person then uses the \$50,000 to buy a \$100,000 car, paying the balance with untainted funds, only half the value of the car would be subject to forfeiture under a "proceeds" theory.

The second issue concerns the attenuation of proceeds invested in a business or other thing of value that has so appreciated since the time of the investment that it may be unfair to consider the present value of the business, in its entirety, to be subject to forfeiture even though it is traceable to the offense. For example, one could start a small business

with \$10,000 obtained in a fraud scheme. Later, the business could grow to be worth \$1 million. Surely, the original "seed money" remains subject to forfeiture, but under subsection 981(a)(3), whether the entire business would be subject to forfeiture would be determined according to the Eighth Amendment, even though the entire business was undeniably traceable to the original investment of fraud proceeds.

### **Sec. 3. Compensation for damage to seized property**

Section 3 provides that property owners who prevail in forfeiture actions can sue the government for any negligent destruction or damage to the property. See Background and Need for Legislation for discussion of this section.

### **Sec. 4. Prejudgment and postjudgment interest**

Section 4 provides for the payment of interest to property owners who prevail in forfeiture actions. See Background and Need for Legislation for discussion of this section.

### **Sec. 5. Seizure warrant requirement**

Section 5 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 section was last amended in 1989 before paragraphs (D), (E) and (F) were added to section 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) preserves the current rule that property may be seized for civil forfeiture either pursuant to the Admiralty Rules once a civil judicial complaint is filed, or pursuant to a seizure warrant. The statute is revised, however, 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. [FN95]

Subsection (b)(2) also conforms section 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 section 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. [FN96] The amendment to section 981(b) is necessary because such circumstances occur frequently in money laundering cases involving electronic funds transfers.

Finally, subsection (b)(2) is revised to make clear that federal authorities do not have to obtain a federal warrant to re-seize property already lawfully in the possession of state law enforcement authorities when the State elects, in accordance with state law, to turn the property over to the federal government for forfeiture under federal law. If there is a controversy over whether the State seizure of the property was lawful, of course, federal law would control, once the property is transferred to federal authority.

The remaining subsections are new provisions. The first, to be codified as section 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 a 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. §1335 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. [FN97] In accord with that 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. After filing a Rule 41(e) motion, however, the moving party may seek to have the motion considered by a judge in another district by filing a change of venue request pursuant to subsection (b)(6).

The second new provision, set forth as section 981(b)(4), 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. Subsection (b) makes parallel changes to the Controlled Substances Act (21 U.S.C. §881(b)).

### **Sec. 6. Access to records in bank secrecy jurisdictions**

Section 6 deals with financial records located in foreign jurisdictions that may be material to a claim filed in either a civil or criminal forfeiture case. Frequently 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 from an account controlled by international drug traffickers or money launderers.

Numerous mutual legal assistance treaties 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 can request the records only through letters rogatory. This amendment 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, the claimant has it within his 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 himself 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.

### **Sec. 7. Access to other records**

Section 7 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. [FN98] The amendment revises the statute to treat civil forfeiture investigations and criminal investigations the same.

### **Sec. 8. Disclosure of grand jury information to federal prosecutors**

Section 8 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 the government, nor does it permit government attorneys to use the information for any other purpose. Thus, the provision recognizes that civil forfeiture actions under section 981 are part of any law enforcement action arising out of a criminal investigation.

The limitation to forfeiture under section 981(a)(1)(C) for banking law violations, however, is obsolete. Because all civil forfeiture actions are now recognized as law enforcement functions, grand jury information should be available to government attorneys for their use in all civil forfeiture cases. The amendment therefore strikes the references to paragraph (c) and to banking law so that disclosure under 18 U.S.C. §3322(a) will be permitted in regard to any forfeiture under federal law. 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.

### **Sec. 9 Use of forfeited funds to pay restitution to crime victims and regulatory agencies**

Section 9 amends the civil forfeiture statutes to make it clear that forfeited property may be used to restore property to victims of the offense giving rise to the forfeiture. The statute dealing with restitution to victims, 18 U.S.C. §981(e), explicitly authorizes the use of forfeited funds to restore property only in cases based on the offenses set forth in sections 981(a)(1)(C) and (D), most of which involve financial institution fraud. [FN99] In contrast, the criminal statute, section 982, permits forfeited funds to be restored to victims in virtually all instances. [FN100] 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. [FN101] These amendments negate that implication by making it clear that the Attorney General make use of 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 section 981(a)(1)(C), is expanded to cover all offenses for which forfeiture is authorized under section 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 section 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). [FN102] 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 subsection (a)(1)(D), 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.

## **Sec. 10. Enforcement of foreign forfeiture judgment**

Section 10 puts the United States in compliance with Vienna Convention regarding the enforcement of foreign 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 (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. [FN103] Indeed, 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 to 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.

### **Sec. 11. Admissibility of foreign business records**

Section 11 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 record keeping 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 the U.S. government 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 the government must (1) rely on the prospective witness' willingness to voluntarily appear (which is very rare and subject to vicissitudes) 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 the U.S. government 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.

### **Sec. 12. Conforming amendments to title 28, to rules of procedure, and to the Controlled Substances Act**

Section 12 makes minor and technical amendments to 28 U.S.C. §524(c), the statute governing the Justice Assets Forfeiture Fund. In addition, Section 12 amends the Admiralty Rules to give the claimant 20 days, instead of only 10 days, to file a claim in a civil judicial forfeiture case. Finally, Section 12 repeals 21 U.S.C. §888. That statute, which contains a filing deadline in forfeiture cases involving automobiles used to facilitate drug trafficking offenses, is rendered unnecessary by the general purpose filing deadlines included in 18 U.S.C. §983.

### **Sec. 13. Inapplicability of the Customs laws**

Section 13 is intended to make clear that the incorporation of the Customs forfeiture laws for forfeiture cases under 18 U.S.C. §983 does not include the cost bond requirement in 19 U.S.C. §1608 or the burden of proof provision in 19 U.S.C. §1615. The latter provision, of course, is plainly inconsistent with the burden of proof provision in section 983(e).

Also, Section 13 amends 28 U.S.C. §2461(b) to make clear that in any civil forfeiture case, the procedures set forth in chapter 46 of title 18 apply, except that those procedures do not apply in cases handled by the U.S. Customs Service under statutes other than those in title 18 or title 21.

### **Sec. 14. Applicability**

This section provides that the amendments made in this Act 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 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 after the effective date of the Act. 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.

### **Sec. 15. Jurisdiction and venue in forfeiture cases**

Section 15 amends the statutes relating to 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. [FN104]

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). [FN105] 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 section 1355(d) as they apply to forfeiture cases.

## **Sec. 16. Minor and technical amendments relating to 1992 forfeiture amendments**

Section 16(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. Section 16(b) makes stylistic changes to section 986, making it applicable to all section 981 forfeitures including the provisions added in 1992, and eliminating the erroneous reference to section 1960. The amendment also makes it possible to issue a subpoena before a civil complaint is filed, and strikes a meaningless cross-reference to a non-existent statute, 18 U.S.C. §985. Section 16(c) is a purely technical amendment.

## **Sec. 17. Drug paraphernalia technical amendments**

Section 17 makes technical changes to the drug paraphernalia statute. 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 section 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". [FN 106] 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).

## **Sec. 18. Certificate of reasonable cause**

Section 18 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 because of the Supreme Court's decision in *United States v. James Daniel Good Property*, [FN107] 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.

## **Sec. 19. Authorization to share forfeited property with cooperating foreign governments**

Section 19 provides authorization to share forfeited property with cooperating foreign governments. Section 981(i) of title 18 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.

## **Sec. 20. Forfeiture of property used to facilitate foreign drug crimes**

Section 20 is another provision relating to Vienna Convention, which the United States ratified on November 11, 1990. Under the Convention, 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.

## **Sec. 21. Forfeiture of proceeds traceable to facilitating property in drug cases**

Section 21 provides for the 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, section 881(a)(7) permits the forfeiture of real property used to facilitate such a violation. Neither statute, however, explicitly extends 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 sections 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 section 983 is enacted, these innocent owner provisions will be stricken by conforming amendments.) The portion of this amendment relating to section 881(a)(4) passed the Senate in 1990 as section 1907 of S. 1970.

## **Sec. 22. Forfeiture of proceeds of certain foreign crimes**

Section 22 authorizes the forfeiture of the proceeds of any foreign crime designated as "specified unlawful activity" for purposes of the money laundering statute. Such crimes currently include drug trafficking, terrorism and other crimes of violence and bank fraud. By authorizing the forfeiture of the proceeds of such crimes when found in the United States, the provision makes it more difficult for international criminals to use the United States as a haven for the profits from their crimes, and it permits the United States to assist foreign governments in recovering the proceeds of crimes committed abroad.

The forfeiture provision will 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.

## **Sec. 23. Civil forfeiture of coins and currency in confiscated gambling devices**

Section 23 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, 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.

## **Sec. 24. Clarification of judicial review of forfeiture**

Section 24 clarifies 21 U.S.C. § 877. That statute 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. [FN108]

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 the Attorney General's designees relating to the seizure, forfeiture, and disposition of forfeited property, including rulings on petitions for remission or mitigation.

#### **Sec. 25. Technical amendments relating to obliterated motor vehicle numbers**

Section 25 contains technical amendments relating to obliterated motor vehicle identification numbers. 18 U.S.C. § 512 is the civil forfeiture statute governing motor vehicles and parts with obliterated serial numbers. The amendments cross-reference the new procedural statutes in sections 981-86, including the innocent owner defense in section 983.

**Sec. 26. Statute of limitations for civil forfeiture actions**

Presently, forfeiture actions must be filed within five 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 1996. 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 to file the forfeiture action within five years of the discovery of the offense giving rise to the forfeiture, as under current law, or within two years from the discovery of the involvement of the property in the offense, whichever is longer.

**Sec. 27. Destruction or removal of property to prevent seizure**

Section 27 is intended to remove any possible ambiguity about whether 18 U.S.C. § 2232 (Destruction or removal of property to prevent seizure) applies to seizures for forfeiture. In particular, it is intended to alleviate any concern that section 2232 is limited to investigative "searches and seizures" only and thus excludes forfeiture seizures executed by law enforcement agencies pursuant to seizure warrants issued against forfeitable property (see, e.g., 21 U.S.C. § 881(b)) and forfeiture seizures executed by the U.S. Marshals Service pursuant to warrants of arrest in rem or orders of criminal forfeiture. The amendment also adds language to clarify that interference with seizures of real property is included within the statute's prohibitions.

**Sec. 28. In personam judgments**

Section 28 makes it clear that ancillary proceedings are not necessary where the order of forfeiture contains only an in personam money judgment against the defendant. 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. [FN109] In such cases, obviously, no interests of any third parties can be implicated. Therefore, there is no need for any ancillary hearing.

**Sec. 29. Uniform procedures for criminal forfeiture**

Section 29 corrects omissions that occurred when Congress enacted new criminal forfeiture provisions for cases involving fraud against government regulatory agencies (18 U.S.C. § 982(a)(3)) and car-jacking (18 U.S.C. § 982(a)(5)) but neglected to enact any criminal forfeiture procedures. To solve that problem, and to make it unnecessary to amend the procedural statute again each time new forfeiture statutes are enacted, section 981(b)(1) is amended to incorporate the procedures in 21 U.S.C. § 853 for all criminal forfeitures under section 981(a). The section dealing with rebuttable presumptions in drug cases, 21 U.S.C. § 853(d), is the only provision omitted because it has no application outside the context of narcotics violations.

**Sec. 30. Availability of criminal forfeiture**

Section 30 is intended to give the U.S. Attorneys the option of pursuing criminal forfeiture as an alternative to civil forfeiture if civil forfeiture is otherwise authorized. Under current law, 28 U.S.C. § 2461(a), if a statute provides for forfeiture without prescribing whether the forfeiture is civil or criminal, it is assumed that only civil forfeiture is authorized. In such cases, the government may not pursue forfeiture as part of the criminal prosecution, but must file a parallel civil forfeiture case in order to prosecute an individual and forfeit the proceeds of the offense. [FN110]

The vast majority of federal forfeiture statutes fall into this category. That is, the vast majority of forfeitures must be done civilly even if there is a related criminal prosecution. To encourage greater use of criminal forfeiture—with its heightened due process protection—this amendment revises section 2461(a) to authorize criminal forfeiture whenever any form of forfeiture is otherwise authorized by statute.

**Sec. 31. Discovery procedure for locating forfeited assets**

Section 31(a) amends 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. [FN111] 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. Subsection (b) contains a technical amendment that makes clear that the authority to subpoena bank records in 18 U.S.C. § 986 applies in criminal forfeiture cases.

### **Sec. 32. Criminal forfeiture for money laundering conspiracies**

Section 32 clarifies the scope of 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 section 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 section 982(a)(1) following a criminal conviction on the conspiracy count.

### **Sec. 33. Correction to criminal provision for alien smuggling and other immigration offenses**

Section 33 corrects technical errors in the drafting of Section 217 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 that nullify the intended effect of the criminal forfeiture provisions. It is evident from the text of the provision that Congress intended to authorize criminal forfeiture for violations of 8 U.S.C. §§ 1324(a), 1324A(a)(1) and 1324A(a)(2). References to those statutes, however, appear only in one subparagraph of the provision, and not in the introductory paragraph that lists the offenses for which forfeiture may be imposed as a penalty. The statutes must be referenced in the introductory language to give the provision its intended effect. Subsequent surplus references are deleted. In addition, the statute is re-designated as paragraph (7) of 18 U.S.C. § 982(a) because another paragraph (6) was previously enacted.

### **Sec. 34. Repatriation of property placed beyond the jurisdiction of the court**

Section 34 allows a court to order the repatriation of property placed beyond the jurisdiction of the court. In criminal forfeiture cases, 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." Frequently, this provision is applied when a defendant has transferred drug proceeds or other criminally derived property to a foreign country. Often, 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 21 U.S.C. § 853 to authorize the sentencing court to issue a repatriation order either post-trial as part of the criminal sentence and judgment, or pre-trial pursuant to the court's authority under 21 U.S.C. § 853(e) to restrain property, including substitute assets, so that they will be available for forfeiture. [FN112] 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 an act would tend to implicate the defendant in a criminal act in violation of the Fifth Amendment. [FN113]

### **Sec. 35. Right of third parties to contest forfeiture of substitute assets**

Section 35 deals with the right of third parties to contest the forfeiture of substitute assets. Current law is unclear with respect to when the government's interest in substitute assets vests. Some have argued that because the relation-back provisions of section 853(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 section 853(n)(6)(B), 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.

### **Sec. 36. Archeological Resources Protection Act**

Section 36 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 apply to such forfeitures.

### **Sec. 37. Forfeiture of instrumentalities of terrorism, telemarketing fraud, and other offenses**

Section 37 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.

### **Sec. 38. Forfeiture of criminal proceeds transported in interstate commerce**

Section 38 provides for the forfeiture of criminal proceeds transported in interstate commerce in violation of 18 U.S.C. § 1952. Section 1952(a)(1) 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. [FN114] There is, however, no statute authorizing forfeiture of the criminal proceeds distributed in violation of section 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. [FN115] The courts, however, have not endorsed this theory either on the ground that mere transportation of drug money is not a "financial transaction," [FN116] or because transporting cash does not, by itself, evince an intent to "conceal or disguise" drug proceeds. [FN117]

The amendment to section 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.

### **Sec. 39. Forfeitures of proceeds of Federal Food, Drug, and Cosmetic Act violations**

Section 39 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. § 311 (civil forfeiture) and § 312 (criminal forfeiture)). FFDCA violations are investigated by the Food and Drug Administration's Office of Criminal Investigations (FDAOCI). The FFDCA presently provides for forfeiture of only the specific articles of food, drugs, or cosmetics that are in violation of the FFDCA. [FN118] In order to achieve forfeitures of the proceeds of FFDCA violations, FDAOCI 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). FDAOCI forfeiture cases under the FFDCA forfeiture statutes will simplify the process by which FDAOCI investigations lead to proceeds forfeitures.

FDAOCI does not seek forfeiture of facilitating property; nor does FDAOCI seek administrative forfeiture authority. FDAOCI 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.

#### **Sec. 40. 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 customs law, 19 U.S.C. § 1602 et seq., and the civil forfeiture procedures in 18 U.S.C. §§ 981-87. The amendments also add a criminal forfeiture provision that cross-references the procedure in section 982.

#### **Sec. 41. Closing of loophole to defeat criminal forfeiture through bankruptcy**

Section 41 closes a loophole that has been used to defeat criminal forfeiture through bankruptcy. These provisions 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.

#### **Sec. 42. Collection of criminal forfeiture judgment**

Section 42 makes the provisions for enforcing a criminal fine available for the enforcement of a criminal forfeiture judgment. The language of the provision is taken virtually verbatim from 18 U.S.C. § 3663(h), the provision for enforcing a restitution order in a criminal case, which likewise incorporates the procedure for enforcing a criminal fine. The amendment is intended to give the government a means of enforcing an in personam money judgment entered against a convicted defendant when there are no substitute assets available to be seized.

#### **Sec. 43. Criminal forfeiture of property in government custody**

Section 43 is intended to resolve any ambiguity that may exist as to whether a federal agency that has obtained lawful custody of property pursuant to a civil seizure warrant or otherwise may retain custody of the property without obtaining another warrant or restraining order when the property is made the subject of a forfeiture count in a criminal case. [FN119] The amendment makes clear that if the property is already in the custody of the government, obtaining a new seizure warrant or restraining order is unnecessary.

#### **Sec. 44. Delivery of property to the Marshals Service**

Section 44 is intended to incorporate procedures from the Admiralty Rules regarding the delivery of property to the Marshals Service. 21 U.S.C. § 853(j) incorporates the civil forfeiture procedures set forth in 21 U.S.C. § 881(d) for purposes of criminal forfeiture. The cross reference to section 881(d), however, fails to include a useful provision of the Admiralty Rules that is used in civil forfeiture. Under Rule C(5) of the Admiralty Rules, the court has the authority to order any person who has custody of a portion of property subject to forfeiture to show cause why that property should not be turned over to the Marshals Service. For example, the government may seize and ultimately forfeit an airplane. To sell the plane for its true value, the Marshals would need to obtain the log books showing the number of hours the plane has flown and its maintenance history. Rule C(5) may be used to order the person holding the log books to show cause why they shouldn't be turned over to the Marshals. The amendment makes this useful procedural tool applicable to criminal forfeitures by incorporating a cross-reference to Rule C(5) in section 853(j).

#### **Sec. 45. Forfeiture for odometer tampering offenses**

Sections 981 and 982 of title 18 were amended in 1992 to include civil and criminal forfeiture provisions, respectively, for certain offenses relating to carjacking and transporting stolen automobiles. This amendment expands the forfeiture statutes to include odometer tampering offenses under 49 U.S.C. § 32703. Because the forfeiture of the proceeds of the odometer tampering offense would not, by itself, be sufficient to deter the commission of this crime, the amendment makes the vehicle's and other property used to commit the offense subject to forfeiture as well.

#### **Sec. 46. Pre-trial restraint of substitute assets**

It 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 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. At first, 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. [FN120] Subsequently, however, other courts held 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. [FN121]

At least one of the recent cases was based on an erroneous reading of the legislative history. *In re Assets of 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. [FN122] 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. [FN123]

The amendment cures this problem of statutory interpretation by including specific cross-references to the substitute assets provision, 21 U.S.C. § 853(p), at the appropriate place in the section dealing with pre-trial restraining orders. The government, in cases involving the pre-trial restraint of substitute assets, must exempt from the restraining order any property needed to pay attorneys fees in the criminal case and for ordinary living expenses.

#### **Sec. 47. Hearing on pre-trial restraining orders; assets needed to pay attorney's fees**

Section 47 concerns the scope of a post-restraint, pre-trial hearing following the issuance of a restraining order in a criminal case. 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. [FN124] 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. [FN125] The 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. [FN126]

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. [FN127]

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." [FN128]

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 a pre-restraint adversary hearing where the restraining order is not issued until after the return of an indictment. [FN129] 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." [FN130]

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. [FN131] 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. [FN132] The Tenth Circuit is in accord, at least where the right-to-counsel issue is not implicated. [FN133]

On the other extreme, the Second Circuit, in a 7-6 en banc opinion, 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. [FN134] 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." [FN135]

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. [FN136] As the Seventh Circuit noted in *United States v. 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." [FN 137] 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. [FN138]

These courts, however, have declined to go as far as the Second Circuit in *United States v. Monsanto* in sanctioning a full-blown reexamination of the validity of the indictment. For example, in *United States v. 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," [FN139] 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. [FN140] 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. [FN141]

Similarly, the Seventh Circuit in *Moya-Go mez* 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." [FN142] But at the same time the court held that the "careful and deliberate judgment of Congress" was entitled to "respect," [FN143] 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.'" [FN144]

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.... [FN145]

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 (5) 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 (5) 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. [FN146] 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. [FN147] 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, and 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, [FN148] 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.

## CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

**FN1** Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 681 n.16 (1974).

**FN2** Holmes, Jr., *The Common Law* 25 (1881).

**FN3** *Id.*

**FN4** *Id.* at 26.

**FN5** See Act of July 31, 1789, §§ 12, 36, 1 Stat. 39, 47.

**FN6** See Piety, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process*, 45 U. Miami L. Rev. 911, 940 n.137 (1991).

**FN7** Criminal forfeiture can occur only after a property owner has been convicted of a crime.

**FN8** See 7 U.S.C. § 2156.

**FN9** See 18 U.S.C. § 2344.

**FN10** See 18 U.S.C. § 1963.

**FN11** 21 U.S.C. § 881(a).

**FN12** Section 301(a)(1) of the Psychotropic Substances Act of 1978 (found at 21 U.S.C. § 881(a)(6)).

**FN13** Section 306(a) of the Comprehensive Crime Control Act of 1984 (found at 21 U.S.C. § 881(a)(7)).

**FN14** See 28 U.S.C. § 524(c)(4)).

**FN15** See 31 U.S.C. § 9703.

**FN16** See 28 U.S.C. § 524(c)(1)).

**FN17** See Civil Asset Forfeiture Reform: Hearing Before the House Committee on the Judiciary, 105th Cong., 1st Sess. 116 (1997) (statement of Stefan Cassella) (hereinafter cited as "1997 Hearing"); U.S. Dept. of Justice, Asset Forfeiture Fact Sheet (1993); Annual Report of the Dept. of Justice Asset Forfeiture Program: 1993, at 15.

**FN18** See 1997 Hearing at 116 (statement of Stefan Cassella). Under "adoptive forfeiture", state and local law enforcement officers seize property and then bring it to a federal agency for forfeiture (provided that the property is forfeitable under federal law). The federal government then returns as much as 85% of the net proceeds to the state or local agency that initiated the case. Also, state and local law enforcement agencies that have cooperated in federal law enforcement actions often receive a percentage of the net proceeds.

**FN19** Richard Thornburgh, Address Before the Cleveland City Club Forum Luncheon (May 11, 1990).

**FN20** 1997 Hearing at 112.

**FN21** The Justice Department has in the past argued that civil forfeiture serves "remedial" rather than "punitive" goals. The Department took this position in part to stave off Eighth Amendment challenges to purportedly excessive civil forfeitures. The Eighth Amendment prohibits, among other things, the imposition of excessive fines. The Supreme Court rejected this argument in *Austin v. United States*, 509 U.S. 602 (1993), by holding that civil forfeitures are at least partly punitive in nature and thus subject to Eighth Amendment limitations.

**FN22** *United States v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896, 905 (2nd Cir. 1992).

**FN23** See, e.g., *Brazil & Berry, Tainted Cash or Easy Money?*, Orlando Sentinel, June 14-17, 1992; *Schneider & Flaherty, Presumed Guilty: The Law's Victims in the War on Drugs*, Pitt. Press, Aug. 11-16, 1991; *Poor & Rose, Hooked on the Drug War*, St. Louis Post-Dispatch, Apr. 28-May 5, 1991, Oct. 6-11, 20, 1991.

**FN24** See Review of Federal Asset Forfeiture Program: Hearing Before the Subcomm. on Legislation and National Security of the House Comm. on Government Operations, 103d Cong., 1st Sess. (1993); Department of Justice Asset Forfeiture Program: Hearing Before the Subcomm. on Legislation and National Security of the House Comm. on Government Operations, 102nd Cong., 2d Sess. (1992).

**FN25** See 1997 Hearing; Civil Asset Forfeiture Reform Act: Hearing Before the House Committee on the Judiciary, 104th Cong., 2nd Sess. (1996) (hereinafter cited as "1996 Hearing").

**FN26** 1996 Hearing at 12-14.

**FN27** A federal court later found that "[t]he presence of trace narcotics on currency does not yield any relevant information whatsoever about the currency's history. A bill may be contaminated by proximity to a large quantity of cocaine, by its passage through the contaminated sorting machines at the Federal Reserve Banks, or by contact with other contaminated bills in the wallet or at the bank." *Jones v. U.S. Drug Enforcement Administration* 819 F. Supp. 698, 720 (M.D. Tenn. 1993) (citation omitted).

**FN28** The money was seized pursuant to 21 U.S.C. § 881(a)(6), under which "[a]ll moneys ... furnished or intended to be furnished by any person in exchange for a controlled substance..." are subject to civil forfeiture. If Jones challenged the forfeiture, he would have the burden of proving by a preponderance of the evidence that the currency was not subject to forfeiture, provided that the government first showed probable cause that the currency was subject to forfeiture. See 19 U.S.C. § 1615.

**FN29** See 1996 Hearing at 15 (statement of E.E. (Bo) Edwards III). See 19 U.S.C. § 1608.

**FN30** *Jones*, 819 F. Supp. at 716.

**FN31** *Id.* at 718.

**FN32** *Id.* at 719. Probable cause is "a reasonable ground for belief of guilt, supported by less than *prima facie* proof but more than mere suspicion." *Id.* (citation omitted).

**FN33** *Id.* at 724.

**FN34** See Hyde, *Forfeiting Our Property Rights: Is Your Property Safe from Seizure?* 38-40 (1995).

**FN35** *Id.* at 12 (based on reporting by Schneider & Flaherty & Minter, "Property Seizures on Trial," *Insight*, Feb. 22, 1993, at 10, 33).

**FN36** See 19 U.S.C. § 1615.

**FN37** See *United States v. A Single Family Residence and Real Property Located at 900 Rio Vista Blvd., Ft. Lauderdale, 803 F.2d 625, 629 n.2* (11th Cir. 1986).

**FN38** *United States v. \$12,390,956 F.2d 801, 811* (8th Cir. 1992) (Beam, J., dissenting).

**FN39** *United States v. \$49,576, No. 95-56170, 1997 WL 345961, at \*3-4* (9th Cir. June 25, 1997) (citations omitted).

**FN40** See *United States v. \$292,888.04 in U.S. Currency*, 54 F.3d 564, 569 (9th Cir. 1995); *United States v. 7108 West Grand Ave., Chicago, Illinois*, 15 F.3d 632, 635 (7th Cir. 1994), cert. denied, 114 S. Ct. 2691 (1994).

**FN41** 1996 Hearing at 289-90 (statement of E.E. (Bo) Edwards III, David Smith, and Richard Troberman, cochairs, National Association of Criminal Defense Lawyers Asset Forfeiture Abuse Task Force).

**FN42** See 18 U.S.C. § 3006A(d)(2). Currently, maximum compensation would not exceed \$3,500 per attorney for representation before a U.S. district court and \$2,500 per attorney for representation before an appellate court. These maximums can be waived in cases of "extended or complex" representation where "excess payment is necessary to provide fair compensation and the payment is approved by the chief judge of the circuit." 18 U.S.C. § 3006A(d)(3).

**FN43** In *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689 (1974), the Supreme Court stated in dicta that "it would be difficult to reject the constitutional claim of ... an owner who proved not only that he was uninvolving 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 his property."

**FN44** "[N]or shall any State deprive any person of life, liberty, or property, without due process of law..." U.S. Const. Amend. XIV, § 1. "[N]or shall any person ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. Amend. V.

**FN45** *Bennis v. Michigan*, No. 94-8729, slip op. at 4 (U.S. March 4, 1996).

**FN46** *Id.*, slip op. at 2 (Stevens, J., Souter, J., Breyer, J., dissenting).

**FN47** *Id.*, slip op. at 4 (Thomas, J., concurring).

**FN48** 21 U.S.C. § 881(a)(7).

**FN49** 21 U.S.C. § 881(a)(4)(C).

**FN50** 18 U.S.C. § 981(a)(2).

**FN51** 18 U.S.C. § 1955(d).

**FN52** See, e.g., *United States v. Lot 111-B, Tax Map Key 4-4-03-71(4)*, 902 F.2d 1443, 1445 (9th Cir. 1990) (per curiam). See, contra, *United States v. 141st St. Corp.* by Hersh, 911 F.2d 870, 877-78 (2nd Cir. 1990), cert. denied, 111 S. Ct. 1017 (1991).

**FN53** See, e.g., *United States v. One Parcel of Property Located at 755 Forest Road, Northford, Connecticut*, 985 F.2d 70, 72 (2nd Cir. 1993); *United States v. One Parcel of Real Estate at 1012 Germantown Road, Palm Beach County, Fla.*, 963 F.2d 1496, 1506 (11th Cir. 1992).

**FN54** H.R. 1965 would exempt traditional U.S. Customs Service seizures and forfeitures from the bill's proposed procedures for reasons explained below.

**FN55** Of course, an owner may be constrained in revoking permission to use property because of provisions of local, state or federal law (i.e., contract or landlord-tenant law). In instances when an owner cannot simply orally revoke permission for use because of such reasons, the owner shall be considered to have revoked permission for purposes of the rebuttable presumption if the owner has taken those actions pursuant to revocation that are permitted by law.

**FN56** See 19 U.S.C. § 1614.

**FN57** "The provisions of [the Act] shall not apply to ... [a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer." 26 U.S.C. § 2680(c).

**FN58** U.S. Comptroller Gen., U.S. Gen. Accounting Office, *Better Care and Disposal of Seized Cars, Boats, and Planes Should Save Money and Benefits Law Enforcement*, at ii (GAO/PLRD-8-3-94, 1983).

**FN59** See 19 U.S.C. § 1608.

**FN60** See *Wiren v. Eide*, 542 F.2d 757, 763 (9th Cir. 1976).

**FN61** Letter from David Smith to Kathleen Clark, Senate Judiciary Committee, at 5 (Aug. 19, 1992).

**FN62** 19 U.S.C. § 1608.

**FN63** Fed. R. Civ. P. C(6) (Supplemental Rules for Certain Admiralty and Maritime Claims) (This is the date when a U.S. court takes possession of the property through "arrest" by a federal marshal. It is not the date when it is initially seized by a law enforcement officer).

**FN64** See, e.g., *United States v. Beechcraft Queen Airplane*, 789 F.2d 627, 630 (8th Cir. 1986).

**FN65** In the absence of an express waiver of sovereign immunity, the government is not liable for interest on seized currency. See *Library of Congress v. Shaw*, 478 U.S. 310, 311 (1986).

**FN66** See, e.g., 18 U.S.C. § 1955 (gambling), § 545 (smuggling).

**FN67** 473 U.S. 531, 537 (1985).

**FN68** See 19 U.S.C. § 1607(a).

**FN69** See *United States v. Clark*, 84 F.3d 378, 380 (10th Cir. 1996) (mailing notice to inmate's place of incarceration is sufficient; personal service not necessary); *Concepcion v. United States*, 938 F. Supp. 134, 141 (E.D.N.Y. 1996) (publication and sending notice to last known address and prison where defendant was incarcerated is adequate whether defendant actually receives the notice or not); *Hong v. United States*, 920 F. Supp. 311, 316 (E.D.N.Y. 1996) (same); *United States v. Franklin*, 897 F. Supp. 1301, 1303 (D. Or. 1995) (attempts to send notice to defendant's home, attorney and place of confinement were sufficient; failure to receive notice was not government's fault); *United States v. Schiavo*, 897 F. Supp. 644, 648-49 (D. Mass. 1995) (sending notice to fugitive's last known address is sufficient; not government's fault that notice was not effective).

**FN70** 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....")

**FN71** *Linarez v. U.S. Department of Justice*, 2F.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.").

**FN72** See *United States v. Woodall*, 12 F.3d 791, 793 (8th Cir. 1993).

**FN73** See *Wright v. United States*, 902 F. Supp. 486, 488-89 (S.D.N.Y. 1995).

**FN74** See *Williams v. U.S. DEA*, 51 F.3d 732, 735 (7th Cir. 1995) (applying Illinois 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).

**FN75** See *United States v. Volanty*, 79 F.3d 86,88 (8th Cir. 1996) (government could correct due process violation by vacating administrative forfeiture and instituting new judicial forfeiture proceeding); *Barrera-Montenegro v. United States*, 74 F.3d 657, 661 (5th Cir. 1996) (remanding for renewed administrative proceeding unless a judicial proceeding is commenced); *United States v. Giraldo*, 45 F.3d 509, 512 (1st Cir. 1995) (same); *United States v. Woodall*, 12 F.3d 791, 795 (8th Cir. 1993) (same); but see *United States v. Boero*, 1997 WL 175099 (2nd Cir. Apr. 14, 1997) (when district court finds that notice of administrative forfeiture was inadequate it should vacate the forfeiture and proceed directly to the merits of the claim).

**FN76** See *Republic National Bank v. United States*, 113 S. Ct. 554 (1992).

**FN77** See *United States v. One 1987 Jeep Wrangler*, 972 F.2d 472, 482 (2nd 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 not violation of due process).

**FN78** See e.g. Supplemental Rules C and E.

**FN79** See Supplemental Rule E(2).

**FN80** See 18 U.S.C. § 981(g).

**FN81** See *Rawlings v. Kentucky*, 448 U.S. 98 (1980).

**FN82** See *United States v. \$7,850.00 in U.S. Currency*, 7 F.3d 1355 (8th Cir. 1993); *United States v. \$67,220.00 in United States Currency*, 957 F.2d 280, 284 (6th Cir. 1992); *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 (2nd Cir. 1989); *United States v. \$633,021.67 in U.S. Currency*, 842 F. Supp. 528 (N.D. Ga. 1993); *United States v. Certain Real Property Located on Hanson Brook*, 770 F. Supp. 722, 730 (D. Me. 1991); *United States v. 155 Bemis Road*, 760 F. Supp. 245, 251 (D.N.H. 1991).

**FN83** See 18 U.S.C. § 1963(d)(3) permitting hearsay to be considered in pre-trial hearings in criminal forfeiture cases. See also *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).

**FN84** 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).

**FN85** 509 U.S. 602, 113 S. Ct. 2801 (1993).

**FN86** 509 U.S. 544, 113 S. Ct. 2766 (1993). 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).

**FN87** See *Hewitt v. City of Truth or Consequences*, 758 F.2d 1375, 1377 n.2 (10th Cir. 1985), 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 (1977).

**FN88** *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).

**FN89** *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.").

**FN90** 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."); see also *United States v. Chandler*, 36 F.3d 358 (4th Cir. 1994); *United States v. Bieri*, 21 F.3d 819 (8th Cir. 1994); *United States v. Busher*, 817 F.2d 1409, 1415 (9th Cir. 1987).

**FN91** See, e.g., 18 U.S.C. § 1955(d) (relating to gambling), § 981(a)(1)(A) and § 982(a)(1) (relating to money laundering).

**FN92** See *United States v. McCarroll*, 1996 U.S. Dist. LEXIS 8975 (N.D. Ill. Jun. 19, 1996) (heroin dealer given credit for cost of heroin sold); *United States v. 122,942 Shares of Common Stock*, 847 F. Supp. 105 (N.D. Ill. 1994) (defendant in fraudulent securities deal permitted to deduct the amount invested in the scheme from the amount subject to forfeiture); but see, *United States v. McHan*, 101 F.3d 1027 (4th Cir. 1996) (§ 853(a) authorizes forfeiture of gross proceeds).

**FN93** See *United States v. One 1980 Rolls Royce*, 905 F.2d 89, 91-92 (5th Cir. 1990) ("[W]e conclude that a court should not ... permit the complete forfeiture ... when there is evidence that the properties were purchased at least in part with legitimate funds."); *United States v. Pole No. 3172, Hopkinton*, 852 F.2d 636, 639 (1st Cir. 1988) ("We agree that the interest acquired as a result of mortgage payments made with the proceeds of drug transactions should be forfeitable.... [but not] that forfeitability spreads like a disease from one infected mortgage payment to the entire interest in the property acquired prior to the payment.").

**FN94** See *United States v. One Parcel of Real Property*, 921 F.2d 370, 375 (1st Cir. 1990); *United States v. One 1987 Mercedes 560 SEL*, 919 F.2d 327, 331 (5th Cir. 1990).

**FN95** See Rule 54(b)(5).

**FN96** See *United States v. Daccarett*, 6 F.3d 37 (2nd Cir. 1993). See also *United States v. Dixon*, 1 F.3d 1080 (10th Cir. 1993) (warrantless seizure under section 881(b)(4) upheld where plain view exception applies).

**FN97** See 28 U.S.C. § 1355(d).

**FN98** See 26 U.S.C. § 6103(i)(1).

**FN99** 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.

**FN100** See 21 U.S.C. § 853(i) incorporated by reference in section 982(b).

**FN101** Section 981(d) incorporates the Customs laws, which in turn contain remission and mitigation authority. See 19 U.S.C. § 1618. But that authority has been interpreted only to permit remission to the owner of the seized property, a category that does not include most victims.

**FN102** See subsection (a)(1)(A) relating to money laundering offenses in which the underlying unlawful activity may be a financial institution offense.

**FN103** See 21 U.S.C. § 853(p).

**FN104** See 28 U.S.C. § 1355(b) (authorizing forfeiture over property in districts where act giving rise to the forfeiture occurred); 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).

**FN105** 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).

**FN106** 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.

**FN107** 114 S. Ct. 492 (1993).

**FN108** *Scarabin v. DEA*, 925 F.2d 100, 100-01 (5th Cir. 1991). This decision was later upheld in *Clubb v. FBI*, No. 93-4912 (5th Cir. Feb. 28, 1994) (unpublished).

**FN109** *United States v. Voight*, 89 F.3d 1050 (3rd Cir. 1996) (government is entitled to a personal money judgment equal to money involved in the money laundering offense); *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. 1985), cert. denied, 474 U.S. 821 (1985).

**FN110** See, e.g., 18 U.S.C. § 1955 (gambling), § 545 (smuggling).

**FN111** *United States v. Saccoccia*, 913 F. Supp. 129 (D.R.I. 1996).

**FN112** See *United States v. Sellers*, 848 F. Supp. 73 (E.D. La. 1994) (pre- trial repatriation order).

**FN113** *Id.* (no Fifth Amendment violation if government does not use evidence of the repatriation in its case in chief).

**FN114** See 18 U.S.C. § 1952(b).

**FN115** See 18 U.S.C. § 981(a)(1)(A) and 982(a)(1).

**FN116** 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).

**FN117** See *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); *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).

**FN118** 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).

**FN119** See *United States v. Schmitz*, 156 F.R.D. 136 (E.D. Wis. 1994) (once government files criminal forfeiture action, it no longer has authority to retain property seized for civil forfeiture under section 881 unless it obtains a restraining order under section 853(e) or a seizure warrant under section 853(f)).

**FN120** See *Assets of Tom J. Billman*, 915 F.2d 916 (4th Cir. 1990); *United States v. Regan*, 858 F.2d 115 (2nd Cir. 1988); *United States v. Schmitz*, 156 F.R.D. 136 (E.D. Wis. 1994); *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).

**FN121** See *United States v. Field*, 62 F.3d 246 (8th Cir. 1995); *United States v. Ripinsky*, 20 F.3d 359 (9th Cir. 1994); *In Re Assets of Martin*, 1 F.3d 1351 (3rd Cir. 1993); *United States v. Floyd*, 992 F.2d 498 (5th Cir. 1993).

**FN122** 1 F.3d at 1360, citing S. Rep. 97-520, 97th Cong., 2d Sess. (1982) at 10 n.18.

**FN123** See S. Rep. 98-225, 98th Cong., 1st Sess. (1983) at 201-05.

**FN124** See 21 U.S.C. § 853(e).

**FN125** 21 U.S.C. §§ 853(e)(1)(B) & (2). 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 (2nd Cir. 1988).

**FN126** S. Rep. 255, 98th Cong., 1st Sess. (1983) at 202-03.

**FN127** *Id.* at 203 (emphasis supplied).

**FN128** *Id.* at 196.

**FN129** See e.g. *United States v. Monsanto*, 924 F.2d 1186, 1192 (2nd Cir. 1991); *United States v. Bissell*, 866 F.2d 1343, 1352 (11th Cir. 1989).

**FN130** *Monsanto*, 924 F.2d at 1192.

**FN131** *Bissell*, 866 F.2d at 1354. See *In Re Protective Order*, 790 F. Supp. 1140 (S.D. Fla. 1992).

**FN132** *Bissell*, *supra*.

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**FN133** 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).

**FN134** *Monsanto*, 924 F.2d at 1195-97.

**FN135** 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).

**FN136** 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).

**FN137** 860 F.2d at 726

**FN138** *Id.*

**FN139** 801 F.2d at 1469-70.

**FN140** *Id.* at 1470.

**FN141** *Id.*

**FN142** 860 F.2d at 731.

**FN143** *Id.* at 729.

**FN144** 860 F.2d at 728 (emphasis added), quoting S. Rep. 225, *supra*.

**FN145** *Id.* See *Monsanto*, 924 F.2d at 1206 (Cardamone, J. dissenting) ("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*).

**FN146** 924 F.2d at 1199, quoting S. Rep. 225 at 203.

**FN147** *Id.* at 1207 (Cardamone, J. dissenting).

**FN148** See 18 U.S.C. § 982(a)(1).

**H.R. REP. 105-358(I), H.R. REP. NO. 358(I), 105TH CONG., 1ST SESS. 1997, 1997 WL 677201 (Leg.Hist.)**

## Part 4

# House Report on Civil Asset Forfeiture Reform Act

H.R. Rep. 106-192, 106TH Cong., 1st Sess. 1999, 1999 WL 406892 (Leg. Hist.)

**Civil Asset Forfeiture Reform Act  
HOUSE REPORT NO. 106-192**

June 18, 1999

Mr. Hyde, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING VIEWS

**[To accompany H.R. 1658]**

The Committee on the Judiciary, to whom was referred the bill (H.R. 1658) to provide a more just and uniform procedure for Federal civil forfeitures, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

**CONTENTS**

	<b>Page</b>
The Amendment .....	2
Purpose and Summary .....	2
Background and Need for the Legislation .....	2
Hearings .....	19
Committee Consideration .....	20
Vote of the Committee .....	20
Committee Oversight Findings .....	20
Committee on Government Reform Findings .....	21
New Budget Authority and Tax Expenditures .....	21
Committee Cost Estimate .....	21
Constitutional Authority Statement .....	21
Section-by-Section Analysis and Discussion .....	21
Changes in Existing Law Made by the Bill, as Reported .....	27
Dissenting Views .....	34

The amendments (stated in terms of the page and line numbers of the introduced bill) are as follows:

Page 6, line 7, strike "receive" and insert "acquired".

Page 6, line 8, insert "or inheritance" after "probate".

Page 6, line 9, strike "receipt" and insert "acquisition".

Page 10, beginning on line 17 strike "CONFORMING" and all that follows through "AND" on line 18 and insert "AMENDMENT".

Page 10, strike line 20 and all that follows through page 11, line 13.

Page 11, line 14, strike "(b) Controlled Substances Act.".

**PURPOSE AND SUMMARY**

H.R. 1658, as reported by the Committee, would create general rules relating to federal civil forfeiture proceedings designed to increase the due process safeguards for property owners whose property has been seized.

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## BACKGROUND AND NEED FOR THE LEGISLATION

### I. Antecedents of Civil Asset Forfeiture

Civil asset forfeiture is based on the legal fiction that an inanimate object can itself be "guilty" of wrongdoing, regardless of whether the object's owner is blameworthy in any way. This concept descends from a medieval English practice whereby an object responsible for an accidental death was forfeited to the king, who "would provide the [proceeds, the 'deodand'] for masses to be said for the good of the dead man's soul . . . or [would] insure that the dead was put to charitable uses." [FN1]

The immediate ancestor of modern civil forfeiture law is English admiralty law. As Oliver Wendell Holmes noted, "a ship is the most living of inanimate things. . . . [E]very one gives a gender to vessels. . . . It is only by supposing the ship to have been treated as if endowed with personality, that the arbitrary seeming peculiarities of the maritime law can be made intelligible." [FN2]

Justice Holmes used this example:

A collision takes place between two vessels, the Ticonderoga and the Melampus, through the fault of the Ticonderoga alone. That ship is under a lease at the time, the lessee has his own master in charge, and the owner of the vessel has no manner of control over it. The owner, therefore, is not to blame, and he cannot even be charged on the ground that the damage was done by his servants. He is free from personal liability on elementary principle. Yet it is perfectly settled that there is a lien on his vessel for the amount of the damage done, and this means that the vessel may be arrested and sold to pay the loss in any admiralty court whose process will reach her. If a livery-stable keeper lets a horse and wagon to a customer, who runs a man down by careless driving, no one would think of claiming a right to seize the horse and the wagon. [FN3]

Holmes then provided the rationale:

The ship is the only security available in dealing with foreigners, and rather than send one's own citizens to search for a remedy abroad in strange courts, it is easy to seize the vessel and satisfy the claim at home, leaving the foreign owners to get their indemnity as they may be able. [FN4]

### II. Federal Civil Asset Forfeiture Statutes

Soon after the creation of the United States, ships and cargo violating the customs laws were made subject to federal civil forfeiture. [FN5] Such forfeiture was vital to the federal treasury for, at that time, customs duties constituted over 80% of federal revenues. [FN6]

Today, there are scores of federal forfeiture statutes, both civil and criminal. [FN7] They range from the forfeiture of animals utilized in cock-fights and similar enterprises, [FN8] to cigarettes seized from smugglers [FN9] to property obtained from violations of the Racketeer Influenced and Corrupt Organizations Act. [FN10]

The Comprehensive Drug Abuse Prevention and Control Act of 1970 made civil forfeiture a weapon in the war against drugs. The Act provides for the forfeiture of:

[a]ll controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter . . . [a]ll raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing . . . delivering, importing, or exporting any controlled substance[s] . . . in violation of this subchapter . . . [a]ll property which is used, or intended for use, as a container for [such controlled substances, raw materials, products or equipment] . . . [a]ll conveyances, including aircraft, vehicles or vessels, which are used, or intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment [of such controlled substances, raw materials, products or equipment]. [FN11]

In 1978, the Act was amended to provide for civil forfeiture of:

[a]ll moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter ...." [FN12]

In 1984, the Act was amended to provide for the forfeiture of:

[a]ll real property ... which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment.... [FN13]

### **III. The Success-and Abuse-of Forfeiture**

Prior to 1984, the monies realized from federal forfeitures were deposited in the general fund of the United States Treasury. Now they primarily go to the Department of Justice's Assets Forfeiture Fund [FN14] and the Department of the Treasury's Forfeiture Fund. [FN15] The money is used for forfeiture- related expenses and various law enforcement purposes. [FN16]

In recent years, enormous revenues have been generated by federal forfeitures. The amount deposited in Justice's Assets Forfeiture Fund (from both civil and criminal forfeitures) increased from \$27 million in fiscal year 1985 to \$556 million in 1993 and then decreased to \$449 million in 1998. [FN17] Of the \$338 taken in 1996, \$250 million was in cash and \$74 million was in proceeds of forfeitable property; \$163 million of the total was returned to state and local law enforcement agencies who helped in investigations. [FN18] As of the end of 1998, a total of 24,903 seized assets valued at \$1 billion were on deposit-7,799 cash seizures valued at \$349 million, 1,181 real properties valued at \$205 million, 45 businesses valued at \$49 million, and 15,878 other assets valued at \$398 million. [FN19]

So, federal forfeiture has proven to be a great monetary success. And, as former Attorney General Richard Thornburgh said: "[I]t is truly satisfying to think that it is now possible for a drug dealer to serve time in a forfeiture- financed prison, after being arrested by agents driving a forfeiture-provided automobile, while working in a forfeiture-funded sting operation." [FN20]

The purposes of federal forfeiture were set out by Stefan Cassella, Assistant Chief, Asset Forfeiture and Money Laundering Section, Criminal Division, U.S. Department of Justice, in testimony before this Committee: [FN21]

Asset forfeiture has become one of the most powerful and important tools that federal law enforcement can employ against all manner of criminals and criminal organizations-from drug dealers to terrorists to white collar criminals who prey on the vulnerable for financial gain....

Federal law enforcement agencies use the forfeiture laws for a variety of reasons, both time-honored and new.... [They] allow the government to seize contraband-property that it is simply unlawful to possess, such as illegal drugs, unregistered machine guns, pornographic materials, smuggled goods and counterfeit money.

Forfeiture is also used to abate nuisances and to take the instrumentalities of crime out of circulation. If drug dealers are using a "crack house" to sell drugs to children as they pass by on the way to school, the building is a danger to the health and safety of the neighborhood. Under the forfeiture laws, we can shut it down. If a boat or truck is being used to smuggle illegal aliens across the border, we can forfeit the vessel or vehicle to prevent its being used time and again for the same purpose. The same is true for an airplane used to fly cocaine from Peru into Southern California, or a printing press used to mint phony \$100 bills.

The government also uses forfeiture to take the profit out of crime, and to return property to victims. No one has any right to retain the money gained from bribery, extortion, illegal gambling, or drug dealing. With the forfeiture laws, we can separate the criminal from his profits-and any property traceable to it-thus removing the incentive others may have to commit similar crimes tomorrow. And if the crime is one that has victims-like carjacking or fraud-we can use the forfeiture laws to recover the property and restore it to the owners far more effectively than the restitution statutes permit.

Finally, forfeiture undeniably provides both a deterrent against crime and a measure of punishment for the criminal. Many criminals fear the loss of their vacation homes, fancy cars, businesses and bloated bank accounts far more than the prospect of a jail sentence.

However, a number of years ago, as forfeiture revenues were approaching their peaks, some disquieting rumblings were heard. The Second Circuit stated that "[w]e 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." [FN22] Newspaper and television exposés appeared alleging that apparently innocent property owners were having their property taken by federal and local law enforcement officers with nothing that could be called due process. [FN23]

Congress investigated these charges through a series of hearings held by the House Committee on Government Operations' Subcommittee on Legislation and National Security under then-Chairman John Conyers [FN24] and then by this Committee. [FN25]

The stories of two of the witnesses at the Judiciary Committee hearings provide a sampling of the types of abuses that have surfaced. Willie Jones (and his attorney E.E. (Bo) Edwards III) testified before the Judiciary Committee on July 22, 1996. Mr. Jones' testified as follows: [FN26]

[Chairman] Hyde: 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.

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. 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. Jones: So we proceeded to go out of the airport. ... 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? [FN27]

Mr. Jones: Yes, sir.

Mr. Hyde: Therefore, they kept the money?

Mr. Jones: They kept the money.

Mr. Hyde: Did they let you go?

Mr. Jones: They 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.

Willie Jones did not challenge the forfeiture under the normal mechanism provided by law [FN28] because he could not come up with the 10% cost bond required. [FN29] He instead filed suit in federal district court alleging that his Fourth Amendment right to be secure against unreasonable searches and seizures had been violated. [FN30] The court determined that the "frisk" which produced the \$9,000 in currency was an unconstitutional search, [FN31] and that the seizure of the currency was undertaken with no probable cause and therefore an unconstitutional seizure. [FN32] The court did determine that there was "insufficient proof that the officers' investigation of Mr. Jones [who is African-American] himself was racially motivated[,]" but that other investigations were so motivated. [FN33]

The court's final comments gave rise for pause:

The Court also observes that the statutory scheme as well as its administrative implementation provide substantial opportunity for abuse and potentiality for corruption. [Drug Interdiction Unit] personnel encourage airline employees as well as hotel and motel employees to report "suspicious" travelers and reward them with a percentage of the forfeited proceeds. The forfeited monies are divided and distributed by the Department of Justice among the Metropolitan Nashville Airport and the Metropolitan Nashville Police Department partners in the DIU and itself. As to the local agencies, these monies are "off-budget" in that there is no requirement to account to legislative bodies for its receipt or expenditure. Thus, the law enforcement agency has a direct financial interest in the enforcement of these laws. The previous history in this country of an analogous kind of financial interest on the part of law enforcement officers-i.e., salaries of constables, sheriffs, magistrates, etc., based on fees and fines-is an unsavory and embarrassing scar on the administration of justice. The obviously dangerous potentiality for abuse extant in the forfeiture scheme should trigger, at the very least, heightened scrutiny by the courts when a seizure is contested. [FN34]

Mr. Jones's case typifies the kind that this Committee is gravely concerned about-except that this time there was a happy ending. Individuals very likely innocent of any crime justifying forfeiture meet some sort of "drug courier" profile [here, by buying an airplane ticket with cash] and are subject to a search or investigation. If they have large sums of cash, it is seized. They may not be tried for a crime (Civil forfeiture requires no related criminal conviction or even criminal charge). However, if there is a prosecution, acquittal does not bar a subsequent forfeiture action. The government need only show probable cause for the seizure to justify a civil forfeiture.). To get their property back, owners have to overcome tremendous procedural hurdles such as posting a cost bond and having to prove their property was "innocent" (once probable cause has been shown). The abuse seems even worse under certain state forfeiture laws. [FN35]

Billy Munnerlyn testified before the Judiciary Committee on June 11, 1997. Following is a short summary of his experience with federal civil forfeiture laws:

For years Billy Munnerlyn and his wife Karon owned and operated a successful air charter service out of Las Vegas, Nevada. In October 1989, Mr. Munnerlyn was hired for a routine job-flying Albert Wright, identified as a "businessman," from Little Rock, Arkansas, to Ontario, California. When the plane landed, DEA agents seized Mr. Wright's luggage and the \$2.7 million inside. Both he and Mr. Munnerlyn were arrested. The DEA confiscated the airplane, the \$8,500 charter fee for the flight, and all of Munnerlyn's business records. Although drug trafficking charges against Mr. Munnerlyn were quickly dropped for lack of evidence, the government refused to release his airplane. (Similar charges against Mr. Wright-who, unbeknownst to Munnerlyn, was a convicted cocaine dealer-were eventually dropped as well.) Mr. Munnerlyn spent over \$85,000 in legal fees trying to get his plane back, money raised by selling his three other planes. A Los Angeles jury decided his airplane should be returned because they found Munnerlyn had no knowledge Wright was transporting drug money-only to have a U.S. district judge reverse the jury verdict. Munnerlyn eventually was forced to settle with the government, paying \$7,000 for the return of his plane. He then discovered DEA agents had caused about \$100,000 of damage to the aircraft. Under federal law the agency cannot be held liable for damage. Unable to raise enough money to restart his air charter business, Munnerlyn had to declare personal bankruptcy. He is now driving a truck for a living. [FN36]

For Mr. Munnerlyn, there was no happy ending.

Neither the state of the law nor its usage have improved in recent years. Since 1974, many observers assumed that the Constitution mandated an "innocent owner" defense to a civil forfeiture. However, in 1996, the Supreme Court in *Bennis v. Michigan* [FN37] ruled that the defense was mandated by neither the due process clause of the Fourteenth Amendment (and presumably that of the Fifth Amendment) nor the just compensation clause of the Fifth Amendment. The Court found

that "a long and unbroken line of cases holds that an owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use." [FN38]

The dissenting justices in *Benn* argued that:

The logic of the Court's analysis would permit the States to exercise virtually unbridled power to confiscate vast amounts of property where professional criminals have engaged in illegal acts. Some airline passengers have marijuana cigarettes in their luggage; some hotel guests are thieves; some spectators at professional sports events carry concealed weapons; and some hitchhikers are prostitutes. The State surely may impose strict obligations on the owners of airlines, hotels, stadiums, and vehicles to exercise a high degree of care to prevent others from making illegal use of their property, but neither logic nor history supports the Court's apparent assumption that their complete innocence imposes no constitutional impediment to the seizure of their property simply because it provided the locus for a criminal transaction. [FN39]

And, Justice Thomas stated in his concurrence that, "[i]f properly used, forfeiture could become more like a roulette wheel employed to raise revenue from innocent but hapless owners whose property is unforeseeably misused, or a tool wielded to punish those who associate with criminals, than a component of a system of justice." [FN40]

The Seventh Circuit recently issued a decision containing a stinging rebuke of the federal government's use of civil forfeiture. *United States v. \$506,231 in U.S. Currency* [FN41] involved the Congress Pizzeria in Chicago. In 1997, the court ordered the return to Anthony Lombardo, the owner and proprietor of this family-owned business, of over \$500,000 in currency improperly seized by police from the restaurant in 1993. The court found the need to remind a U.S. Attorney that "the government may not seize money, even half a million dollars, based on its bare assumption that most people do not have huge sums of money lying about, and if they do, they must be involved in narcotics trafficking or some other sinister activity." [FN42] The court also found the need to say that "[w]e are certainly not the first court 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." [FN43]

Civil asset forfeiture does not just impact civil liberties and property rights. It can work at total cross purposes with the professed public policy goals of the federal government. Few will argue against the proposition that more private investment needs to be made in our inner cities in order to offer residents hope of a better life. How, then, would anyone explain the actions in 1998 of the U.S. Attorney's Office in Houston in seizing a Red Carpet Motel in a high-crime area of the city? [FN44] There were no allegations that the hotel owners participated in any crimes. Indeed, motel personnel called the police to the establishment dozens of times to report suspected drug-related activity in the motel's rooms by some of its overnight guests. However, the government claimed the hotel deserved to be seized and forfeited because management had failed to implement all of the "security measures" dictated by law enforcement officials, such as raising room rates. This failure to agree with law enforcement about what security measures were affordable and wise from a legitimate business-operating standpoint was deemed to be "tacit approval" of illegality, subjecting the motel to forfeiture. The U.S. Attorney bragged to the press that he envisioned using current civil asset forfeiture laws in the same fashion against similar types of legitimate commercial enterprises, such as apartment complexes.

A Houston Chronicle editorial pointed to the absurdity and danger of this government forfeiture theory against legitimate business: "Perhaps another time, the advice will be to close up shop altogether." [FN45] The editorial then correctly noted that:

More than due to shortcomings of the motel owners, this situation appears to be the result of ineffective police work and of ... prosecutors' inability to build cases against scofflaws operating in an open drug market.

The prosecution's action in this case is contrary not only to the reasonable exercise of government, but it contradicts government-supported enticements to businesses that locate in areas where high crime rates have thwarted development. Good people should not have to fear property seizure because they operate business in high-crime areas. Nor should they forfeit their property because they have failed to do the work of law enforcement.

... This case demonstrates clearly the need for lawmakers to make a close-re-examination of federal drug forfeiture laws.

After much bad publicity, the government dropped its forfeiture proceedings after exacting a written "agreement" with the motel owners as to certain security measures that the owners would undertake. The motel owners had lost their motel to the government's seizure for several months, suffered a significant loss of good business reputation, and were forced to spend substantial amounts of time and money on hiring an attorney and defending against the government's forfeiture action, which should never have been undertaken in the first place. The resolution does not detract from the fact that business owners who dare to invest in high crime areas are at the complete mercy of our civil asset forfeiture laws and the predilections of prosecutors.

#### IV. H.R. 1658, the Civil Asset Forfeiture Reform Act

H.R. 1658 is designed to make federal civil forfeiture procedures fair to property owners and to give owners innocent of any wrongdoing the means to recover their property and make themselves whole after wrongful government seizures. H.R. 1658 amends the rules governing all civil forfeitures under federal law except those contained in the Tariff Act of 1930 or the Internal Revenue Code of 1986.

## The Eight Core Reforms of H.R. 1658

### 1. BURDEN OF PROOF

When a property owner goes to federal court to challenge the seizure of property under a federal civil forfeiture law, the government is required to make an initial showing of probable cause that the property is subject to forfeiture. Under current law, the property owner must then establish by a preponderance of the evidence that the property is not subject to forfeiture. [FN46] The government can meet its burden without having obtained a criminal conviction or even having charged the owner with a crime. Since the government doesn't need the proof beyond a reasonable doubt required for a criminal conviction, even the acquittal of the owner does not bar forfeiture of the property allegedly used in a crime. The probable cause the government needs is the lowest standard of proof in the criminal law. It is the same standard required to obtain a search warrant and can be established by evidence with a low indicia of reliability such as hearsay. [FN47]

Allowing property to be forfeited upon a mere showing of probable cause can be criticized on many levels:

[T]he current allocation of burdens and standards of proof requires that the [owner] prove a negative, that the property was not used in order to facilitate illegal activity, while the government must prove almost nothing. This creates a great risk of erroneous, irreversible deprivation. "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of fact finding, is to instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *Addington v. Texas*, 441 U.S. 418, 423 . . . (1979) . . . The allocation of burdens and standards of proof implicates similar concerns and is of greater importance since it decides who must go forward with evidence and who bears the risk of loss should proof not rise to the standard set. In civil forfeiture cases, where claimants are required to go forward with evidence and exculpate their property by a preponderance of the evidence, all risks are squarely on the claimant. The government, under the current approach, need not produce any admissible evidence and may deprive citizens of property based on the rankest of hearsay and the flimsiest evidence. This result clearly does not reflect the value of private property in our society, and makes the risk of an erroneous deprivation intolerable. [FN48]

Some federal courts have even intimated that probable cause is an unconstitutional standard:

The Supreme Court . . . has recently expanded the constitutional protections applicable in forfeiture proceedings to include those of the Eighth Amendment. . . . We therefore agree with the Second Circuit: "Good and Austin reopen the question of whether the quantum of evidence the government needs to show in order to obtain a warrant in rem allowing seizure -probable cause-suffices to meet the requirements of due process." *United States v. One Parcel of Property Located at 194 Quaker Farms Road*, 85 F.3d 985, 990 (2nd Cir.), cert denied . . . 117 S. Ct. 304 . . . (1996).

[W]e observe that allowing the government to forfeit property based on a mere showing of probable cause is a "constitutional anomaly. . . ." As the Supreme Court has explained, burdens of proof are intended in part to "indicate the relative importance attached to the ultimate decision." . . . The stakes are exceedingly high in a forfeiture proceeding: Claimants are threatened with permanent deprivation of their property, from their hard-earned money, to their sole means of transport, to their homes. We would find it surprising were the Constitution to permit such an important decision to turn on a meager burden of proof like probable cause. [FN49]

This Committee finds probable cause too low a standard of proof for the government to meet. Therefore, H.R. 1658 provides that the burden of proof should not shift to a property owner upon a showing of probable cause, but should remain with the government with a standard of clear and convincing evidence that the property is subject to forfeiture.

Why "clear and convincing evidence" and not "a preponderance of the evidence?" The Justice Department used to argue that federal civil forfeiture provisions were not designed to punish anybody. Justice argued that forfeiture served purely remedial functions-such as to remove the instruments of the drug trade and thereby protect the community from the threat of continued drug dealing, and to compensate the government for the expense of law enforcement activity and for its expenditure on societal problems resulting from the drug trade. The Department made this argument in order to provide a rationale for not applying to civil forfeitures the Eighth Amendment's prohibition against excessive fines. In its 1993 decision in *Austin v. United States*, [FN50] the Supreme Court rejected Justice's argument, finding that:

In light of the historical understanding of forfeiture as punishment, the clear focus of [the instant forfeiture provisions] on the culpability of the owner, and the evidence that Congress understood those provisions as serving to deter and to punish, we cannot conclude that [the provisions serve] solely a remedial purpose. We therefore conclude that forfeiture under these provisions constitutes "payment to a sovereign as punishment for some offense. . . ." [FN51]

One might ask, punishment for what? Clearly, the punishment is for a property owner's alleged involvement in drug trafficking. Civil forfeiture is being used to punish a property owner for alleged criminal activity. The general civil standard of proof-preponderance of the evidence-is too low a standard to assign to the government in this type of case. A higher standard of proof is needed that recognizes that in reality the government is alleging that a crime has taken place. As the Supreme Court has said, civil forfeiture actions are in essence "quasi- criminal in character" designed "like a criminal proceeding ... to penalize for the commission of an offense against the law." [FN52] Since civil forfeiture doesn't threaten imprisonment, proof beyond a reasonable doubt is not necessary. [FN53] The intermediate standard- clear and convincing evidence-is more appropriate.

The Florida Supreme Court has ruled that the Florida Constitution mandates a clear and convincing evidence standard in civil forfeiture proceedings commenced under Florida law, stating that:

In forfeiture proceedings the state impinges on basic constitutional rights of individuals who may never have been formally charged with any civil or criminal wrongdoing. This Court has consistently held that the [Florida] Constitution requires substantial burdens of proof where state action may deprive individuals of basic rights. [FN54]

Under H.R. 1658, a property owner would still have the burden of proving affirmative defenses, such as the "innocent owner" defense, by a preponderance of the evidence. Also, property can still be initially seized by the government based on probable cause, and this standard is sufficient to effect forfeiture in cases where a claim to the seized property is not filed.

## 2. APPOINTMENT OF COUNSEL

There is no Sixth Amendment right to appointed counsel for indigents in civil forfeiture cases, since imprisonment is not threatened. [FN55] This is undoubtedly one of the primary reasons why so many civil seizures are not challenged. As the cochairs of the National Association of Criminal Defense Lawyers' Forfeiture Abuse Task Force stated before this Committee in 1996: "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 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." [FN56] This Committee believes that civil forfeiture proceedings are so punitive in nature that appointed counsel should be made available for those who are indigent, or made indigent by a seizure, in appropriate circumstances.

H.R. 1658 provides that a federal court may appoint counsel to represent an individual filing a claim in a civil forfeiture proceeding who is financially unable to obtain representation. In determining whether to appoint counsel, the court shall take into account the claimant's standing to contest the forfeiture and whether the claim appears to be made in good faith or to be frivolous. Compensation for appointed counsel will be equivalent to that provided for court-appointed counsel in federal felony cases. Currently, maximum compensation would not exceed \$3,500 per attorney for representation before a U.S. district court and \$2,500 per attorney for representation before an appellate court. These maximums can be waived in cases of "extended or complex" representation where "excess payment is necessary to provide fair compensation and the payment is approved by the chief judge of the circuit." [FN57]

## 3. INNOCENT OWNER DEFENSE

The impact of Bennis [FN58] is limited by the fact that many federal civil forfeiture provisions contain statutory innocent owner defenses. For instance, real property used to commit or to facilitate a federal drug crime is forfeitable unless the violation was "committed or omitted without the knowledge or consent of [the] owner." [FN59] Conveyances used in federal drug crimes are not forfeitable "by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner." [FN60] Property involved in certain money laundering transactions shall not be forfeited "by reason of any act or omission established by that owner or lienholder to have been committed without the knowledge of that owner or lienholder." [FN61] Other federal civil forfeiture statutes contain no innocent owner defenses. For instance, the statute providing for forfeiture of any property, including money, used in an illegal gambling business contains no such defense. [FN62] Many courts require that to qualify as an innocent owner, an owner have done all that reasonably could be expected to prevent the illegal use of the property. [FN63]

Not only are these statutory innocent owner defenses nonuniform, but the protections of the ones using the "committed or omitted" language have been seriously eroded by a number of federal courts ruling that qualifying owners must have had no knowledge of and provided no consent to the prohibited use of the property. [FN64] Such an interpretation means that owners who try to end the illegal use by others of their property cannot make use of the defense simply because they knew about such use.

Believing that a meaningful innocent owner defense is required by fundamental fairness, the Committee sets out an innocent owner defense in H.R. 1658 designed to provide such a defense for all federal civil forfeitures, to make that defense uniform, and to ensure that it offers protection in all appropriate cases.

The innocent owner defense in the bill provides that, with respect to a property interest in existence at the time the illegal conduct giving rise to the forfeiture took place, an innocent owner is an owner who did not know of this conduct or, upon learning of it, did all that reasonably could be expected under the circumstances to terminate such use of the property. One way in which an owner may show that he did all that reasonably could be expected is to demonstrate that he, to the extent permitted by law, (1) gave timely notice to an appropriate law enforcement agency of information that led the person to know the conduct would occur or has occurred, and (2) in a timely fashion revoked or attempted to revoke permission for those engaging in such conduct to use the property or took reasonable actions in consultation with a law enforcement agency to discourage or prevent the illegal use of the property.

Thus, a safe harbor is created for an owner who notifies police and revokes or attempts to revoke (to the extent permitted by law) permission to use the property by those who are using it in the course of criminal activity. The owner's obligations end right there—property owners should not have to assume the responsibilities of police to stop crime. In the Red Carpet Motel incident described earlier, the hotel owner could have taken advantage of the bill's safe harbor by (as he did) notifying police of drug sales taking place at the motel and making a good faith attempt to evict the responsible motel guests from their rooms. In the situation of an apartment building where a tenant is selling illegal drugs, the owner could take advantage of the safe harbor by notifying police and making a good faith attempt to evict the tenants. The term "good faith attempt" is used because in many instances, an owner may be constrained in revoking permission to use property because of provisions of local, state or federal law (i.e., contract or landlord-tenant law). For instance, in many parts of the country it is extremely difficult to evict a tenant because of allegations of illegal drug sales without the tenant having already been convicted of drug trafficking. [FN65]

Finally, an owner is not required—in order to do "all that can reasonably be expected"—to take steps that he reasonably believes would be likely to subject any person (other than the wrongdoer) to physical danger.

With respect to a property interest acquired after the conduct giving rise to the forfeiture has taken place, an innocent owner is generally one who, at the time he acquired the interest in the property, was a bona fide purchaser or seller for value and reasonably without cause to believe that the property was subject to forfeiture. This formulation is required because much fraud could result were innocent donees allowed to be considered innocent owners. As Justice Kennedy noted in dissent in *United States v. A Parcel of Land* (92 Buena Vista Ave.), [FN66] criminals would then be allowed to shield their property from forfeiture through transfers to relatives.

However, the bill makes exceptions to this formulation in two instances to avoid unjust results. First, a person is considered to be an innocent owner if he acquired an interest in property through probate or inheritance, and was at the time of acquisition reasonably without cause to believe that the property was subject to forfeiture. The risk of a moral hazard here is slight. It is hardly likely that many criminals will commit suicide for the express purpose of foiling imminent seizures by having their property devolved to their heirs. And this policy has a sound basis. A person may have inherited property from a relative without cause to believe that it had been involved in some criminal activity. Years later, the government might decide to institute forfeiture proceedings against the property. Without the availability of an innocent owner defense, the inheritor would be put in the position of having to rebut the government's case that the property was forfeitable, that it had been involved in criminal activity. To do this, the inheritor would have to know what a dead person had done with the property and what was in the mind of that dead person. It is fundamentally unfair to put someone in this position. [FN67]

Second, if the property is real property, the owner is the spouse or minor child of the person who committed the offense giving rise to forfeiture, and the owner uses the property as a primary residence, an otherwise valid innocent owner claim shall not be denied because the owner acquired his interest in it not through a purchase but through dissolution of marriage or by operation of law (in the case of a spouse) or as an inheritance upon the death of a parent (in the case of a minor child). However, to be considered an innocent owner, the spouse or minor child must have been reasonably without cause to believe that the property was subject to forfeiture at the time of the acquisition of his interest in the property.

#### **4. RETURN OF PROPERTY UPON SHOWING OF HARDSHIP**

Even should a property owner prevail in a civil forfeiture proceeding, irreparable damage may have been done to the owner's interests. For instance, if property is used as a business, its lack of availability for the time necessary to win a victory in court could have forced its owner into bankruptcy. If the property is a car, the owner might not have been able to commute to work until it was won back. If the property is a house, the owner may have been left temporarily homeless (unless the government let the owner rent the house back). In cases such as this, even when the government's case is extremely weak, the owner must often settle with the government and lose a certain amount of money in order to get the property back as quickly as possible.

The case of Michael and Christine Sandsness is instructive:

Michael Sandsness and his wife, Christine, owned two gardening supply stores called "Rain & Shine" in Eugene and Portland, Oregon. Among the items sold were metal halide grow lights, used for growing many indoor plants. The grow

lights also can be used to grow marijuana, but it is not illegal to sell them. Because some area marijuana gardens raided by [the Drug Enforcement Administration] had the lights, the agency began building a case to seize the gardening supply businesses. [T]he DEA sent undercover agents to the stores to try to get employees to give advice on growing marijuana. Unsuccessful in those efforts, the agents then engaged an employee in conversation, asking advice on the amount of heat or noise generated by the lights, making oblique comments suggesting that they wanted to avoid detection and commenting about High Times magazine. They never actually mentioned marijuana. The employee then sold the agents grow lights. DEA raided the two stores, seizing inventory and bank accounts. Agents told the landlord of one of the stores that if he did not evict Sandsness, the government would seize his building. The landlord reluctantly complied. While the forfeiture case was pending, the business was destroyed. Mr. Sandsness was forced to sell the remaining unseized inventory in order to pay off creditors. [FN68]

Current law does allow for the release of property pending final disposition of a case upon payment of a full bond. [FN69] However, most property owners do not have the resources to make use of this provision. Therefore, in order to alleviate hardship, H.R. 1658 provides that a property owner is entitled to release of seized property if a court determines that its continued possession by the government pending the final disposition of forfeiture proceedings will likely cause substantial hardship to the owner and that this hardship outweighs the risk that the property will be destroyed, damaged, lost, concealed, or transferred if it is returned during the pendency of the proceedings. The court may place such conditions on release of the property as it finds are appropriate to preserve the property's availability for forfeiture.

## **5. COMPENSATION FOR DAMAGE TO PROPERTY WHILE IN THE GOVERNMENT'S POSSESSION**

The federal government is exempted from liability under the Federal Tort Claims Act for damage to property while detained by law enforcement officers. [FN70]

Seized property awaiting forfeiture can be quickly damaged:

Seized conveyances devalue from aging, lack of care, inadequate storage, and other factors while waiting for forfeiture. They often deteriorate—engines freeze, batteries die, seals shrink and leak oil, boats sink, salt air and water corrode metal surfaces, barnacles accumulate on boat hulls, and windows crack from heat. On occasion, vandals steal or seriously damage conveyances. [FN71]

It cannot be categorized as victory when a boat owner gets back, for instance, a rusted and stripped hulk of a vessel. The bill amends the Federal Tort Claims Act to allow for tort claims against the United States government based on the destruction, injury, or loss of goods, merchandise, or other property while in the possession of any law enforcement officer if the property had been seized for the purpose of forfeiture. Of course, if seized property is successfully forfeited, no claim would be allowed.

## **6. ELIMINATION OF COST BOND**

Under current law, a property owner wanting to contest a seizure of property under a civil forfeiture statute must give the court a bond of the lesser of \$5,000 or ten percent of the value of the property seized (but not less than \$250). [FN72]

The bond is unconstitutional in cases involving indigents, because it would deprive such claimants of hearings simply because of their inability to pay. [FN73] Even in cases not involving indigents, the bond should not be required. It "is simply an additional financial burden on the claimant and an added deterrent to contesting the forfeiture." [FN74] H.R. 1658 eliminates the requirement.

## **7. ADEQUATE TIME TO CONTEST FORFEITURE**

Currently, a property owner has 20 days (from the date of the first publication of the notice of seizure) to file a claim with the seizing agency challenging the government's administrative forfeiture of property. [FN75] To challenge a judicial forfeiture, the property owner has an exceedingly short 10 days (after process has been executed): [FN76]

Even assuming that notice is published the next day after process is executed, the reader of the notice will have a mere nine days to file a timely claim. Most local rules require that notice be published for three successive weeks, on the assumption that interested parties will not necessarily see the first published notice. But by the time the second notice is published, more than ten days will have elapsed from the date process is executed. Thus anyone who misses the first published notice will be unable to comply with the exceedingly short time limitation for filing a claim. . . . [FN77]

Even though these time limits sometimes are ignored in the interests of justice, failure to file a timely claim often results in judgment in favor of the government. [FN78]

The bill provides a property owner 30 days to file a claim following both administrative and judicial forfeiture actions.

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## 8. INTEREST

Under current law, even if a property owner prevails in a forfeiture action, he may receive no interest for the time period in which he lost use of his property. [FN79] In cases where money or other negotiable instruments were seized, or money is awarded a property owner, this is manifestly unfair.

H.R. 1658 provides that upon entry of judgment for the owner in a forfeiture proceeding, the United States shall be liable for post-judgment interest on any money judgement. The United States shall generally not be liable for pre-judgment interest. However, in cases involving currency, proceeds of an interlocutory sale, or other negotiable instruments, the government must disgorge any funds representing interest actually paid to the United States that resulted from the investment of the property or an imputed amount that would have been earned had it been invested.

## HEARINGS

While no hearings were held in the 106th Congress, the Committee held one day of hearings on civil asset forfeiture reform legislation on June 11, 1997. Testimony was received from Billy Munnerlyn, E.E. (Bo) Edwards III, F. Lee Bailey, Susan Davis, Gerald B. Lefcourt, Stefan D. Cassella, Deputy Chief, Asset Forfeiture and Money Laundering Section, Criminal Division, U.S. Department of Justice, Jan P. Blanton, Director, Executive Office for Asset Forfeiture, Department of the Treasury, Bobby Moody, Chief of Police, Marietta, Georgia, and 1st Vice President, International Association of Chiefs of Police, and David Smith. Additional material was submitted by Nadine Strossen, President, American Civil Liberties Organization, and Roger Pilon, Director, Center for Constitutional Studies, CATO Institute.

## COMMITTEE CONSIDERATION

On June 15, 1999, the Committee met in open session and ordered reported favorably the bill H.R. 1658 without amendment by a recorded vote of 27-3, a quorum being present.

## VOTE OF THE COMMITTEE

Vote on final passage: Adopted 27 to 3.

### AYES

Mr. Sensenbrenner  
 Mr. Gekas  
 Mr. Coble  
 Mr. Smith (TX)  
 Mr. Gallaugh  
 Mr. Canady  
 Mr. Goodlatte  
 Mr. Chabot  
 Mr. Barr  
 Mr. Jenkins  
 Mr. Cannon  
 Mr. Rogan  
 Mr. Graham  
 Mr. Scarborough  
 Mr. Conyers  
 Mr. Frank  
 Mr. Berman  
 Mr. Nadler  
 Mr. Scott  
 Mr. Watt  
 Ms. Lofgren  
 Ms. Jackson Lee  
 Mr. Delahunt  
 Mr. Wexler  
 Mr. Rothman  
 Ms. Baldwin  
 Mr. Hyde

### NAYS

Mr. Bryant  
 Mr. Hutchinson  
 Mr. Weiner

## COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of Rule XIII of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of Rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

## COMMITTEE ON GOVERNMENT REFORM FINDINGS

No findings or recommendations of the Committee on Government Reform were received as referred to in clause 3(c)(4) of Rule XIII of the Rules of the House of Representatives.

## NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of House Rule XIII is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

## COMMITTEE COST ESTIMATE

In compliance with clause 3(d)(2) of Rule XIII of the Rules of the House of Representatives, the Committee believes that the bill will have no cost for the current fiscal year, and that the cost incurred in carrying out H.R.1658 would be \$52 million for the next five fiscal years.

The Congressional Budget Office did not have an independent cost estimate prepared by the time of filing of this report. However, CBO did prepare a cost estimate in 1997 of H.R. 1965, another bill reforming federal forfeiture laws. While the two bills have significant differences, H.R. 1965 did contain versions of the eight fundamental reforms of civil forfeiture laws contained in H.R. 1658. The CBO estimated that over the period 1998-2002, implementation of H.R. 1965 would cost \$52 million and that any changes to direct spending and governmental receipts would be less than \$500,000 a year. [FN80]

## CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of Rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in Article I, section 8 of the Constitution.

## SECTION-BY-SECTION ANALYSIS AND DISCUSSION

### Section 1. Short title.

Section 1 contains the Short Title of the bill.

### Section 2. Creation of general rules relating to civil forfeiture proceedings.

Section 2 creates new subsections (j) and (k) of section 981 of title 18 of the United States Code (and redesignates subsection (j) as subsection (l)) that contain revised procedures which are to govern all administrative and judicial civil forfeiture actions brought pursuant to federal law (except as specified in subsection (j)(8)). To the extent these procedures are inconsistent with any preexisting federal law, these procedures apply and supersede preexisting law.

Subparagraph (A) of paragraph (1) of subsection (j) provides that in any nonjudicial civil forfeiture proceeding under a civil forfeiture statute, with respect to which the agency conducting a seizure of property must give written notice to interested parties, such notice shall be given as soon as practicable and in no case more than 60 days after the later of the date of the seizure or the date the identity of the interested party is first known or discovered by the agency, except that the court may extend the period for filing a notice for good cause shown.

Subparagraph (B) of paragraph (1) provides that a person entitled to written notice in such proceeding to whom written notice is not given may on motion void the forfeiture with respect to that person's interest in the property, unless the agency show either good cause for the failure to give notice to that person or that the person otherwise had actual notice of the seizure.

Subparagraph (C) of paragraph (1) provides that if the government does not provide notice of a seizure of property in accordance with subparagraph (A), it shall return the property and may not take any further action to effect the forfeiture of such property. If the government has made a mistake or administrative error in providing notice, a court may consider good cause to have been shown pursuant to subparagraph (A). In such case, the government may take further action to effect the forfeiture.

Subparagraph (A) of paragraph (2) provides that any person claiming property seized in a nonjudicial forfeiture proceeding may file a claim with the appropriate official after the seizure.

Subparagraph (B) of paragraph (2) provides that a claim under subparagraph (A) may not be filed later than 30 days after either the date of final publication of notice of seizure or, in the case of a person entitled to written notice, the date that notice was received.

Subparagraph (C) of paragraph (2) provides that the claim shall state the claimant's interest in the property.

Subparagraph (D) of paragraph (2) provides that not later than 90 days after a claim has been filed, the Attorney General shall file a complaint for forfeiture in the appropriate court or return the property, except that a court in the district in which the complaint will be filed may extend the period for filing a complaint for good cause shown or upon agreement of the parties.

Subparagraph (E) of paragraph (2) provides that if the government does not file a complaint for forfeiture of property in accordance with subparagraph (D), it shall return the property and may not take any further action to effect the forfeiture of such property.

Subparagraph (F) of paragraph (2) provides that any person may bring a claim under subparagraph (A) without posting bond with respect to the property which is the subject of the claim.

Subparagraph (A) of paragraph (3) provides that in any case where the government files in the appropriate United States district court a complaint for forfeiture of property, any person claiming an interest in the seized property may file a claim asserting such person's interest in the property within 30 days of service of the government's complaint or, where applicable, within 30 days of alternative publication notice.

Subparagraph (B) of paragraph (3) provides that a person asserting an interest in seized property in accordance with subparagraph (A) shall file an answer to the government's complaint for forfeiture within 20 days of the filing of the claim.

Subparagraph (A) of paragraph (4) provides that if the person filing a claim is financially unable to obtain representation by counsel, the court may appoint counsel to represent that person with respect to the claim.

Subparagraph (B) of paragraph (4) provides that in determining whether to appoint counsel to represent the person filing the claim, the court shall take into account such factors as the claimant's standing to contest the forfeiture and whether the claim appears to be made in good faith or to be frivolous.

Subparagraph (C) of paragraph (4) provides that the court shall set the compensation for that representation, which shall be equivalent to that provided for court-appointed representation under section 3006A of title 18 of the United States Code (for federal criminal defendants), and to pay such cost there are authorized to be appropriated such sums as are necessary as an addition to the funds otherwise appropriated for the appointment of counsel under that section.

Paragraph (5) provides that in all suits or actions brought under any civil forfeiture statute for the civil forfeiture of any property, the burden of proof is on the United States government to establish, by clear and convincing evidence, that the property is subject to forfeiture.

Subparagraph (A) of paragraph (6) provides that an innocent owner's interest in property shall not be forfeited under any civil forfeiture statute.

Subparagraph (B) of paragraph (6) provides that with respect to a property interest in existence at the time the illegal conduct giving rise to forfeiture took place, the term "innocent owner" means an owner who either did not know of the conduct giving rise to the forfeiture or, upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property. To meet the requirements of the last clause of the preceding sentence, the property owner is not required to take every conceivable action which could be considered reasonable, but only to take actions which are in total a reasonable response to the conduct giving rise to the forfeiture. In determining what is a reasonable response, the economic situation of the property owner (and his business, if applicable) should be taken into account.

Subparagraph (C) of paragraph (6) provides that with respect to a property interest acquired after the conduct giving rise to the forfeiture has taken place, the term "innocent owner" means a person who, at the time that person acquired the interest in the property, was reasonably without cause to believe that the property was subject to forfeiture and was either a bona fide purchaser or seller for value (including a purchaser or seller of goods or services for value) or a person who acquired an interest in property through probate or inheritance.

A property owner is considered to have acquired an interest in property through probate or inheritance at the time of the death of the previous property owner, not at the time of final, permanent, distribution of the property.

The use of the term inheritance recognizes that property interests often pass at the death of previous owners outside of formal probate proceedings. For instance, property interests are routinely inherited in community property states (such as California and Texas) without a testamentary device. Likewise, standard property law in many states recognizes transfers of interests through mechanisms such as remainder interests, and "tenancy-in-entireties" (which cause property interests in the whole res to pass virtually automatically upon the death of one "tenant"/owner to the surviving "tenant"/owner). This is often true of partnership property, including family business partnerships. In short, the use of the term recognizes that non-probate assets might be acquired by truly innocent owners through all manner of standard, legitimate state and commercial law mechanisms, for fundamental tax and estate planning reasons. For example, assets commonly inherited but not subject to probate administration in many states include the following: joint bank accounts with right of survivorship, property held in joint tenancy, property subject to a community property agreement (in community property states), property held in an *inter vivos* (living) trust, life insurance (unless all beneficiaries are dead or proceeds are payable to the estate), and assets governed by dispositive provisions in an insurance policy, employment contract, bond, mortgage, promissory note, deposit agreement, pension plan, conveyance, or other non-testamentary written instrument effective as a contract, gift, conveyance or trust.

Subparagraph (D) of paragraph (6) provides that where the property subject to forfeiture is real property, and the claimant uses the property as the claimant's primary residence (i.e., homestead) and is the spouse or minor child of the person who committed the offense giving rise to the forfeiture, an otherwise valid innocent owner claim shall not be denied on the ground that the claimant acquired the interest in the property not through a purchase but through dissolution of marriage or by operation of law (in the case of a spouse) or as an inheritance upon the death of a parent (in the case of a minor child [FN81]). The claimant must establish that at the time of the acquisition of the property interest, the claimant was reasonably without cause to believe that the property was subject to forfeiture.

This provision recognizes that one spouse might acquire an innocent, legitimate ownership interest in a residence through formal "dissolution" of marriage (divorce)-without any reasonable cause to believe that the property is tainted by the other spouse's conduct. Some states recognize separate property interests between spouses after a certain period of separation, even without formal marriage "dissolution" proceedings. An annulment, too, may not be regarded as a "dissolution" of marriage, *per se*, but rather, an official pronouncement that no legitimate marriage ever existed between the "spouses." A community property agreement between spouses, in community property states like California and Texas, is another common example of how one spouse could innocently acquire an interest in his or her primary residence by operation of (state) law, other than dissolution of marriage. Such standard agreements exist during the life of a marriage, after marriage, and indeed, serve as a non-probate asset after death of a spouse. The provision for acquisition by an innocent spouse "by operation of law", as well as "dissolution of marriage", is intended to cover all of the similarly innocent situations regarding spousal acquisition of a primary residence under various, legitimate operations of state and commercial laws.

Paragraph (7) provides that (for purposes of paragraph (6)) one way in which a person may show that he did all that reasonably could be expected would be to demonstrate that he, to the extent permitted by law, gave timely notice to an appropriate law enforcement agency of information that led him to know the conduct giving rise to a forfeiture would occur or has occurred while in a timely fashion revoking or attempting to revoke permission for those engaging in such conduct 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. To meet the requirements of the last clause of the preceding sentence, the person is not required to take every conceivable action which could be considered reasonable, but only to take actions which are in total a reasonable response to the conduct giving rise to the forfeiture. In determining what is a reasonable response, the economic situation of the property owner (and his business, if applicable) should be taken into account. Paragraph (7) also provides that in order to do all that could reasonably be expected (for purposes of paragraph (6)), a person is not required to take steps that the person reasonably believes would be likely to subject any person (other than the person whose conduct gave rise to the forfeiture) to physical danger.

Paragraph (8) provides definitions of terms for purposes of subsection (j). The term "civil forfeiture statute" means any provision of federal law (other than the Tariff Act of 1930 or the Internal Revenue Code of 1986) providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense. The term "owner" means a person with an ownership interest in the specific property sought to be forfeited, including a leasehold, lien, mortgage, recorded security device, or valid assignment of an ownership interest; it does not include a person with only a general unsecured interest in (or claim against) the property or estate of another, a bailee (unless the bailor is identified and the bailee shows a colorable legitimate interest in the property seized), or a nominee who exercises no dominion or control over the property.

Paragraph (1) of subsection (k) provides that a claimant under subsection (j) is entitled to immediate release of seized property if the court determines that (1) the claimant has a possessory interest in the property, (2) the continued possession by the United States government pending the final disposition of forfeiture proceedings will cause substantial hardship to

the claimant (such as preventing the functioning of a business, preventing an individual from working, or leaving an individual homeless), and (3) the claimant's likely hardship from the continued possession by the United States government of the seized property outweighs the risk that the property will be destroyed, damaged, lost, concealed, or transferred if it is returned to the claimant during the pendency of the proceeding.

Paragraph (2) provides that a claimant seeking release of property under subsection (k) must request possession of the property from the appropriate official, and the request must set forth the basis on which the requirements of paragraph (1) are met.

Paragraph (3) provides that if within 10 days after the date of the request the property has not been released, the claimant may file a motion or complaint in any district court that would have jurisdiction of forfeiture proceedings relating to the property setting forth the basis on which the requirements of paragraph (1) are met and the steps the claimant has taken to secure release of the property from the appropriate official.

Paragraph (4) provides that if a motion or complaint is filed under paragraph (3), the district court shall order that the property be returned to the claimant, pending completion of proceedings by the United States government to obtain forfeiture of the property, if the claimant shows that the requirements of paragraph (1) have been met. The court may place such conditions on release of the property as it finds are appropriate to preserve the availability of the property or its equivalent for forfeiture.

Paragraph (5) provides that the district court shall render a decision on a motion or complaint filed under paragraph (3) no later than 30 days after the date of the filing, unless such 30 day limitation is extended by consent of the parties or by the court for good cause shown.

### **Section 3. Conforming amendment to the Controlled Substances Act.**

Section 3 repeals section 518 of the Controlled Substances Act (21 U.S.C. § 888). Section 518 provides for expedited forfeiture procedures in the cases of seized conveyances.

### **Section 4. Compensation for damage to seized property.**

Subsection (a) of section 4 amends the Federal Tort Claims Act, which currently does not allow a claim for damages to be brought against the United States in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law enforcement officer (see 28 U.S.C. § 2680(c)). The subsection provides that claims can be brought that are based on the destruction, injury, or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if the property was seized for the purpose of forfeiture but the interest of the claimant is not forfeited.

Subsection (b) of section 4 provides that with respect to a claim that cannot be settled under the Tort Claims Act, the Attorney General may settle, for not more than \$50,000 in any case, a claim for damage to, or loss of, privately owned property caused by an investigative or law enforcement officer who is employed by the Department of Justice and acting within the scope of his or her employment. However, the Attorney General may not pay a claim that is presented more than 1 year after it occurs or is presented by an officer or employee of the United States government and arose within the scope of employment.

### **Section 5. Prejudgment and postjudgment interest.**

Section 5 amends section 2465 of title 28 of the United States Code to provide that 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 title 28 of the United States Code. The United States shall not be liable for prejudgment interest, except that in cases involving currency, other negotiable instruments, or the proceeds of an interlocutory sale, 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, and for any period during which no interest is actually paid, an imputed amount of interest that such currency, instruments, or proceeds would have earned at the rate described in section 1961. 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.

### **Section 6. Applicability.**

Section 6 provides that unless otherwise specified in this Act, the amendments made by this Act apply with respect to claims, suits, and actions filed on or after the date of the enactment of this Act. However, the standard for the required burden of proof shall apply in cases pending on the date of the enactment of this Act and the amendment made by section 5 shall apply to any judgment entered after the date of enactment of this Act.

## DISSENTING VIEWS

While we support the general concept of reforming our asset forfeiture laws and believe it is important to ensure that innocent citizens do not have their property taken away by an over-zealous government, we oppose this particular legislation as it tilts the balance too far in favor of the alleged criminal.

During the 105th Congress, this Committee overwhelmingly approved compromise legislation accomplishing the desired end of reforming our asset forfeiture laws so that individuals are not deprived of their rights, but doing so in a way that ensures that drug dealers, money launderers and organized crime syndicates are not able to exploit loopholes in the system. Unfortunately, the House did not have the opportunity to debate that bill and we find ourselves here today in a situation where that balanced approach has been discarded.

While our specific concerns regarding H.R. 1658 vary, we agree that in six fundamental ways, the bill denies law enforcement the tools they need to make sure that criminals are not able to enjoy the proceeds of their illegal activity.

### BURDEN OF PROOF

Current law requires that the government only have probable cause to seize property, but requires citizens to prove by a preponderance of the evidence that the property or proceeds were not used in illegal activity. H.R. 1658 shifts the burden of proof to the government and requires that the government prove by clear and convincing evidence that the property was used in an illegal manner. While we support shifting the burden of proof to the government, the clear and convincing standard is too high. The standard of proof in these cases should be the same as in all civil cases—that of preponderance of the evidence.

### APPOINTMENT OF COUNSEL

H.R. 1658 allows the court to appoint counsel for "any person claiming an interest in the seized property" who is "financially unable to obtain representation." The only factors that the court must consider in determining this are (1) the claimant's standing to contest the forfeiture and (2) whether the claim appears to be made in good faith.

The Department of Justice undertakes 30,000 seizures a year, most of them in drug and alien smuggling cases. H.R. 1658 authorizes the appointment of free counsel in all of those cases for anyone who asserts an interest in the seized property. The potential for abuse is great and there are no safeguards in the bill to prevent it. It is also important to note that those who successfully challenge civil forfeiture decisions already are able to recover attorneys fees under the Equal Access to Justice Act.

### INNOCENT OWNER DEFENSE

H.R. 1658 provides that certain individuals are de facto innocent owners, including those who receive property through probate. In these cases, the property would forever be protected against forfeiture.

We fully support the notion of protecting innocent owners who legitimately may not be aware that someone else has used the property illegally. But we do not think that the wives, family members and friends of criminals should be able to claim that they are "innocent" owners of the proceeds of crimes. In particular, the "probate" provision of H.R. 1658 allows a drug dealer to amass a large fortune in drug proceeds and pass it on to his girlfriend, wife or children should he be killed in a shoot-out with police or rival narcotraffickers.

### RETURN OF PROPERTY FOR HARDSHIP

H.R. 1658 allows a claimant to recover his property pending trial if he can show that the forfeiture will cause substantial hardship, such as preventing the functioning of a business, preventing an individual from working or leaving an individual homeless. The only burden that must be met to allow the transfer is a determination that the hardship outweighs any risk that the property will be destroyed, damaged, lost, concealed or transferred. The bill does not even ask judges to consider the likelihood of whether the property will be maintained and used in the continued commission of crime. No provisions are included to ensure that the government can recover the property once a judicial determination is made that the property is subject to forfeiture. Certain instruments of alleged illegal activity are not appropriate to be returned while the forfeiture is pending, but the bill makes no distinction between legitimate business assets and contraband, currency and other property that is likely to be used to commit additional crime if returned.

### NOTIFICATION TO CLAIMANT

H.R. 1658 requires that actual notice be given to a potential claimant within 60 days or the forfeiture action is nullified and may never be activated against that property again. The bill includes no exceptions for administrative errors, such as a misaddressed letter to a jail or prison.

So, under the bill, if the government arrests a drug dealer, puts him in jail, and sends him notice of the forfeiture of his drug proceeds, but misdirects the notice to the wrong jail, the Attorney General would have to return the money to the prisoner. Moreover, based on case law, prisoners would have eleven years in which to raise such claims. The proper remedy for such administrative errors is to give the prisoner proper notice and allow him the normal period of time in which to file a claim contesting the forfeiture.

## EFFECTIVE DATE

H.R. 1658 applies its new standard of proof (that of clear and convincing evidence) to cases pending at the time of the bill's enactment. This provision has the potential for wreaking havoc on on-going cases and cases on appeal. We believe that any change in the standard of proof should apply prospectively.

For these and other reasons, we opposed H.R. 1658 when it was considered by the Committee. We urge the Committee and Members of the full House to consider these issues as the bill moves through the legislative process.

Asa Hutchinson.  
Ed Bryant.  
Anthony Weiver.

**FN1** Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 681 n.16 (1974).

**FN2** Holmes, Jr., The Common Law 25 (1881).

**FN3** *Id.*

**FN4** *Id.* at 26.

**FN5** See Act of July 31, 1789, secs. 12, 36, 1 Stat. 39, 47.

**FN6** See Piety, Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process, 45 U. Miami L. Rev. 911, 940 n.137 (1991).

**FN7** Criminal forfeiture requires an antecedent criminal conviction of the property owner.

**FN8** See 7 U.S.C. § 2156.

**FN9** See 18 U.S.C. § 2344.

**FN10** See 18 U.S.C. § 1963.

**FN11** 21 U.S.C. § 881(a).

**FN12** Section 301(a)(1) of the Psychotropic Substances Act of 1978 (found at 21 U.S.C. § 881(a)(6)).

**FN13** Section 306(a) of the Comprehensive Crime Control Act of 1984 (found at 21 U.S.C. § 881(a)(7)).

**FN14** See 28 U.S.C. § 524(c)(4)).

**FN15** See 31 U.S.C. § 9703.

**FN16** See 28 U.S.C. § 524(c)(1)).

**FN17** See Office of National Drug Control Policy, National Drug Control Strategy: Budget Summary 1999, at 107 (hereinafter cited as "National Drug Control Strategy"); Civil Asset Forfeiture Reform: Hearing Before the House Comm. on the Judiciary, 105th Cong., 1st Sess. 116 (1997) (statement of Stefan Cassella) (hereinafter cited as "1997 Hearing"); U.S. Dep't. of Justice, Asset Forfeiture Fact Sheet (1993); Annual Report of the Dept. of Justice Asset Forfeiture Program: 1993, at 15.

**FN18** See 1997 Hearing at 116 (statement of Stefan Cassella). Under "adoptive forfeiture", state and local law enforcement officers seize property and then bring it to a federal agency for forfeiture (provided that the property is forfeitable under federal law). The federal government then returns as much as 80% of the net proceeds to the state or local agency that initiated the case. Also, state and local law enforcement agencies that have cooperated in federal law enforcement actions often receive a percentage of the net proceeds.

The Committee is concerned about two aspects of adopted forfeiture. The first is that since property or funds returned to state or local law enforcement agencies through adoptive forfeiture can be kept by these entities, the process can be used to bypass provisions of state laws or state constitutions that dictate that property forfeited (pursuant to state forfeiture provisions) should be used for non-law enforcement purposes such as elementary and primary education. A recent series in the Kansas City Star highlighted this problem in Missouri. See Karen Dillon, Missouri Police Find Ways to Keep Cash Meant for Schools, Kansas City Star, Jan. 2, 6, 11, 20, 21, Feb. 5, 9, 10, 12, 27, Mar. 14, 25, Apr. 23, May 7, 8, 1999. Second, while the property returned through adoptive forfeiture must be used for law enforcement purposes, state and local governing bodies do not exercise their normal oversight role over how the property is used since it is not appropriated through the normal legislative process. Consequently, there have been many disturbing reports of state and local law enforcement using forfeited property, or the proceeds from its sale, for unnecessary or needlessly extravagant expenditures and uses. See, e.g., Hyde, Forfeiting Our Property Rights: Is Your Property Safe from Seizure? 37 (1995) (hereinafter cited as "Forfeiting Our Property Rights"). The Committee plans to continue to closely monitor these two issues. In addition, the Committee urges state and local law enforcement agencies to use forfeited property only for legitimate purposes and urges local communities to engage in oversight over the use by their law enforcement agencies of forfeited property (while not unduly limiting the flexibility of law enforcement).

**FN19** See National Drug Control Strategy at 108.

**FN20** Richard Thornburgh, Address Before the Cleveland City Club Forum Luncheon (May 11, 1990).

**FN21** 1997 Hearing at 112.

**FN22** United States v. All Assets of Statewide Auto Parts, Inc., 971 F.2d 896, 905 (2nd Cir. 1992).

**FN23** See, e.g., Brazil & Berry, Tainted Cash or Easy Money?, *Orlando Sentinel*, June 14-17, 1992; Schneider & Flaherty, Presumed Guilty: The Law's Victims in the War on Drugs, *Pitt. Press*, Aug. 11-16, 1991; Poor & Rose, Hooked on the Drug War, *St. Louis Post-Dispatch*, Apr. 28-May 5, 1991, Oct. 6-11, 20, 1991.

**FN24** See Review of Federal Asset Forfeiture Program: Hearing Before the Subcomm. on Legislation and National Security of the House Comm. on Government Operations, 103rd Cong., 1st Sess. (1993); Department of Justice Asset Forfeiture Program: Hearing Before the Subcomm. on Legislation and National Security of the House Comm. on Government Operations, 102nd Cong., 2nd Sess. (1992).

**FN25** See 1997 Hearing; Civil Asset Forfeiture Reform Act: Hearing Before the House Comm. on the Judiciary, 104th Cong., 2nd Sess. (1996) (hereinafter cited as "1996 Hearing").

**FN26** 1996 Hearing at 12-14.

**FN27** A federal court later found that "[t]he presence of trace narcotics on currency does not yield any relevant information whatsoever about the currency's history. A bill may be contaminated by proximity to a large quantity of cocaine, by its passage through the contaminated sorting machines at the Federal Reserve Banks, or by contact with other contaminated bills in the wallet or at the bank." *Jones v. U.S. Drug Enforcement Administration*, 819 F. Supp. 698, 720 (M.D. Tenn. 1993) (citation omitted).

**FN28** The money was seized pursuant to 21 U.S.C. § 881(a)(6), under which "[a]ll moneys . . . furnished or intended to be furnished by any person in exchange for a controlled substance . . ." are subject to civil forfeiture. If Jones challenged the forfeiture, he would have the burden of proving by a preponderance of the evidence that the currency was not subject to forfeiture, provided that the government first showed probable cause that the currency was subject to forfeiture. See 19 U.S.C. § 1615.

**FN29** See 1996 Hearing at 15 (statement of E.E. (Bo) Edwards III). See 19 U.S.C. § 1608.

**FN30** *Jones*, 819 F. Supp. at 716.

**FN31** See *id.* at 718.

**FN32** See *id.* at 721. Probable cause is "a reasonable ground for belief of guilt, supported by less than *prima facie* proof but more than mere suspicion." *Id.* (citation omitted).

**FN33** See *id.* at 723.

**FN34** *Id.* at 724.

**FN35** See Forfeiting Our Property Rights at 38-40.

**FN36** *Id.* at 12 (based on reporting by Schneider & Flaherty & Miniter, "Property Seizures on Trial," *Insight*, Feb. 22, 1993, at 10, 33).

**FN37** 516 U.S. 442 (1996).

**FN38** *Id.* at 446.

**FN39** *Id.* at 458-59 (Stevens, J., Souter, J., and Breyer, J., dissenting).

**FN40** *Id.* at 456 (Thomas, J., concurring).

**FN41** 125 F.3d 442 (7th Cir. 1997).

**FN42** *Id.* at 454 (emphasis in original).

**FN43** *Id.*, quoting *U.S. v. All Assets of Statewide Auto Parts*, 971 F.2d at 905.

**FN44** See Deborah Tedford, Hotel Owners Agree to Beef Up Security, *Houston Chron.*, July 18, 1998; Steve Brewer, Seizure of Hotel Sets Precedent, *Houston Chron.*, March 7, 1998; Deborah Tedford, No Vacancy for Drug Dealers: Feds Seize Hotel, *Houston Chron.*, Feb. 18, 1998.

**FN45** U.S. Attorney Here Overstepped Bounds in Motel Seizure, *Houston Chron.*, Mar. 12, 1998.

**FN46** See 19 U.S.C. § 1615.

**FN47** See *United States v. A Single Family Residence and Real Property Located at 900 Rio Vista Blvd., Ft. Lauderdale*, 803 F.2d 625, 629 n.2 (11th Cir. 1986).

**FN48** *United States v. \$12,390,956* F.2d 801, 811 (8th Cir. 1992) (Beam, J., dissenting).

**FN49** *United States v. \$49,576,116* F.3d 425, 429 (9th Cir. 1997) (citations omitted).

**FN50** 509 U.S. 602 (1993).

**FN51** *Id.* at 621-22 (footnote omitted), quoting *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989).

**FN52** *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700 (1965).

**FN53** Some states do require proof beyond a reasonable doubt. The Supreme Court of Nevada has ruled that because of the "quasi-criminal nature of forfeiture actions," "[p]roof beyond a reasonable doubt is therefore appropriate in order that the innocent not be permanently deprived of their property." *A 1983 Volkswagen v. County of Washoe*, 101 Nev. 222, 224, 699 P.2d 108, 109 (Nev. 1985). Others provide only for criminal forfeiture in most situations, which of course leads to the same result. See, e.g., Cal. Health and Safety Code § 11470.

**FN54** *Department of Law Enforcement v. Real Property*, 588 So.2d 957, 967 (Fla. 1991). See also Cal. Health and Safety Code § 11470 (clear and convincing evidence in cases involving drug proceeds over \$25,000); N.Y. Civ. Prac. L. & R. §§ 1311(1), 1310(6) (clear and convincing evidence in drug cases); Wisc. Stat. Ann. § 973.076(3) (requiring proof "satisfying or convincing to a reasonable certainty by the greater weight of the credible evidence").

**FN55** See *United States v. \$292,888.04 in U.S. Currency*, 54 F.3d 564, 569 (9th Cir. 1995); *United States v. 7108 West Grand Ave., Chicago, Illinois*, 15 F.3d 632, 635 (7th Cir. 1994), cert. denied, 114 S. Ct. 2691 (1994).

**FN56** 1996 Hearing at 289-90 (statement of E.E. (Bo) Edwards III, David Smith, and Richard Troberman).

**FN57** 18 U.S.C. § 3006A(d).

**FN58** 516 U.S. at 442.

**FN59** 21 U.S.C. § 881(a)(7).

**FN60** 21 U.S.C. § 881(a)(4)(C).

**FN61** 18 U.S.C. § 981(a)(2).

**FN62** 18 U.S.C. § 1955(d).

**FN63** See, e.g., *United States v. One Parcel of Property Located at 755 Forest Road, Northford, Connecticut*, 985 F.2d 70, 72 (2nd Cir. 1993); *United States v. One Parcel of Real Estate at 1012 Germantown Road, Palm Beach County, Fla.*, 963 F.2d 1496, 1506 (11th Cir. 1992).

**FN64** See, e.g., *United States v. Lot 111-B, Tax Map Key 4-4-03-71(4)*, 902 F.2d 1443, 1445 (9th Cir. 1990) (per curiam). See, contra, *United States v. 141st St. Corp. by Hersh*, 911 F.2d 870, 877-78 (2nd Cir. 1990), cert. denied, 111 S. Ct. 1017 (1991).

**FN65** In some areas of the country, it might be generally agreed to be impossible to evict a tenant without a preexisting criminal conviction-in such a case, the bill would not require an owner to go through the futile motion of seeking eviction in order to enjoy the protection of the safe harbor.

**FN66** 113 S. Ct. 1126, 1146 (1993).

**FN67** The Committee has heard testimony from the executor of an estate who was placed, along with the beneficiaries of a house, in the position of having to fight a seizure based on "an unnamed person in prison [having] told an unnamed government agent that an unnamed vessel was used by unnamed persons to offload cocaine at the home of the decedent . . . on an unspecified date in December 1988." 1997 Hearing at 38 (testimony of Susan Davis).

**FN68** Forfeiting Our Property Rights at 13.

**FN69** See 19 U.S.C. § 1614.

**FN70** 26 U.S.C. § 2680(c).

**FN71** U.S. Comptroller Gen., U.S. Gen. Accounting Office, *Better Care and Disposal of Seized Cars, Boats, and Planes Should Save Money and Benefits Law Enforcement*, at ii (GAO/PLRD-8-3-94, 1983).

**FN72** See 19 U.S.C. § 1608.

**FN73** See *Wiren v. Eide*, 542 F.2d 757, 763 (9th Cir. 1976).

**FN74** Letter from David Smith to Kathleen Clark, Senate Judiciary Committee, at 5 (Aug. 19, 1992).

**FN75** 19 U.S.C. § 1608.

**FN76** Fed. R. Civ. P. C(6)(Supplemental Rules for Certain Admiralty and Maritime Claims)(This is the date when a U.S. court takes possession of the property through "arrest" by a federal marshal. It is not the date when it is initially seized by a law enforcement officer).

**FN77** David Smith, Prosecution and Defense of Forfeiture Cases, § 9.03[1], at 9-45 (1998).

**FN78** See, e.g., *United States v. Beechcraft Queen Airplane*, 789 F.2d 627, 630 (8th Cir. 1986).

**FN79** The courts are divided on whether the government must pay interest to a successful claimant. Compare *United States v. \$515,060.42 in U.S. Currency*, 152 F.3d 491, 504-06 (6th Cir. 1998)(awarding interest) with *United States v. \$7,990 in U.S. Currency*, 170 F.3d 843 (8th Cir. 1999)(so sovereign immunity bars awarding of interest).

**FN80** H.R. Rep. No. 105-358, pt. 1, at 38-41 (1997).

**FN81** The time of acquisition of a minor child's interest is at the time of the parent's death.

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H.R. REP. 106-193

H.R. Rep. No. 193, 106TH Cong., 1ST Sess. 1999, 1999 WL 417034 (Leg.Hist.)

**PROVIDING FOR THE CONSIDERATION OF H.R. 1658, CIVIL ASSET FORFEITURE REFORM ACT  
HOUSE REPORT NO. 106-193**

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June 22, 1999  
Ms. Pryce of Ohio, from the Committee on Rules, submitted the following  
REPORT

**[To accompany H. Res. 216]**

The Committee on Rules, having had under consideration House Resolution 216, by a nonrecord vote, report the same to the House with the recommendation that the resolution be adopted.

**SUMMARY OF PROVISIONS OF RESOLUTION**

The resolution provides for the consideration of H.R. 1658, the "Civil Asset Forfeiture Reform Act," under a modified open rule. The rule provides one hour of general debate divided equally between the chairman and ranking minority member of the Committee on the Judiciary.

The rule waives all points of order against consideration of the bill. The rule provides that the amendment in the nature of a substitute modified by the amendment recommended by the Committee on the Judiciary now printed in the bill be considered as the original bill for the purpose of a amendment.

The rule provides that the amendment in the nature of a substitute shall be open for amendment by section. The rule provides that prior to the consideration of any other amendment it shall be in order to consider the amendment printed in this report, which may be offered by Representative Hyde or his designee, may amend portions of the bill not yet read for amendment, and shall be considered as read.

The rule provides for the consideration of only those amendments preprinted in the Congressional Record, which may be offered only by the Member who caused it to be printed or his designee.

The rule allows for the Chairman of the Committee of the Whole to postpone votes during consideration of the bill, and to reduce voting time to five minutes on a postponed question if the vote follows a fifteen minute vote. Finally, the rule provides one motion to recommit with or without instructions.

Text of the amendment made in order under the rule:

Page 11, strike line 3 and all that follows through line 3 on page 12 and redesignate sections 4, 5, and 6 as sections 3, 4, and 5, respectively.

Page 12, line 17, strike "forfeiture" and insert "forfeiture under any provision of Federal law (other than the Tariff Act of 1930 or the Internal Revenue Code of 1986) providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense".

Page 13, beginning in line 20 strike "under any Act of Congress" and insert "under any provision of Federal law (other than the Tariff Act of 1930 or the Internal Revenue Code of 1986) providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense".

Page 13, line 25, strike "pre-judgment interest" and insert "for pre-judgment interest in a proceeding under any provision of Federal law (other than the Tariff Act of 1930 or the Internal Revenue Code of 1986) providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense".

Page 14, line 17, strike "any intangible benefits" and insert "any intangible benefits in a proceeding under any provision of Federal law (other than the Tariff Act of 1930 or the Internal Revenue Code of 1986) providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense".

## Part 5

### Floor Debate in the House of Representatives on H.R. 1658

145 Cong. Rec. H4851-01, 1999 WL 419754 (June 24, 1999)

Congressional Record -- House of Representatives  
Proceedings and Debates of the 106th Congress, First Session  
Thursday, June 24, 1999

#### **\*H4851 PROVIDING FOR CONSIDERATION OF H.R. 1658, CIVIL ASSET FORFEITURE REFORM ACT**

Ms. PRYCE of Ohio.

Mr. Speaker, by the direction of the Committee on Rules, I call up House Resolution 216 and ask for its immediate consideration.

The Clerk read the resolution, as follows:

#### **H. RES. 216**

Resolved, That at any time after the adoption of this resolution the Speaker may, pursuant to clause 2(b) of rule XVIII, declare the House resolved into the Committee of the Whole House on the state of the Union for consideration of the bill (H.R. 1658) to provide a more just and uniform procedure for Federal civil forfeitures, and for other purposes. The first reading of the bill shall be dispensed with. All points of order against consideration of the bill are waived. General debate shall be confined to the bill and shall not exceed one hour equally divided and controlled by the chairman and ranking minority member of the Committee on the Judiciary. After general debate the bill shall be considered for amendment under the five-minute rule. It shall be in order to consider as an original bill for the purpose of amendment under the five-minute rule an amendment in the nature of a substitute consisting of the bill modified by the amendment recommended by the Committee on the Judiciary now printed in the bill. Each section of that amendment in the nature of a substitute shall be considered as read. Before consideration of any other amendment it shall be in order to consider the amendment printed in the report of the Committee on Rules accompanying this resolution, which may be offered only by Representative Hyde or his designee, may amend portions of the bill not yet read for amendment, and shall be considered as read. No further amendment to the amendment in the nature of a substitute made in order as original text shall be in order except those printed in the portion of the Congressional Record designated for that purpose in clause 8 of rule XVIII and except pro forma amendments for the purpose of debate. Each amendment so printed may be offered only by the Member who caused it to be printed or his designee and shall be considered as read. The chairman of the Committee of the Whole may: (1) postpone until a time during further consideration in the **\*H4852** Committee of the Whole a request for a recorded vote on any amendment; and (2) reduce to five minutes the minimum time for electronic voting on any postponed question that follows another electronic vote without intervening business, provided that the minimum time for electronic voting on the first in any series of questions shall be 15 minutes. At the conclusion of consideration of the bill for amendment the Committee shall rise and report the bill to the House with such amendments as may have been adopted. Any Member may demand a separate vote in the House on any amendment adopted in the Committee of the Whole to the bill or to the amendment in the nature of a substitute made in order as original text. The previous question shall be considered as ordered on the bill and amendments thereto to final passage without intervening motion except one motion to recommit with or without instructions.

The SPEAKER pro tempore (Mr. PLEASE).

The gentlewoman from Ohio (Ms. PRYCE) is recognized for 1 hour.

Ms. PRYCE of Ohio.

Mr. Speaker, for the purpose of debate only, I yield the customary 30 minutes to the gentlewoman from New York (Ms. SLAUGHTER), pending which I yield myself such time as I may consume. During consideration of this resolution, all time yielded is for the purpose of debate only.

Mr. Speaker, House Resolution 216 is a modified, open rule providing for the consideration of H.R. 1658, the Civil Asset Forfeiture Reform Act.

The Committee on the Judiciary reported the bill by a bipartisan vote of 27- to-3, which demonstrates the broad support this legislation has garnered across the ideological spectrum.

The list of organizations that have endorsed H.R. 1658 ranges from the Eagle Forum, Americans for Tax Reform, and the NRA, to the National Association of Criminal Defense Lawyers, the American Bar Association, and the ACLU.

Despite this broad support, there are some who feel that this legislation may go too far, and the rule accommodates these concerns by providing ample opportunity to debate and amend the bill.

Under the rule, 1 hour of general debate will be equally divided among the chairman and ranking minority member of the Committee on the Judiciary. The rule waives all points of order against consideration of the bill and, for the purpose of amendment, the rule makes in order the amendment in the nature of a substitute modified by the amendment recommended by the Committee on the Judiciary, which is now printed in the bill.

First, it will be in order to consider an amendment printed in the Committee on Rules report, which may be offered by the gentleman from Illinois (Mr. HYDE) or his designee.

The Hyde amendment clarifies that the bill applies only to civil asset forfeiture, not criminal asset forfeiture. Few dispute that it is proper for the government to seize the yachts, planes and mansions of convicted drug dealers who finance their possessions with illegal drug money. Therefore, the bill does not alter the law with regard to criminal asset forfeiture.

What H.R. 1658 seeks to address are the abuses of civil asset forfeiture law, where the government can seize the property of a person who may never be accused of any crime or wrongdoing. The Hyde amendment makes the focus of this bill unmistakably clear.

After consideration of the amendment of the gentleman from Illinois (Mr. HYDE), the rule allows the House to debate and vote on any amendment, as long as it has been preprinted in the CONGRESSIONAL RECORD and complies with the Rules of the House.

To ensure the orderly and timely consideration of H.R. 1658, the Chair is given the option of postponing votes and reducing voting time to 5 minutes on postponed questions, as long as the first vote in the series is a 15-minute vote.

Finally, the rule provides the minority with the option of offering a motion to recommit with or without instructions.

Mr. Speaker, American citizens hold dear the protections they are afforded under our Constitution. Sometimes, we take these rights for granted, but we are quick to identify violations of the principles that serve as a foundation of our system of justice and government.

Our current civil asset forfeiture laws, at their core, deny basic due process, and the American people have reason to be both offended and concerned by the abuse of individual rights which happens sometimes under these laws.

Today, the government may seize the assets of any individual if there is probable cause to believe that these assets have been part of some illegal activity. Strange as it may sound, the legal tenet behind this process is that it is the property that is being accused, not the person. That means that even if there is no related criminal charge or extra conviction against the individual, the government may confiscate his or her property. And the current law gives little consideration to whether the forfeiture of the property results in a mere inconvenience to the owner, or jeopardizes the owner's business or very livelihood.

All that is required of the government is a demonstration of probable cause, an unreasonably low standard of proof, given the fundamental property rights at stake. Then the burden shifts to the property owner, who may have done nothing wrong and may have absolutely no knowledge of any crime to prove that his property is not subject to forfeiture.

To reclaim his property, the owner must overcome a number of obstacles that turn the principles of presumed innocence on its head.

To contest a seizure of property, the owner must come up with \$5,000 or a 10 percent cost bond, whichever is less. This serves little purpose other than to discourage individuals from seeking justice, and may even preclude low-income folks or those who have been made poor by the seizure of their assets altogether.

Then, if the owner can come up with the money and afford to hire a lawyer, he has the burden of proving, by a preponderance of the evidence, that his property is "innocent." And again, under current law, if the owner succeeds in reclaiming his property, the government owes him nothing for his trouble; no apology, no interest, no compensation, nothing whatsoever.

H.R. 1658 would put into check the possibility of government to unintentionally trample over the rights of innocent citizens in its rightful pursuit of the criminal element in our society.

Again, this bill does nothing to prevent the confiscation of assets owned by convicted criminals. It applies only to civil asset forfeiture in an effort to restore due process for law-abiding citizens who are not accused of doing any wrongdoing.

The bill includes eight reforms to restore fairness to the law.

Under H.R. 1658, if a property owner challenges a seizure, the burden would be placed on the government to prove by clear and convincing evidence that the property is "guilty" and is subject to forfeiture. In cases where the confiscation of property imposes substantial hardship on a citizen, judges would have the flexibility to release the property before final disposition of the case. Judges also would be able to appoint counsel for indigent citizens in civil forfeiture proceedings to ensure that the poorest in society are protected from the government's exercise of power. In addition, property owners would no longer have to file a bond, and they could sue if their property is damaged while in the government's possession.

The bill also provides for interest payments to a property owner who is successful in winning his money back.

Other reforms would increase the time period during which a citizen may challenge civil forfeiture and provide a uniform defense for innocent owners who knew nothing of the illegal use of their property or did all that they could reasonably do to prevent it.

Mr. Speaker, these are reasonable reforms that bring the scales of justice closer to balance and to protect the rights of Americans. For those who disagree, the rule provides an opportunity to debate the finer points of the law and amend the legislation, if it is the will of this House.

I look forward to today's debate, and I hope my colleagues will give serious consideration to the fundamental issues of fairness that this legislation embodies. I urge the swift passage of the rule so that the House may proceed with the bill's consideration.

Mr. Speaker, I reserve the balance of my time.

Ms. SLAUGHTER.

Mr. Speaker, I thank my good friend, the gentlewoman from Ohio (Ms. PRYCE) for **\*H4853** yielding me the customary time, and I yield myself such time as I may consume.

(Ms. SLAUGHTER asked and was given permission to revise and extend her remarks.)

Ms. SLAUGHTER.

Mr. Speaker, while I generally support this rule, I do not support the requirement that amendments to this bill must be preprinted in the CONGRESSIONAL RECORD. We offered an amendment in the Committee on Rules to delete this provision from the bill, but it was defeated.

I am concerned that there seems to be an increasing pattern on the part of my friends on the Committee on Rules majority to report rules which allow only those amendments which are preprinted. This may be helpful to the committee of jurisdiction in preparing for the floor, but it can be troublesome to the rest of the House Members who are then limited in their opportunities to contribute their ideas to the overall debate. A truly open rules process does not limit the offering of amendments in this way.

The Civil Asset Forfeiture Reform Act, H.R. 1658, gives people whose property has been seized by the Federal Government because of alleged connection to criminal activity improved chances to recover that property.

To some degree, we are today attempting to amend the law of unintended consequences, a law of nature which usually applies in situations where apparent only through the luxury of hindsight.

Civil asset forfeiture in its current form was created to fight the war on drugs. Law enforcement officials have reported that civil asset forfeiture is one of law enforcement's most effective tools and have expressed concern that H.R. 1658 would

impair the ability of law enforcement to deprive criminals of the proceeds of their illegal activities, and I hope that an amendment will pass today that will satisfy the concerns of law enforcement.

However, in recent years, many have complained that the government's authority to seize property has been used excessively and has resulted in abuse suffered by innocent property owners.

Civil assets forfeiture differs from criminal assets forfeiture in that criminal forfeitures are part of a criminal proceeding against a defendant, and the verdict of forfeiture is rendered by a court or jury only if a defendant is found guilty of the underlying crime.

In contrast, civil asset forfeiture focuses on property connected to an alleged crime. The government targets the property, and because the property itself is the defendant, the guilt or innocence of the property owner is said to be irrelevant.

This bill requires the government to prove by clear and convincing evidence that the property confiscated was subject to forfeiture because of illegal misuse. Under current law, the burden of proof lies with the person whose property was seized, and the government has only to show probable cause that the property is subject to forfeiture.

Under the bill, an owner would not be required to forfeit property at the time of the illegal conduct if the person did not know of the conduct giving rise to forfeiture; or, if the property owner did all that he reasonably could to keep the property from being used illegally. The bill requires the Federal Government to give 60 days written notice when confiscating private property.

Under the bill, a person would also be entitled to the immediate release of seized property if continued possession by the government would cause substantial hardship, such as preventing the functioning of a business, preventing an individual from working, or leaving an individual homeless.

Moreover, the bill provides financial damages to be paid for the destruction, injury or loss of goods or merchandise while forfeited property is in the government's possession.

As was pointed out during the hearing in the Committee on Rules hearing, this bill is sponsored by the members of the Committee on the Judiciary on both sides of the aisle who often represent divergent points of view. The fact that they are in concert regarding this measure favorably commends it to the House.

Mr. Speaker, I reserve the balance of my time.

Ms. PRYCE of Ohio.

Mr. Speaker, I yield 5 minutes to the distinguished gentleman from Arkansas (Mr. HUTCHINSON), a member of the Committee on the Judiciary.

Mr. HUTCHINSON.

Mr. Speaker, I thank the gentlewoman for yielding me this time.

I want to express my support for this rule which allows consideration of the base bill, but also a substitute bill that has been offered by myself, the gentleman from New York (Mr. WEINER) and the gentleman from New York (Mr. SWEENEY). This substitute that is being offered is drawn from the provisions of a bill that passed out of the Committee on the Judiciary last year that was supported by both the gentleman from Illinois (Mr. HYDE), the chairman of the Committee on the Judiciary, and the gentleman from Michigan (Mr. CONYERS), the ranking member of that committee, and the Justice Department.

It was a compromise proposal that accomplished significant reform, but also did not do damage to the legitimate interests of law enforcement. So that is the essence of the substitute that will be considered under this rule.

I want to take this opportunity to extend my appreciation to the gentleman from Illinois (Chairman HYDE) for his leadership on this critical issue. Certainly in our society we know there is need for reform, so he has led the fight on that. This substitute I believe improves on the effort that he is trying to accomplish in a way that is consistent and balances the interests of law enforcement.

Some of the things provided in the substitute include very similar provisions to the base bill in terms of protecting our citizens. It includes eliminating the cost bond, it includes reimbursing claimants for damage the government might do to an

innocent person's property. Most importantly, it shifts the burden of proof to the government in an asset forfeiture case, and it also provides paying of interest on assets that are returned.

So there are many similarities and significant reform, accomplished both in the substitute and the base bill. But there are some significant differences as well.

The first one and probably the most significant is the burden of proof. The substitute that is offered continues to ensure that the government bears the burden of proving that the property has been used in illegal activity, but maintains the same standard of proof as in all civil cases, which is a preponderance of the evidence.

Let us examine the distinction, here. If the standard of proof is clear and convincing, then there will be cases in which the government can show by the weight of the evidence that the money was used in criminal activity, but yet the criminal will be able to maintain those assets. I believe that is fundamentally wrong.

The greatest problem with the high standard of proof, clear and convincing standard, is whenever there is that sophisticated international money laundering on behalf of the south American drug cartels. Such schemes invariably involve shadowy transactions through bank secrecy jurisdictions conducted by shell corporations claiming to be in the travel, import-export, or money remitting businesses.

Most of these cases are dependent upon circumstantial evidence, so it would be difficult to prosecute to obtain those assets with such a standard that is unusual in ordinary civil cases.

The American people certainly want fairness in their forfeiture laws, but they do not want to grant extraordinary protections to the financial henchmen of the drug lord. So that is the distinction.

Another one is in reference to appointment of counsel. The Department of Justice undertakes 30,000 seizures a year, most of them in drug and alien smuggling cases. The base bill authorized the appointment of counsel in all of those cases, at taxpayers' expense. For anyone who asserts an interest in the seized property, the potential for abuse is clearly there.

The substitute continues to allow for the appointment of counsel, but with greater safeguards to eliminate that abuse.

There are other distinctions in there. The innocent owner defense is somewhat different in the substitute language. The base bill provides that when **\*H4854** there is an innocent owner, and there are de facto innocent owners who are bona fide purchasers, and those also who receive the property through probate. We see that as a problem. The substitute maintains that innocent owner defense but ensures that the provision will not be used by criminals to shield their property through sham transactions.

For example, the probate provision would allow a drug dealer to amass a large fortune, and then to transfer that by his will to his criminal cohorts or his mistress, and upon his death, if he has died in a shootout or an arrest, then it would transfer without being able to be seized, even though it is clearly the result of drug trafficking. So that is fundamentally wrong, and the substitute would correct that problem.

There are a number of other distinctions, Mr. Speaker, in the base bill and the substitute that is being offered, but we believe that the rule is fair that allows this. It would allow a fair debate on this.

I will point out that law enforcement has expressed concern in the base bill, from the Drug Enforcement Administration to the International Association of Chiefs of Police. So I would ask my colleagues to support the rule.

Ms. SLAUGHTER.

Mr. Speaker, I yield 1 minute to the gentleman from Michigan (Mr. CONYERS).

Mr. CONYERS.

Mr. Speaker, I thank the gentlewoman for New York for yielding time to me.

Mr. Speaker, I rise to indicate that on our side we support the rule, a modified open rule, and urge its support by all the Members. We want to try to proceed to general debate and the amendments, and hope that this measure may terminate and be concluded in final passage by this evening.

Ms. SLAUGHTER.

Mr. Speaker, I have no further requests for time, and I yield back the balance of my time.

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Ms. PRYCE of Ohio.

Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, in closing, let me reiterate that the criteria does nothing to undermine laws that allow for the confiscation of property in the case of a convicted criminal. Instead, the bill focuses on the potential abuse under civil forfeiture laws when a property owner may not be accused of any crime or wrongdoing.

The reforms in the bill protect the rights of innocent citizens to basic due process. The bill has the support of numerous organizations who span the ideological spectrum, but if my colleagues do not share the views of this broad coalition, they are free to offer amendments under this fair rule.

Every Member of the House should support this rule, which provides for a full and fair debate on civil asset forfeiture reform in the interest of restoring fairness to our system of justice. I urge a yes vote on the rule.

Mr. Speaker, I yield back the balance of my time, and I move the previous question on the resolution.

The previous question was ordered.

The resolution was agreed to.

A motion to reconsider was laid on the table.

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**145 Cong. Rec. H4851-01, 1999 WL 419754**

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145 Cong. Rec. H4854-02  
1999 WL 419756

Congressional Record -- House of Representatives  
Proceedings and Debates of the 106th Congress, First Session  
Thursday, June 24, 1999

**\*H4854 CIVIL ASSET FORFEITURE REFORM ACT**

The SPEAKER pro tempore.

Pursuant to House Resolution 216 and rule XVIII, the Chair declares the House in the Committee of the Whole House on the State of the Union for the consideration of the bill, H.R. 1658.

**IN THE COMMITTEE OF THE WHOLE**

Accordingly, the House resolved itself into the Committee of the Whole House on the State of the Union for the consideration of the bill (H.R. 1658) to provide a more just and uniform procedure for Federal civil forfeitures, and for other purposes, with Mr. LAHOOD in the chair.

The Clerk read the title of the bill.

The CHAIRMAN.

Pursuant to the rule, the bill is considered as having been read the first time.

Under the rule, the gentleman from Illinois (Mr. HYDE) and the gentleman from Michigan (Mr. CONYERS) each will control 30 minutes.

The Chair recognizes the gentleman from Illinois (Mr. HYDE).

Mr. HYDE.

Mr. Chairman, I yield myself such time as I may consume.

(Mr. HYDE asked and was given permission to revise and extend his remarks.)

Mr. HYDE.

Mr. Chairman, about 6 years ago I was reading a newspaper and I read an op ed article in the Chicago Tribune explaining a process that goes on in our country, and I must tell the Members, I could not believe it. I thought that over 200 years we had ironed out what due process meant, what equal protection under the law meant. But I found out that there are corners in our legal proceedings into which light needs to be shed. One of them concerns civil asset forfeiture.

There are two kinds of forfeiture, criminal asset forfeiture and civil asset forfeiture. What is the difference? The difference is in criminal asset forfeiture you must be indicted and convicted. Once that happens, the government then may seize your property if your property was used, however indirectly, in facilitating the crime for which you have been convicted.

You are a criminal, you are convicted, and they seize your property. I have no problem with that. I think that is useful in deterring drug deals and extortionists and terrorists. I have no problem with criminal asset forfeiture.

But the other type is civil asset forfeiture. That is a horse of a different color. In civil asset forfeiture, the government, the police, the gendarmes, can seize your property upon the weakest, most flimsy, diaphenous charge, probable cause. Probable cause will let you execute a search warrant or maybe frisk somebody, but no, they use probable cause as the basis to seize your property. I do not just mean your roller skates, they can take your business, they can take your home, they can take your farm, they can take your airplane. They take anything and everything premised on the weakest of criminal charges, probable cause.

What is also unbelievable is that unless you take action in court, you can not get your property back. They do not have to convict you, they do not have to even charge you with a crime, but they have your property because they allege probable cause.

How do you get your business back, your home back? You go to court, you hire a lawyer, you post a bond, and then you have to prove within 10 days, you have 10 days to do all this, you have to prove that your property was not involved in a crime. In other words, you prove a negative.

I do not know how you do that. I have been a lawyer since 1950, and I do not know how you prove that something did not happen. But nonetheless, that is the burden now. Under our jurisprudence, the burden of proof should be with the government. If you are guilty of anything, then prove it. The standard is beyond a reasonable doubt in a criminal case.

So what we are asking is to turn justice right side up, to switch the burden of proof from the poor victim, who has been deprived of his property and not convicted of anything, to the government, who has seized this property.

Now, may I suggest there are some incentives for some police organizations not to do this, because they share in the proceeds of the seized property. It is like the speed trap along the rural highway where the sheriff waits for us, takes us to a magistrate, and his salary is paid out of the fines he levies against us. We do not have a very great chance at equal justice.

That is the situation here. Civil asset forfeiture as allowed in our country today is a throwback to the old Soviet Union, where justice is the justice of the government and the citizen did not have a chance.

So I suggest we remedy this, and that is what we are trying to do.

The bill before us makes eight changes. First, the burden of proof goes to the government, where it belongs.

Secondly, the standard is clear and convincing. The reason it is not a mere, simple preponderance is that this is quasi-criminal. They are punishing **\*H4855** you when they have taken charge of your assets and of your property.

The next thing it does, it permits the judge to release the property pending the disposition in case a hardship exists and you are out of business or you have no place to live.

The third thing is the court can, in an appropriate case, appoint counsel. That is important if you are broke, if they have taken your property. You need help, you cannot afford a lawyer. The reason some organizations resist appointing counsel is because if you cannot get a lawyer, you cannot file a claim, so the forfeiture stands. You have a disincentive, you are discouraged from filing a claim because you cannot pay for a lawyer.

We also eliminate the bond, and I am happy to see that the gentleman from Arkansas (Mr. HUTCHINSON) eliminates the bond, too.

Our bill provides an innocent owner defense which is uniform across the country. If you own something and somebody else performed a crime in it or with it, and you are perfectly innocent and that can be established, that is a defense. You can sue the government under my bill if they destroy your property, and you can get interest if they have held your cash, and you can have 30 days to file your claim, not 10 or 20.

Lastly, let me just say this. This bill puts civil liberties and due process back in our criminal justice system. I am so delighted at the sponsors of this bill, both Democrats and Republicans, liberals and conservatives.

I am also delighted at the organizations that have endorsed it: The American Bar Association, the National Rifle Association, the National Association of Criminal Defense Lawyers, the American Civil Liberties Union, Americans for Tax Reform, the National Association of Realtors, the Credit Union National Association, the American Bankers Association, National Association of Home Builders, and on and on; the U.S. Chamber of Commerce. There is the widest possible spectrum of support for this reformation of our civil asset forfeiture laws.

I beg Members to listen carefully and join me in this essential reform.

Mr. Chairman, I reserve the balance of my time.

Mr. CONYERS.

Mr. Chairman, I yield myself such time as I may consume.

Mr. Chairman, to the Members of the House of Representatives, I would like Members to understand that there is wide, wide support not only in the committee but among organizations for reforming civil asset forfeiture.

When we bring together the gentleman from Illinois (Mr. HYDE), chairman of Committee on Judiciary, myself, the ranking member, the distinguished gentleman from Massachusetts (Mr. FRANK), and the gentleman from California (Mr. FARR), then we have a combination that covers, I think, the entire political philosophical spectrum of the Congress.

When we bring also the American Civil Liberties Union, the Criminal Defense Lawyers, the United States Chamber of Commerce, the Cato Institute, and the National Rifle Association, we have a combination of organizations that I think they come together every 10 years on a legislative agreement.

But it is wide, it is deserved, it is merited only because we have now found a process that is so abominable that it must be corrected, and we are very proud to have this wide array of philosophical views joining behind the Civil Asset Forfeiture Act, H.R. 1658.

Would my colleagues believe that, under current law, the government can confiscate an individual's private property on a mere showing of probable cause and then, even though the person may never have been convicted of a crime, require the person to file an action in Federal court to prove that the property is not subject to forfeiture in order to get the property back.

Well, that is the state of the law. There is no question that forfeiture laws, as Congress has intended to serve legitimate law enforcement purposes, and in the greater instances, they do, but they are currently susceptible to abuse and abuse that this measure proposes to correct.

There is also a problem for racial minorities. For example, a 10-month Pittsburgh Press investigation of drug law seizure and forfeiture included an examination of court records on 121 sole suspected drug courier stops, where money was seized and no drugs were discovered.

The Pittsburgh Press found that African-American, Latino, and Asian persons accounted for 77 percent of these arrests. So this bill before us today, the Civil Asset Forfeiture Act, seeks to change this and to make Federal civil forfeiture laws more equitable in a number of ways.

First of all, we change the burden of proof. Very few places in our law other than this, if any, require that the person coming in carry the burden of proof. Well, not so in forfeiture law. So if a property owner challenges a seizure, we want the government to prove by clear and convincing evidence that the property is subject to forfeiture. There cannot be any problems with that.

Now it is just the reverse. The government comes in, and the person seized has to prove that the property should not have been seized. This provision that we correct places the burden of proof where it historically belongs under United States jurisprudence within the government agency that performed the seizure. It protects individuals from the difficult task of proving a negative, in other words, that their property was not subject to forfeiture, which may be pretty hard to prove.

Secondly, I think it is important that the bill provide for the appointment of legal counsel if the person challenging the forfeiture is indigent or cannot otherwise afford proper legal counsel. What this provision does is simply recognize that legal representation is appropriate, indeed necessary, to defend against this type of deprivation of property.

Now, in determining whether or not to appoint counsel, the court must consider whether the claim appears to be made in good faith. Because if it is, they should get counsel. If it is not, they should not be provided counsel.

Third, the bill permits a court to provisionally return the seized property to the owner before the final adjudication is complete if the claimant can prove and demonstrate substantial hardship. Now this could occur, for example, if the forfeiture crippled the functioning of a business, which oftentimes is the case, prevented an individual from working, or left an individual homeless in the case of where homes are seized. Individuals lives and livelihoods should not be in peril during the course of a legal challenge to a seizure.

The next thing we do that I think commends the bill to the Members of the House of Representatives is that we create a uniform innocent owner defense against forfeiture to prevent people from losing their property because of the wrongdoing of others.

The presumption of innocence is fundamental to the American criminal justice system and should be in the case of civil asset forfeiture. This basic tenet, however, is seriously compromised whenever assets are confiscated, as they are now often seized under these forfeiture statutes without proof of wrongdoing by the owner.

The next thing that we do that I think should attract the attention and support of the Members is that we permit individuals who prevail in their forfeiture challenges to be able to sue the government if their property was destroyed or damaged, what could be more fair than that, while it was in government custody. It makes little sense to grant the right to reclaim the property only to find that it has lost all or half of its value.

The next item that is in this bill that I commend to the Members' attention is the requirement that the government pay successful claimant post-judgment interest as well as prejudgment interest on currency. This provision prevents the government from gaining a windfall on improperly seized property and puts the property owner in the position he or she would have been if the property had not been seized in the first instance.

The next thing that we do is eliminate the current requirement that a claimant must file a bond before challenging a forfeiture. This lifts a financial hurdle to filing a forfeiture challenge.

Finally, we expand the time to file a forfeiture challenge by 10 days from 20 to 30 days, giving additional persons time to learn about their rights and **\*H4856** file a claim. We believe that this measure is long overdue in coming.

We have had a very thorough and fair hearing in the Committee on the Judiciary. Everybody is pleased about it. But I should warn my colleagues that a substitute may be offered that would expand the categories of crime, that would worsen the measure that is before us, expanding categories of crime subject to a civil forfeit, and includes a seize now, fish for evidence later provision that allows the government to hold the property with no evidence, and then use their powerful Federal civil discovery tools to seek more evidence to try to build their case.

So I would like to put our colleagues on notice that there is a substitute that would completely reverse the benefits of this bill. I urge Members, both Democratic and Republican, to join us in the bill that has the widest support both in and out of the House.

Mr. Chairman, I include the following document, entitled "The Need for H.R. 1658: Recent Cases of Civil Asset Forfeiture Abuses of Innocent, Legitimate Businesspeople and Entities" as follows:

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## THE NEED FOR H.R. 1658

### RECENT CASES OF CIVIL ASSET FORFEITURE ABUSES OF INNOCENT, LEGITIMATE BUSINESSPEOPLE AND ENTITIES

#### *Houston, Texas: Red Carpet Motel-Raise Your Prices or Else!*

February 17, 1998, the U.S. Attorney's Office in Houston seized a Red Carpet Motel in a high-crime area of the city. The government's action was based on a negligence theory—that the motel owners, GWJ Enterprises Inc. and Hop Enterprises Inc., had somehow "tacitly approved" alleged drug activity in the motel's rooms by some of its overnight guests.

There were no allegations that the hotel owners participated in any crimes. Indeed, motel personnel called the police to the establishment dozens of times to report suspected drug-related activity. U.S. Attorney James DeAtley readily bragged to the press that he envisioned using current civil asset forfeiture laws in the same fashion against similar types of legitimate commercial enterprises, such as apartment complexes.

The government claimed the hotel deserved to be seized and forfeited because it had "failed" to implement all of the "security measures" dictated by law enforcement officials. This failure to agree with law enforcement about what security measures were affordable and wise from a legitimate business-operating standpoint was deemed to be the "tacit approval" of illegality cited by the prosecutors, subjecting the motel to forfeiture action.

One of the government's "recommendations" refused by the motel owners was to raise room rates. A Houston Chronicle editorial pointed to the absurdity and danger of this government forfeiture theory against legitimate business: "Perhaps another time, the advice will be to close up shop altogether." The editorial went on to make these additional, excellent points:

"The prosecution's action in this case is contrary not only to the reasonable exercise of government, but it contradicts government-supported enticements to businesses that locate in areas where high crime rates have thwarted development. Good people should not have to fear property seizure because they operate business in high-crime areas. Nor should they forfeit their property because they have failed to do the work of law enforcement. . . . This case demonstrates clearly the need for lawmakers to make a close-re-examination of federal drug forfeiture laws." . . . (emphasis added)

After more bad publicity all over Texas, in July 1998, the government finally released the motel back to the owners and dropped its forfeiture proceedings. It exacted a face-saving, written "agreement" with the motel owners. The agreement, however, in fact only put into words the security measures and goals the owners had already undertaken and those which it had always strived to meet.

The motel owners had lost their business establishment to the government's seizure for several months, suffered a significant loss of good business reputation, and were forced to spend substantial amounts of time and money on hiring an attorney and defending against the government's forfeiture action, which should never have been undertaken in the first place.

*Source:* Houston Chronicle, Mar. 12, 1998 editorial and 1998 articles Dallas Morning News, 1998 articles (unreported case)

#### *San Jose, California: Aquarius Systems, Inc-Your Buyer, Your Assets!*

October 28, 1998, a federal judge in San Jose, California finally granted summary judgment against the government in a civil forfeiture action, ruling that the government must return to Los Angeles-based Aquarius Systems, Inc. (aka CAF Technologies Inc.) the \$296,000 it had seized from it 6 years ago. Aquarius and 4 other computer chip dealer companies had been accused of marketing stolen chips. Federal agents, who participated in this "sting" operation, then seized \$1.6 million of the companies' chip-buying, operating money.

Unknown to Aquarius Systems, Inc., the buyer used by the company had been operating for his own profit, by purchasing chips for \$50.00 each while reporting to his supervisors at the company a unit cost of \$296.00 (which at the time was a reasonable price). (The buyer ultimately served a short sentence of conspiracy to buy stolen property.)

In his ruling ordering the government to return to Aquarius \$296,000 of its seized operating money, U.S. District Court Judge Jeremy Fogel blamed the government for dragging its feet on due process, by tying up the company's operating assets for so many years. Ruled the Court: "It is incumbent upon the government to institute civil forfeiture proceedings expeditiously." The judge then denied the government's motion for summary judgment against the company, and granted

the company's motion for summary judgment against the government. The Court held that Aquarius Systems knew nothing about what its buyer was doing. As the judge noted, the company was unusual in its ability to stave off ruin from the government's seizure and forfeiture action, and in its ability " to fight <it> for six years."

*Source:* The (California) Recorder, Nov. 17, 1998 article (unreported case)

*Chicago, Illinois: Family-Owned and Operated Congress Pizzeria-Restaurant*

September 3, 1997, Anthony Lombardo, owner and proprietor of the family business, Congress Pizzeria of Chicago, was finally returned over \$500,000 in currency improperly seized from his restaurant in early 1993. It took him over four years, and much expensive litigation, all the way to the federal court of appeals for the Seventh Circuit, before former U.S. Attorney and Chief Judge Bauer and his colleagues on the Court ordered the government to return Mr. Lombardo's money.

Based on the "confidential informant" testimony of Josue Torres, the Chicago Police Department conducted a search of Congress Pizzeria. Torres, a crack addict, had been employed as a truck driver for the restaurant up until a few months before he told his story to the police. He told the police that he regularly fenced stolen property at various places in Chicago in order to feed his crack cocaine habit, and that Congress Pizzeria was one of the places in which he did so.

On this, a warrant was issued to authorize police to search the pizzeria and to seize a camera, a snow blower, a television, and three VCRs, which are items the informant said he had sold to the sons at the restaurant. None of these items were found. During the search, however, the police did "find" and seize three unregistered guns, and \$506,076 in U.S. currency.

The money was in a make-shift safe in the family-owned restaurant-a forty- four gallon barrel located inside either a boarded-up elevator or a dumb-water shaft (the record was somewhat unclear). It was wrapped in plastic bags and consisted of mostly small bills-such as might be expected from transactions by a pizzeria.

The owner's son, Frank Lombardo, was present at the time of the search. He was arrested and charged with possessing unregistered firearms (the guns at the restaurant). At the state court proceeding, the guns case thrown out, because " it was not apparent that the guns were contraband per se" and "the guns were seized prior to the establishment of probable cause to seize them." No other state or federal criminal case was every investigated or charged against the Lombardos or their pizzeria.

The federal government nonetheless moved to seize and forfeit the \$500,000 "found" in the pizzeria, under current civil asset forfeiture drug laws. The government's theory of why this money was forfeitable as "drug money" was this: The owner's son, Frank Lombardo, was said to have been "extremely distraught" and "visibly shaken when he was told that the money was being seized" from his family's restaurant; and, said the government, he had "offered no explanation for the cash horde." (Later, Frank went to the police station to explain that the money belonged to his father, the owner of the pizzeria, who was then in Florida.)

Drug-sniffing dogs were also brought to the police station (not in the pizzeria), to check out the money for the presence of drugs. A narcotics canine named Rambo was instructed to "fetch dope" and he grabbed on bundle of money from the table and ripped the packaging apart. To the amazement of the court of appeals, this behavior apparently indicated to the officers the presence of drugs on the money.

At best, as the Court noted, the dog only identified narcotics on one bundle of the seized currency even though the officers seized 31,392 separate bills in multiple bundles. And, even the government admitted that no one can place much stock in the results of dog sniffs because at least 1/3 of all the currency circulating in the United States, and perhaps as much as 90-96%, is known to be contaminated with cocaine. (Indeed, as the court of appeals noted, even Attorney General Reno's purse was found by a dog sniff to contain such contaminated currency.)

On this non-evidence of any nexus between the money and drugs, the government kept the money of Mr. Lombardo and his family Pizzeria for 4 years- until the 7th Circuit finally ruled that it must be returned, in late 1998. The Court held that the government had in fact failed to establish even the cursory burden that it is supposed to shoulder \*H4857 under current law-the establishment of "probable cause" to seize property in the first place.

None of the supposed "suspicious factors" cited by the government had "any bearing on the probable cause determination. The existence of any sum of money, standing alone, is not enough to establish probable cause to believe the money is forfeitable." Nor, for the reasons discussed above, was the police-station, drug-sniffing dog episode enough for probable cause. And, "putting to one side the fact that the state court suppressed the guns as evidence against Frank Lombardo, <there is> no reason to believe that the presence of handguns should necessarily implicate narcotics activity or that their presence need be seen as anything other than protection in a small business setting."

In conclusion, the Court wrote: "We believe the government's conduct in forfeiture cases leaves much to be desired. We are certainly not the first court 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.'" (Quoting US v. All Assets of Statewide Auto Parts, Inc., 971 F.2d 896, 905 (2d Cir. 1992))

*Source: U.S. v. \$506,231 in U.S. Currency, 125 F. 3d 442 (7th Cir. 1997) (Bauer, J.).*

#### *North Dakota and Daytona Beach, Florida: Customs versus Bob's Space Racers- Who's Amusement?*

In 1997, on a routine business trip, a large number of circus employees of the Bob's Space Racers Company, of Daytona Beach, Florida, were traveling to Canada. Bob's Space Racers, a privately held company, is one of the leading providers of amusement park games. The company also provides entertainment at traveling circuses.

As normal, the employees had been provided with their salary and traveling expenses for the project in cash. Thus, each of the 14 employees had several hundred dollars in his or her pockets when the group attempted to cross the border into Canada from North Dakota.

Customs agents at the North Dakota border seized all their money on the theory that, when the Customs agents aggregated all the money carried by each of the 14 employees, the total came to just over \$10,000-the amount of money triggering the regulations about "declaring" and filing Customs' "cash reporting" forms (Form 4790).

Customs had no basis for "aggregating" the money of the employees. And there was no reason to believe the employees were part of any conspiracy to smuggle money out of the country without filing the appropriate Customs forms. Indeed, the company informed Customs that the money was legitimate traveling expenses.

Into 1998, at least, the company was still trying to get Customs to remit the employee travel expenses seized.

*Source: National Association of Criminal Defense Lawyers (NACDL) Asset Forfeiture Abuse Task Force Co-Chair David B. Smith, Alexandria, Virginia (unreported case)*

#### *Haleyville, Alabama: Doctor, Beware Your Banker?*

In 1996, after many years and much costly litigation, Dr. Richard Lowe of the small northwest Alabama town of Haleyville, was finally returned his wrongfully seized life savings of almost \$3 million, when the 11th Circuit Court of Federal Appeals ordered the government to return it.

Dr. Lowe, MD, is something of a throwback. He's a country doctor in small- town America, who still charged \$5.00 for an office visit in 1997. He drives a used car and lives in a very modest home.

When he was a small child in the Depression, he lost \$4.52 in savings when the local bank failed in his home town in rural Alabama. His parents lost all of their savings when that bank collapsed. Because of that experience, he has always hoarded cash. He'd empty his pockets at night into shoe boxes in a closet at home. Over the years, he had accumulated several boxes of cash in the back of a closet in his home.

In 1988, he consolidated his savings in the First Bank of Roanoke, Alabama- in order to set up a charitable account for a small private K-12 school in his hometown that was about to fail. He transferred all of his life savings into the consolidated account. At the time the government first wrongfully seized his account, in June 1991, Dr. Lowe had given the school over \$900,000, had saved it from collapse, and was still contributing to it.

In the fall of 1990, his wife was urging him to do something about the boxes of money in the closet. The Doctor said OK, you count it and we'll put it in the school's account. It came to \$316,911 in denominations of ones, fives, tens and twenties. Some of the bills were as much as 20 years old. Dr. Lowe took the money to the bank and gave it to the bank president, who was a longtime friend and former neighbor of Dr. Lowe's.

This is the first cash that had ever been placed in the bank account. All the other money had been transferred by check from other banks when CD's matured.

The bank president knew the Doctor was obsessive about anonymity; he did not want to be known as a "rich doctor." So, instead of depositing the money to the account, the bank president just put the money in the bank vault. He gave the Doctor a receipt for the deposit, but he chose to simply put the money in the bank's vault. Then, with some of the money over the next 6 weeks, the bank president went to neighboring banks in the vicinity of Roanoke, and bought \$6,000, \$7,000, and \$8,000 cashier's checks, and then credited it to Dr. Lowe's account.

When some of the other banks thought it was peculiar that the Roanoke bank president was doing this, they made a report to authorities. When FBI agents came to interview the bank president, he told them exactly what he had done and why. He told them that it was his idea and not Dr. Lowe's. And he told them that as he understood the reporting laws, he had done nothing wrong.

Still, the FBI and U.S. Attorney decided to seize Dr. Lowe's account. They did not just seize the \$316,000 in cash deposits. They seized his entire account-his entire life savings of some \$2.5 million, at the time.

The bank president and his son, who was vice president, were both indicted. The bank president later made a deal with the government to plead guilty to structuring/reporting violations, in exchange for the government's dismissal of charges against his son. And, a full two years after the seizure and attempted forfeiture of the Doctor's accounts, during which time all of his money was held by the government, the government decided to indict Dr. Lowe as well, for the alleged reporting transgressions of his banker.

It is, however, not violation of law, and certainly no crime, for a bank to send cash to another domestic financial institution. That is not within the definition of illegal "structuring." In short, there was no offense here, by even the banker, let alone the totally innocent, ignorant bank customer, Dr. Lowe.

Prosecutors kept pursuing their case against the Doctor anyway. With just one more week to go before his trial was to start, the prosecutors balked at taking their shoddy case to a jury. The government, to save face, offer the Doctor a "pretrial diversion" rather than simply dismissing the case, as they should have done. Under the diversion, the Doctor had to agree to stay out of trouble for one year and the case would be dismissed. Of course, the Doctor had no trouble staying out of trouble, as he had never done anything wrong to begin with, or in his entire life.

Still, even then, the U.S. Attorney General's office in Birmingham refused to drop its civil asset forfeiture action against Dr. Lowe's life savings account-clinging to the fact that, under current law, the burden remained on the Doctor to prove his money innocent!

While prosecutors now understood there was no "structuring" violation by anyone, as they had initially asserted they changed their theory to this Alice in Wonderland claim: Dr. Lowe's account was forfeitable under civil asset forfeiture laws because the bank had failed to file with the government the required regulatory reporting form, a Cash Transaction Report (CTR), upon receipt of Dr. Lowe's \$300,000 in currency. At best, this was a violation by the bank, not the customer. Yet, the government deemed this enough to proceed in a civil forfeiture action against the Doctor's life savings-to force him to meet his burden of proof under current law, or else lose his property permanently.

The federal district court judge did rule that there was nothing wrong with the underlying account until the \$300,000 cash deposit. And thus, he held that these monies should be returned to the Doctor. This was 3 years after the government's initial seizure-for 3 years, Dr. Lowe was denied access to any of his life savings.

The federal district court judge erred in ruling for the government on the \$300,000 in currency, "finding" without any evidence that the Doctor "must have exhorted" the bank president (his words) not to file the technical CTR with the government, even though the government itself had never even noticed that a CTR had not been filed when it started its action against Dr. Lowe, the bank president and his son.

Dr. Lowe somehow had the wherewithal to continue his long fight against the government's wrongful taking of his money, and appealed to the 11th Circuit Court of Appeals. Finally, in late 1996, the court of appeals vindicated Dr. Lowe. It reversed the lower court's erroneous ruling, holding that, even under current, distorted civil asset forfeiture law, the Doctor had shown by evidence clear beyond a preponderance that he knew nothing of the banker's actions.

Meanwhile, though, he was without access to any of his seized life savings for 3 years, and without access to \$300,000 of his accounts (which he had donated to the private school) for 6 years. He faced a wrongful indictment and threat of criminal trial. And he endured the financial, physical and emotional devastation of lengthy, costly litigation against a U.S. Attorneys Office blindly pursuing his assets, no matter the shoddy nature of its case.

Perhaps the government thought it could simply sear "the old man" out? The impact of this experience on him was so severe that Dr. Lowe had to be hospitalized at least once for stress and high blood pressure. Very few victims of such governmental abuse would have been able to keep fighting to win, as did the extraordinary Dr. Lowe.

*Source:* Hearing before the U.S. House Judiciary Committee, on H.R. 1835 (105th Congress), June 11, 1997 (Testimony of National Association of Criminal Defense Lawyers (NACDL) Asset Forfeiture Abuse Task Force Co-Chair E.E. Edwards III, Nashville, Tennessee) (unpublished case).

*Kent, Washington: Maya's Restaurant-The Sins of the Brother?*

In 1993, in the Seattle suburb of Kent, Washington, police officers stormed Maya's **\*H4858** Mexican food restaurant in the middle of business hours, ordering customers out of the establishment, and telling the patrons that the restaurant was being forfeited because "the owners were drug dealers." Local newspapers prominently publicized that Maya's restaurant had been closed and seized by the government for "drug dealing."

Exequiel Soltero is the president and sole stockholder in Soltero Corp., the small business owner of the restaurant. The actual allegation was that his brother had sold a few grams of cocaine in the men's restroom of the restaurant at some point.

Exequiel Soltero and the Soltero Corporation Inc. were completely innocent of any wrongdoing and had no knowledge whatsoever of the brother's suspected drug sale inside the restaurant. According to the informant relied upon by the law enforcement officers, the brother had told him that he was part owner of the restaurant. This was not true. It was nothing but puferry from the brother. The officers never made any attempt to check it out. If they had, they would have easily learned that Exequiel Soltero was the sole owner of the Soltero Corp., Inc., and Maya's.

There was no notice or any opportunity for Mr. Soltero to be heard before the well-publicized, business-ruining raid and seizure of his restaurant. Fortunately, Mr. Soltero was able to hire a lawyer to contest the government's seizure and forfeiture action, but not until his restaurant had already been raided and his business had suffered an onslaught of negative media attention about being seized for "drug dealing." Further his restaurant was shut down for 5 days before his lawyer was able to get it re-opened.

Finally, when Mr. Soltero volunteered to take, and passed, a polygraph test conducted by a police polygraph examiner, the case was dismissed. However the reckless raid, seizure and forfeiture quest by the authorities cost him thousands of dollars in lost profits for the several days his restaurant was shut down, as well as significant, lingering damages to his good business reputation. And he suffered the loss of substantial legal fees fighting the seizure of his business.

*Source:* National Association of Criminal Defense Lawyers (NACDL) Asset Forfeiture Abuse Task Force Co-Chair Richard Troberman, Seattle, Washington (unreported case)

**NOTES ON RECENT CASES AND HYDE/CONYERS ASSET FORFEITURE REFORM ACT, H.R. 1658**

Each of the above cases demonstrates the importance of the Hyde/Conyers Asset Forfeiture Reform Act. Several features of the legislation would deter governmental abuse of innocent Americans and legitimate business under the civil asset forfeiture laws.

Placing the burden of proof where it belongs, on the government-to prove its takings of private property are justified, by a clear and convincing standard of evidence-should curb reckless seizures and forfeiture actions like those described above. Now, the government can seize and pursue forfeiture against private property without any regard to its evidence, or lack thereof, without any burden of proof. The burden is borne by the citizen or business, to prove the negative, that the property seized is in fact innocent.

The clarification of a uniform innocent owner defense will also protect businesses and other property owners and stakeholders from wrongful seizures and forfeiture actions, based now on nothing more than a "negligence" theory of civil asset forfeiture liability. The uniform innocent owner provision will protect all innocent owners, no matter which particular federal civil asset forfeiture provision is invoked against their property.

The Hyde/Conyers Asset Forfeiture Reform Act will also place a time-clock on forfeiture actions by the government, akin to the Speedy Trial Act, which protects persons accused of crime. This will prevent the type of post-seizure, foot-dragging in civil forfeiture cases like those above, in which the government can simply wear down and bankrupt innocent individuals and businesses, who cannot withstand the loss of operating assets and lengthy litigation against the government.

The court-appointed counsel provision will ensure a fair fight against the government's forfeiture actions-even for those with less financial resources than the individuals and businesses described above. This is especially important to those the government can otherwise render indigent, and unable to afford counsel, simply by seizing all of their assets.

Mr. Chairman, I reserve the balance of my time.

The CHAIRMAN.

The Committee will rise informally.

The Speaker pro tempore (Mr. BRYANT) assumed the chair.

**145 Cong. Rec. H4854-02, 1999 WL 419756**

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145 Cong.Rec. H4858-02  
1999 WL 419758

Congressional Record -- House of Representatives  
Proceedings and Debates of the 106th Congress, First Session  
Thursday, June 24, 1999

**\*H4858 CIVIL ASSET FORFEITURE REFORM ACT**

The Committee resumed its sitting.

Mr. HYDE.

Mr. Chairman, may I inquire of the Chair how much time I have remaining.

The CHAIRMAN.

The gentleman from Illinois (Mr. HYDE) has 221/2 minutes remaining.

Mr. HYDE.

Mr. Chairman, I am pleased to yield 6 minutes to the distinguished gentleman from Tennessee (Mr. BRYANT).

Mr. BRYANT.

Mr. Chairman, I thank the gentleman from Illinois (Mr. HYDE) for yielding this time to me. It is with great respect that I rise in opposition to the underlying bill and urge my colleagues to support the Hutchinson substitute.

The gentleman from Illinois (Mr. HYDE) and I have been together on many issues, and actually we are not that far apart on this one. The Hyde-Conyers bill, in many ways, has the same provisions that the Hutchinson substitute has, but I think the substitute makes some very important improvements to the bill.

I do not think there is any question that this bill is good. The Hyde-Conyers bill needs to be passed into the law, at least some form of it does. It is time that we have the reform in the area of asset forfeiture that that bill speaks directly to.

It is very important in this country, I think, that we begin to address the due process involved in property rights. Those are very important issues, and I am proud to be a part of this. I just think that the bill, as it is written, while well constructed and well thought out and certainly well intended, needs some fine tuning, if you will, some changes to it, I think, to strike a more reasonable balance.

Before, things were out of balance one way, and I want to be careful, as I urge the adoption of the Hutchinson substitute, that we do not take it too far out of balance the other way.

There are a number of law enforcement, some 19 major law enforcement groups that support the Hutchinson substitute, among those, the Drug Enforcement Administration, the DEA, the Fraternal Order of Police, the National Troopers Association, the National Sheriff's Association, the National Association of Chiefs of Police, and many others.

The reason they support this is because, as we all agree here today, we need to be able to seize the ill-gotten gains of criminals, seize that property, and use that, convert that over and use that to fight more crime. I think that is very important. We agree on that.

Now, I would like to see this go a little further on the other end, and I have asked that report language be put into this bill that there be a little bit more accountability on the use of these funds.

I know in my area back in Western Tennessee, this is a very important issue right now, is what happens to these funds once they get into the hands of law enforcement. I would like to see some very broad community-based, through a

government agency, through the mayor, the county mayor, city mayor, oversight of these funds, with all due respect to the necessity sometimes in police work that they have flexibility and secrecy in using some of these funds. But at least there will be some accountability on the end of where it is used to fight crime as it is supposed to be done.

But in the Hutchinson substitute, we have brought the Hyde-Conyers bill, I think, back to a better balance. Rather than requiring that law enforcement prove by a clear and convincing bit of evidence that this money was ill-gotten and as a result of crime, we use the normal, the customary standard in civil cases, which is what this is, and that is a preponderance of the evidence. I am sure we have people that agree with that.

We also talk about furnishing some lawyers to people for free. Now, in the civil context, that is not typically done in any case. There are hardship cases where it is rarely done, and certainly that would apply here given the circumstances of the particular forfeiture, the amount of money involved, the needs of the people. That can be done. But on a routine required basis that the underlying bill would require, I do not think we need that.

I think that would be very, very expensive and probably result in much more litigation than we really need. \*H4859

Also, the hardship provision is addressed in the Hutchinson amendment, and it refines that language. Certainly there are circumstances where I think the court should have the authority if it creates a hardship and the property can be protected, that that ought to happen; that the person ought to have that property returned pending the trial. But in many cases it has been shown that evidence, money, or whatever might be seized disappears, along with people sometimes. So if we can assure that there is adequate protection there to ensure that this will be there when the trial comes up, that the property will still be there and the property owner will still be there, then certainly if that is a hardship situation, that can be addressed.

So I would respectfully disagree with my colleague from Michigan (Mr. CONYERS) that we are miles apart on this. I think we are very close on many of the issues, and if we can just work through a couple more of these issues and agree to these, which, again, I think the Hyde-Conyers bill is good but can be made better, then I think we would be better served.

Let me clear up one thing, too, that the gentleman from Michigan (Mr. CONYERS) said in terms of the percentages being high of people being caught with money but no drugs. The way the system works in this is when there are couriers, they do not have them both at the same time. They either have the money or they have the drugs, but they do not have them both. They carry the money to point X to get the drugs to bring back to point Y. So we either find drugs on the person or money on the person, depending which way they are going.

So it is not unusual in that context for there to be a seizure of money without finding any drugs on the person, because we are usually dealing with a mule, a courier, somebody whose job it is to go to a drug source city and bring the drugs back and pay for it as they go down. So that is not anything out of the ordinary.

I think this is a very good cause we are working for. I think we are all trying to achieve the same results, and I just simply ask that we go back to the normal standards that we have in a civil case, preponderance of evidence, no appointed counsel, and work closer on the hardship situations to ensure that the money, the evidence, and the defendant will be there at trial.

Mr. CONYERS.

Mr. Chairman, I yield myself 30 seconds.

The problem with the assertions of the gentleman from Tennessee (Mr. BRYANT) that a drug courier is either carrying money or drugs is quite correct. But the problem is, unless they are drug couriers, we could end up with a person with large amounts of money on them that they have to then prove where and how they got the money, which is a little bit out of line. And if they are carrying drugs, that is patently illegal, too, so they will be arrested.

Mr. Chairman, I yield such time as he may consume to the gentleman from Massachusetts (Mr. DELAHUNT), a law enforcement prosecutor of many years and a valued member of the Committee on the Judiciary.

Mr. DELAHUNT.

Mr. Chairman, I thank the gentleman for yielding me this time, and I rise in support of Hyde-Conyers bill and in opposition to the substitute proffered by the gentleman from Arkansas (Mr. HUTCHINSON) and the gentleman from New York (Mr. WEINER).

Mr. Chairman, a few days from now the sun will finally set on the Independent Counsel Act that has come to embody for many Americans all the evils of prosecutorial excess. But the problems illustrated by the Independent Counsel Act are not unique to special prosecutors, nor are they confined to cases involving Presidents and high civil officials.

The potential for abuse and excess is inherent in a system of justice which delegates such enormous power and discretion to every prosecutor. Now, most prosecutors exercise these awesome responsibilities with decency and restraint. But, unfortunately, there are a few who do not, and they bring the entire system of justice into disrepute, and they encourage, by their actions, public cynicism and, unfortunately, erode respect for the rule of law.

Now, the Hyde-Conyers bill recognizes that asset forfeiture is an extraordinarily powerful tool in the hands of a prosecutor, a tool that is so potent, and under current law so easy to apply, that it is also highly prone to abuse. And, in fact, there is a growing litany of cases documenting that abuse occurs. This bill recognizes that the time has come to impose reasonable, and let me underscore reasonable, restraints on this power so as to maintain public confidence in the fundamental fairness and integrity of our criminal justice system that is so essential in a democracy.

And let us be clear. This bill would not hamper the ability of law enforcement to go after the bad folks, the drug kingpins and racketeers who are the proper targets of forfeiture laws. What it would do is to prevent law enforcement officials from abusing these laws to the detriment of ordinary innocent citizens. It would ensure that when prosecutors wrongfully seize, wrongfully seize the property of owners who are innocent of any crime, the owners have the ability to recover their property and make themselves whole.

And make no mistake, we are not talking about a few marginal cases. Some 80 percent of the people whose property is seized are never even charged with a crime. Think of that, Mr. Chairman, 80 percent of those whose property is seized are never even charged with a crime.

Now, let me put forth some examples; like the traveler whose property was seized at the Detroit airport because he was carrying a large amount of cash and simply happened to fit a profile of a drug courier. No arrest, no conviction; or the 33 tenants in a New York apartment building who were evicted by the government because the building had previously been home to a drug ring, which none of the tenants were connected with and had no knowledge of, yet they were evicted; or the hotel owner in Houston whose hotel was seized by Federal agents after patrons were accused of drug trafficking; or how about the 72-year-old woman in Washington, D.C., right here in the Nation's Capital, whose home and personal effects were seized by the FBI because her nephew, her nephew, who was staying in the house overnight, was suspected of selling drugs from the porch. Suspected of selling drugs from her porch. A 72-year-old woman.

The irony is that all of these people would have been entitled to some due process if they had been charged with a crime. If they had been charged criminally, they would have had a shot. But under the civil forfeiture laws, the government can seize the property of innocent owners without even triggering basic minimal due process requirements. That is not, I daresay, what most of us think about when we think of the American system of justice.

Supreme Court Justice Clarence Thomas has likened this situation to, and I am quoting now, "a roulette wheel employed to raise revenue from innocent but hapless owners whose property is unforeseeably misused," rather than a tool for ensuring that justice is done.

In 1997, the Court of Appeals for the 7th Circuit confessed itself 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.

We cannot allow, I submit, such a situation to continue, Mr. Chairman, and I urge my colleagues to support Hyde-Conyers and defeat the substitute.

Mr. HYDE.

Mr. Chairman, I yield 5 minutes to the gentleman from South Carolina (Mr. GRAHAM).

Mr. GRAHAM.

Mr. Chairman, I thank the gentleman for yielding me this time, and I, too, rise in support of the Hyde-Conyers Civil Asset Forfeiture Reform Act of 1999, and I would ask the Members listening to the debate to focus their attention on the title and see if it lives up to its billing: Reform Act. What are we trying to do; and is it an act in need of reform; and do the measures envisioned in this bill create some reform.

I would point the Members' attention to the burden of proof. There is a dramatic change in this bill from existing law, and I believe it justifies the title of reform and is very much a necessary measure in terms of reforming the law.

Imagine this: An individual has a piece of property, an innocent owner. At least they want to claim that status. And that individual winds up facing their government after a seizure **\*H4860** has occurred through a mere probable cause analysis, and they now have to prove by a preponderance of evidence that they are innocent and that the forfeiture should never have

occurred. I think that is appalling. I do not believe in America any citizen should have to go into a court and fight the government and prove that they are innocent in terms of their connection to their property. While it may not be depriving them of a liberty interest, it certainly is depriving them of a property interest.

This bill, quite rightly, corrects that measure, and it does reform the burden of proof because it places upon the government the duty to prove that the assets seized should be taken and denied to the rightful owner by a clear and convincing evidence standard.

The substitute changes the burden, which I think is an acknowledgment that the basic law is very much off base. It is a matter of what standard we would like to place upon the government before people are denied their property. In my opinion, the standard should be more rather than less; that when we are facing the government, they should have a strong burden before they can take our property forever from us. And the clear and convincing evidence standard in civil law, I think, is the appropriate remedy, and the preponderance of evidence standard that the substitute bill has is an inappropriate remedy.

The innocent owner defense. Most of us cannot imagine a situation where we find ourselves before a Federal court, losing our property because of someone else's misdeeds, but it happens every day in this country. As my friend from Massachusetts (Mr. DELAHUNT) indicated, 80 percent of the people affected by this law are never prosecuted. What if an individual owned an asset or were a joint titled owner of a car, and somebody in the family or some friend chooses to engage in criminal activity with that individual's vehicle without their knowledge or without their permission. Under the current law that individual has to go and prove they are innocent before they lose their property.

We have talked about changing the burden. Before an individual's property could be taken under what the gentleman from Illinois (Mr. HYDE) and the gentleman from Michigan (Mr. CONYERS) have done, they have to make a compelling case that that individual was involved, that that individual had knowledge. And what this law does, Mr. Chairman, is it brings uniformity across the board in civil asset forfeiture statutes under the Federal law, bringing uniformity to the innocent owner defense. In civil forfeiture cases involving illegal gambling activities, there is no such innocent owner defense, and I think that is appalling.

So the good thing about this bill, in my opinion, is it brings uniformity and it establishes a standard that makes a lot of common sense; that the government has to prove at the time of the instance in question that an individual did not know of the conduct giving rise to the forfeiture, because if someone does not know of the conduct and was not involved, they should not lose their property because someone intends to violate the law or does violate the law, because that individual has done nothing wrong.

Upon learning of the conduct, if a person does all that is reasonably expected under the circumstances to terminate such use of the property, the law should not allow the taking of a person's property because they acted in a responsible manner.

This bill brings uniformity to the law. It is a haphazard catch-as-you-can series of statutes, and now is the time to correct that as we go into the next century.

An appointment of counsel. This bill I believe remedies a very big problem. A lot of people are subject to losing their assets under this law, and when it comes time to have their day in court and they are an indigent person or without the means to have counsel, for whatever reasons, they are facing the Government alone. That is no place to be when their property is taken from them by the Government.

It is true we normally do not appoint counsels in civil matters because civil matters are usually between two citizens litigating over some property interest. This is different, Mr. Chairman. This is a person fighting the Government for their property. I believe it is only right and fitting that we appoint counsel under those circumstances.

I ask my colleagues to support this measure.

Mr. CONYERS.

Mr. Chairman, I am pleased to yield 3 minutes to my friend, the gentleman from New York (Mr. WEINER.)

Mr. WEINER.

Mr. Chairman, I thank the gentleman for yielding.

Mr. Chairman, I rise in support of the Hutchinson amendment and with deep reservations about the base bill, the Hyde-Conyers bill.

There is a great deal, frankly, that we agree about in this debate. My good friend from Massachusetts read a litany of concerns about the present civil forfeiture dynamic. It is broken. It is broken. I believe that the Hyde effort is one that is laudable and goes a long way towards trying to fix the problem. But there also seems to be emerging in this House a fundamental debate about whether or not we should have civil forfeiture at all. And I would argue that we should, and I would argue that it has been a tool that has been very helpful.

I would argue that law enforcement agencies all around this country have rallied to the cause of trying to preserve civil asset forfeiture because it is vitally necessary to continue the downward trend in crime that we have seen. That is why sheriff's associations around the country have supported the Hutchinson-Weiner-Sweeney substitute. That is why the City of New York and Los Angeles and other places have all supported the idea of making it important that the Government prove its case but just have a reasonable standard.

Now, since we have heard so many horror stories about what is wrong with civil forfeiture, I think it is important that we understand that there are many times where it is used in ways that I think we all agree it is important, like a crack house in the Middle District of Tennessee that over and over again was the subject of criminal activity. The owner of the house was not the person who was doing the criminal activity, but it was allowed to go on there. The children, the spouse, people in the community were selling drugs out of that home. Finally that problem, which was right next to a church, was solved by using this civil asset forfeiture.

There are frequently times that the criminal statutes do not allow us to fully sink our teeth into what some of these problems are. I believe that the main difference between the Hyde-Conyers bill and the Hutchinson-Weiner-Sweeney substitute are the burden of proof that we set. We do not make it a burden of proof that is so difficult that localities who are now making this argument will never be able to use civil asset forfeiture laws again.

We make it a reasonable test. The Government still has to prove its case. They cannot seize their property and keep it wantonly. They are going to have a tough test. We are going to have provisions in the amendment that provide for counsel. But we also make sure that these forfeiture laws remain intact so we can continue to confiscate contraband, drugs, obscene matters, explosives, counterfeit money and seize the instrumentalities of crime, crack houses, handguns, and cash.

We have to recognize that there are times that there is not the direct connection between the person and the criminal activity and the fact that we know with some certitude that that is an instrument of crime.

The Hutchinson-Weiner amendment will allow us to get at the crime problem while dealing with many of the abuses that the gentleman from Illinois (Mr. HYDE) has correctly pointed out.

Mr. HYDE.

Mr. Chairman, I am pleased to yield 5 minutes to the distinguished gentleman from Georgia (Mr. BARR).

Mr. BARR of Georgia.

Mr. Chairman, I thank the distinguished gentleman from Illinois (Mr. HYDE) the chairman of the Committee on the Judiciary not only for his work in bringing this important piece of legislation to the floor today but over the course of many years for his championing the rights of our citizens both on the law enforcement side of the equation as well as on the civilian side. **\*H4861**

The chairman of the Committee on the Judiciary has been a tireless champion in support of our Constitution, all of our Constitution, in this regard.

Mr. Chairman, when we look at asset forfeiture, we have to be struck by the fact that what was originally intended to be an extraordinary remedy to be used in only those most serious of criminal cases has become a commonplace tool of law enforcement. Unfortunately, Mr. Chairman, not only has it become a common tool of law enforcement, but in many jurisdictions, not all, but in far too many it has become the monetary tail wagging the law enforcement dog.

Mr. Chairman, as more and more offenses over the last several years have been added to the predicates on which asset forfeiture seizures and forfeitures can take place, it becomes more and more incumbent on us to take a very close look, a comprehensive look, at exactly where we stand in America with regard to this awesome power the Government has.

It is our responsibility, which we are exercising today under the leadership of the chairman of the Committee on the Judiciary, to bring back into focus this power the Government has that we all believe Government needs to have but to bring it back into proper focus. And that means balancing the important needs of law enforcement to strike at the criminal element where it really hurts, and that is in their pocketbook, but not with a blunderbuss, not to the extent that we also rope into that power the civil rights, the individual rights, the constitutional rights of law-abiding citizens.

Many who are opposed for example, Mr. Chairman, say that the sky will fall if we dare reform asset forfeiture laws. That is not the case. I say that, Mr. Chairman, from the standpoint of both having been a United States Attorney and having exercised in the Northern District of Georgia the tremendous power of asset seizure and forfeiture, but also from the civilian side of the bar.

Let us be perfectly clear, Mr. Chairman. H.R. 1658 does not and will not eviscerate asset forfeiture power. It reforms it. It does not kill it. We need also only to look, Mr. Chairman, to the experiences in recent years of some States which have grappled with the issue of reforming their own asset forfeiture laws to make them more mindful and reflective of individuals' rights to see that despite the naysayers and the Chicken Little sometimes running around saying the sky is going to fall if we dare reform this particular process, that in fact it has not.

I would cite to our colleagues the case of California, which just a few years ago addressed the issue of asset forfeiture reform, changed the process, changed the burdens. Many in law enforcement in California were very concerned that, in fact, those changes to the laws where they shifted the burden and brought a little bit more balance to the process would eviscerate the ability of California law enforcement authorities and prosecutors to truly go after and seize legitimate criminal assets of the criminal element.

In fact, Mr. Chairman, as over the last few years, that reform system in California has worked its way through the system, people have become used to it, the system has brought itself back into balance. Even the prosecutors, one of whom I spoke with just yesterday here in Washington who is currently still with the Attorney General's Office in California, says there has in fact been no precipitous drop-off, as a matter of fact, overall no drop-off in the ability and the amounts of seizures and forfeitures that have, in fact, taken place.

When we look also, for example, Mr. Chairman, at the specifics of this legislation, as the distinguished gentleman from South Carolina (Mr. GRAHAM) just got through talking about, if we look at what this legislation, that is H.R. 1658, does, it is fairness, it is the embodiment of fairness and constitutional due process.

It places the burden where it ought to be, on the Government, to prove by clear and convincing evidence, which is a standard burden that is placed on the Government, in many cases on private parties, in many cases on States in many civil cases, to prove by substantial evidence that the property has in fact been used for the furtherance of criminal activity. It really is hard, Mr. Chairman, to imagine why anybody would object to that.

As a matter of fact, the power of the Government, when they focus on the problem of asset forfeiture honestly in this way, they will recognize that this simply may create just a slight burden, a temporary burden, on law enforcement, but it will force them to pay closer attention to what they are doing.

The gentleman from South Carolina (Mr. GRAHAM) also properly noted several other specific aspects of this legislation that I believe lend itself to strong support for H.R. 1658 and against the substitute proposal, which does not reform the system in any meaningful way.

Mr. Chairman, some who are opposed to civil asset forfeiture reform would have us believe the sky will fall if we dare reform these laws. As someone who has served on both sides of the bar, first as a federal prosecutor, and later as a private attorney, I can tell you this is simply not the case. But don't take my word for it. Let's get to specifics. What exactly does our legislation do? And, what doesn't it do?

First, let's be perfectly clear, H.R. 1658 does not and will not eviscerate asset forfeiture power; it reforms, but it does not kill.

Secondly, it addresses basic procedures, not underlying authority. For example, H.R. 1658 requires the government to prove by clear and convincing evidence that the property being seized has been used in criminal conduct. This goes back to a very basic principle: innocent until proven guilty. We should all be able to agree on that. Otherwise, we end up with justice according to the Queen in Alice in Wonderland, "<s>entence first-verdict afterwards."

Thirdly, our legislation would allow judges to release seized property, pending final adjudication, in order to prevent the property holder from suffering substantial hardship. This would allow judges, for example, to exercise their discretion to prevent a person who has not been convicted for any crime from losing their job because the police have seized the car they use to travel to work.

Again, no sensible person can argue that our legal system will collapse if we trust judges to make this simple judgement call.

Additionally, our legislation eliminates the requirement that an owner file a 10 percent cost bond in order to defend against the seizure of their property. Remember, under current law, if the government simply thinks you're guilty, it can

take your property; and then, in addition, require you to post a bond simply for the privilege of walking into a courtroom and arguing your innocence. To make matters worse, the very fact that your assets have been seized, may very well make it impossible for you to post the bond. This kind of treatment is simply not acceptable in a country that purports to balance individual and property rights against necessary law enforcement powers.

Finally, our reform legislation provides the owners of seized property with a reasonable time period within which to contest the seizure in court. Strict and very limited time limits in current law frequently slam the doors of justice shut before the target of a seizure even has a fair opportunity to pass through them into court.

Those who oppose these common sense changes say the government cannot fight crime unless asset forfeiture laws remain dramatically tilted in its favor. However, as the 65,000 member Law Enforcement Alliance of America—which supports our legislation—knows, effective law enforcement depends ultimately on citizens having confidence in its fairness and honesty. Our current asset forfeiture laws undermine this confidence by treating some citizens unfairly, and sending others a message that our legal system is arbitrary, capricious, and motivated by profit rather than principle.

Unfortunately, the substitute being offered today does not address the fundamental problems inherent in the current system. It does not level the playing field, and it does not improve the access to our legal system by innocent citizens whose property has been seized. The substitute resembles rejected legislation from the last Congress; a proposal that was opposed by groups as diverse as the National Rifle Association and the National Association of Criminal Defense Lawyers.

Few, if any in this House, oppose law enforcement having the necessary and appropriate tools with which to fight crime; I certainly don't. One of these appropriate tools is asset forfeiture; but it must be fair and reasonable asset forfeiture; and it must not be allowed to be abused as some jurisdictions now do.

In fact, our legislation preserves assets forfeiture, placing only very reasonable limits on its use; it restores the balance intended in the original legislation. This was done just a few years ago in California; where, despite **\*H4862** naysayers predicting the collapse of asset forfeitures, state prosecutors and law enforcement in fact adjusted to the new requirements and continued to seize and forfeit assets.

A vote for the Civil Asset Forfeiture Act is a vote for returning to our law the basic principle that each of us is innocent until proven guilty. Remember, this Act in no way restricts the ability of law enforcement to seize the assets of someone who has been convicted of a crime under criminal asset forfeiture laws. It applies only to civil asset forfeiture provisions, which are used to seize property based not on a guilty verdict or plea—that is, proof beyond a reasonable doubt—but on a much, much lower standard.

Simply put, a vote for the substitute amendment is a vote to presume that an individual citizen is a criminal, and that the government can take their car, cash, or home simply because it harbors reasonable suspicious doubt. This is wrong. We all know it is wrong. Let's take this opportunity to change it.

Mr. FRANK of Massachusetts.

Mr. Chairman, I yield 5 1/2 minutes to the gentlewoman from Texas (Ms. JACKSON-LEE).

(Ms. JACKSON-LEE of Texas asked and was given permission to revise and extend her remarks.)

Ms. JACKSON-LEE of Texas.

Mr. Chairman, I thank the distinguished gentleman from Massachusetts for yielding me the time.

Mr. Chairman, I come to this debate with a slightly different perspective, some that the Members may have coming from local government and being in the local government arena when the civil asset forfeiture law was, in fact, passed by this body.

I have worked with a number of law enforcement agencies. I have worked with communities, particularly when many of our inner city communities, many of our rural communities suburban communities were under siege with the bad behavior, the bad actors of drug running, drug activity.

I know neighborhoods in my community where crack took over in some of the older neighborhoods. Many times we would find senior citizens still living amongst houses that had been abandoned or the owner had left, or it was a rental property and the crack dealers or crack possessors, the crack sellers would take over.

So some years ago, as this legislation was passed, it became a godsend for our local law enforcement, our sheriffs, our police departments, our constables to protect our neighborhoods. And at the same time, I remember, as a member of city

council, those well-needed funds used appropriately added extra resources for clean parks and new equipment for our children.

So I would like to at least acknowledge that we have had good uses, good intentions of this legislation. And I would hope that our law enforcement community would recognize, prosecutors included, that we are supportive of their efforts to still be able to use these tools to effectively fight crime.

We do not want the crack dealers, cocaine dealers, any kind of dealers setting up and getting rich over these criminal activities. We do not want to see the elderly dispossessed from their neighborhoods. We do not want to see young families not able to allow their children to be out playing because these activities have been going on. We do not want the fraudulent activities of money laundering to result in the wealth of individuals while others are suffering.

At the same time, I support the strategies of the Hyde-Conyers amendment because I think there have been a number of abuses that, keeping with the Constitution and property rights, we frankly should address. We should not be frightened to balance the needs of law enforcement along with the needs of citizens to protect their property rights.

In particular, I think it is worth noting, as my colleague noted, there is some 80 percent of those who have had their property civilly taken because they are related to or they are thought to be associated with and have been found to be criminally associated with and have never been prosecuted. For that reason, I think we have a problem. This is a huge number, 80 percent.

Who could that be? Spouses, sisters, brothers, relatives of any kind? Who could that be who have lost their property because they have been associated with someone who has done the wrong thing?

I believe that this is a good balance to take law enforcement needs and consideration into account along with those who have suffered and lost property. I would hope that we would have an opportunity, however, Mr. Chairman, to look at some other aspects of concern that I have.

I had a number of amendments. The substitute includes one of them. But I think, regardless of what happens to the substitute, we should have further discussion as to whether or not the clear and convincing evidence standard is the right balance for law enforcement versus the preponderance of evidence.

I think we should also discuss, Mr. Chairman, the issue as to the district court of a claimant reviewing the district court of a claimant for substantial hardship to render decision on that hardship issue within 10 days. I am concerned that we would have a problem there.

Mr. Chairman, I have another one on 10 days with respect to notice and another one with the Attorney General with respect to 30 days to a motion regarding the claimant's cause.

Mr. HYDE.

Mr. Chairman, will the gentlewoman yield?

Ms. JACKSON-LEE of Texas.

I yield to the gentleman from Illinois.

Mr. HYDE.

Mr. Chairman, I think the gentlewoman has raised some very significant issues worthy of study. And I pledge that, should this legislation pass and reach conference, that her concerns will be fully considered and debated and, hopefully, we can do something about them.

Ms. JACKSON-LEE of Texas.

Mr. Chairman, reclaiming my time, I appreciate the fact that we will be engaged in this issue, because it is a balance between property rights and law enforcement.

The one point that I would like to end on, I certainly would like innocent individuals to know early who has their property if it has been seized and I would like to make sure that we bring that time frame down under the 60-day time frame.

Mr. Chairman, I am in support of this bill which calls for civil assets forfeiture reform. Your leadership on this issue is to be commended. This is a good bipartisan bill which now shifts the burden of proof to the government to prove by clear and convincing evidence when seizing property and permits the appointment of counsel for indigent claimants while protecting innocent owners. I believe however in conference we might consider the burden of the government being a preponderance of the evidence.

Unlike criminal forfeiture, civil forfeiture requires no due process before a property owner is required to surrender their property.

Studies suggest that minorities are acutely affected by civil asset forfeitures. As we are well aware by now, racial profiling by the police has alarmingly increased the number of cases of minorities involved in traffic stops, airport searches and drug arrests. These cases afford the government, sometimes justifiably, with the opportunity to seize property. Since 1985, the Justice Department's asset forfeiture fund increased from \$27 million to \$338 million.

Since a deprivation of liberty is not implicated in a civil forfeiture, the government is not bound by the constitutional safeguards of criminal prosecution. The government needs only show probable cause that the property is subject to forfeiture. The burden shifts to property owner to prove that the property is not subject to forfeiture.

The property owner may exhaust his or her financial assets in attorney's fees to fight for the return of property. If the financial burden of attorney's fees is not crushing enough, the owner has to post a bond worth 10 percent of the value of the property, before contesting the forfeiture. Indigent owners are not entitled to legal counsel.

Interestingly enough, persons charged in criminal cases are entitled to a hearing in court and the assistance of counsel. The government need not charge a property owner with a crime when seizing property under civil laws. The result is that an innocent person, or a person not charged with a crime, has fewer rights than the accused criminal. This anomaly must end.

Reform of civil asset forfeiture laws is long overdue. I have several amendments regarding a sooner notice for property owners whose property is seized-I also hope we can present this in conference. My constituents' property rights must be protected.

I urge you to support this bill to ensure that innocent owners are provided some measure of due process before their property is seized.

Mr. FRANK of Massachusetts.

Mr. Chairman, I yield myself such time as I may consume. \*H4863

Mr. Chairman, the substitute seems to me to be based on one premise which I reject, that is, that having the government take your property but calling it civil somehow is different than if the government takes your property and says it is criminal. In either case, you lost the property. In either case, you are stigmatized. In either case, the reason for the loss of the property is that you are considered to have done something wrong.

We have already conceded a great deal, it seems to me, in saying that the government, which must prove beyond a reasonable doubt to fine you criminally, need only meet the lesser standard of clear and convincing evidence to fine you civilly. But to go below that to the preponderance of the evidence is to engage the fiction, indulge the fiction that losing your home because someone did something wrong there, a member of your family, is somehow not as serious a penalty as being fined \$10,000. We acknowledge the value of what you are losing through this procedure could far exceed what you might be hit with a criminal fine. Indeed, there is no proportionality here, so that you might lose much more through this civil procedure than through the criminal procedure. If, in fact, your property is taken, it is probably going to be known, so that the obloquy is there, so the question then is, does the legal fiction of calling this a civil asset forfeiture when it looks, smells, talks, acts and operates like a criminal penalty justify making it easier for the government to take it away from you, because that is what we are talking about.

The government takes something away from you because you did something wrong. Or because somebody else did something wrong and you did not try hard enough to stop it, in the judgment of the government. Why should the government have a lower standard of proof in that situation than in another situation where the penalty might be less? While imprisonment obviously is more, criminal fines could be less than the amount of the civil forfeiture, but we make it easier for the government to do the one than the other for no good reason.

I must say it has been my experience when I meet with people in this regard that when they ask to have this explained, they are incredulous that the government does this.

I also want to say, I am a great supporter of law enforcement. In the substitute that the gentleman from Michigan put forward to the juvenile justice bill, there was a bill that I had cosponsored with some of my Massachusetts colleagues to renew the COPS program and to allow law enforcement to continue to pay cops who were originally federally paid. I want to provide more money for law enforcement, but I want to do that through the rational process of appropriations. The notion that we should give law enforcement differential incentives by saying that if they enforce this law they are direct financial beneficiaries but not if they enforce that law seems to me a terrible idea. We should not put our police officers on a bounty system. We ought to fund them better than we now fund them but through the regular process.

I congratulate the gentleman from Illinois for the hard work he has done in bringing this forward. He has already, I think, been judicious in his compromises, and there is no reason to indulge the continuing legal fiction that suffering the penalty of the loss of your property through a civil asset forfeiture is somehow less damaging to you than losing it through a criminal conviction. In every real way, the impact is the same on the individual, and thus by dealing with a clear and convincing standard, we have already lowered the bar for government. To lower it further as this substitute requires is to lower too low the protections that a citizen ought to enjoy vis-a-vis the government.

I hope that we will proceed to considering defeating the substitute and passing the legislation as proposed by the gentleman from Illinois.

Mr. Chairman, I yield back the balance of my time.

Mr. HYDE.

Mr. Chairman, I yield 2 minutes to the gentleman from Arkansas (Mr. HUTCHINSON).

Mr. HUTCHINSON.

Mr. Chairman, I thank the gentleman for yielding me this time.

Clearly we are all supportive of reform. I think that that has been clear from the debate today. I want to respond to the gentleman from Massachusetts concerning the difference in standard of proof. If a student is sued to collect on a defaulted government loan, the government must prove it by a preponderance of the evidence. But if you go against a drug dealer, it has to be a much higher standard of proof, and I think that is unfair. If the government goes after a doctor or a hospital for overcharging on Medicare, you have a lower standard of proof than if you are going after a drug dealer. I think that is fundamentally unfair. And so I think there is a rational reason for keeping the standard of proof the same.

There have been some complaints about the uses of the forfeiture money. Neither the base bill nor the substitute addresses whether it goes through the appropriation process. That is not addressed in these bills. But we have to acknowledge there have been some very beneficial uses, victims assistance programs, safety equipment for law enforcement officers, helping our local law enforcement communities. This would be severely undermined if we cannot go after the drug dealer's assets.

In East St. Louis, Illinois, \$350,000 was used of federally forfeited money for a water park that assisted a community. And then in regards to the appointment of counsel, I think there are certain instances in which that would be appropriate, but you have to have adequate safeguards.

If you have a car transporting drugs from New York to Florida, there is an arrest made and there is \$60,000 in there, you could have potentially four different people, from the person in New York to the recipient in Florida, to the individuals in the vehicle that would be claiming that money. Would they all be entitled to have appointed counsel? How much is this going to cost the taxpayers? And so I think that we are for reform.

The gentleman from Illinois has done such an extraordinary job with the gentleman from Michigan and others. We are together on this. But I do believe that the substitute offers some improvements that will continue this as a useful tool for law enforcement. And so I think that we need to consider that as we move forward into the debate.

Mr. HYDE.

Mr. Chairman, I yield myself the balance of my time.

The CHAIRMAN.

The gentleman from Illinois is recognized for 41/2 minutes.

(Mr. HYDE asked and was given permission to revise and extend his remarks.)

Mr. HYDE.

Mr. Chairman, I want to thank my friends on both sides of the aisle for the enlightening debate on this issue and I would like to respond briefly to my friend from Arkansas. He keeps saying going after a drug dealer. When did he become a drug dealer? You have filed a probable cause. You have not convicted him of anything. But you have confiscated his property, you have put him out of business, you have put him out of house and home. You persist in calling him a drug dealer, but he has not been convicted of anything. He is innocent until proven guilty, unless we follow the perverse logic of our civil asset forfeiture laws.

Now, we want to give some poor guy who has been wiped out by the government on probable cause a lawyer. You say, "Okay, we'll give you a lawyer, but let the government cross-examine him first, extensively, about anything and everything." My God, then he does not need a lawyer. You have held him up to the light and shaken him. You have cross-examined him. Is that the hurdle he has to mount and surmount to get a lawyer? That is really not so.

The preponderance of evidence is fine in a civil suit and the highest standard is beyond all reasonable doubt. We suggest a middle standard, clear and convincing. Why? Because it is not a civil suit. It is a quasi-criminal suit and it is punishment. The Supreme Court has said when they confiscate your property, that is punishment. And so you ought to meet a little higher standard than preponderance and that is the standard of clear and convincing.

The gentleman's bill, his substitute, expands incrementally, exponentially the field of civil asset forfeiture. That may be a good idea, but not in this bill. This is a reform of the process. This is \*H4864 not a bill to broaden the concept of civil asset forfeiture. I am interested in it. If he wants to prepare a bill and file it, I will give him very good hearings and quick hearings. But this bill is to reform the process and ought not to be diluted or diverted into issues over which we have had no hearings.

Now, all I want to do is give the average citizen who is not a sheriff, who does not have a relative in the city council, I want to give him due process of law. That means the government, King Louis XIV, does not confiscate your property on probable cause. That is all. You prove, Mr. Government, that you ought to have that property, that some crime has been committed and it is connected to the defendant and that is fine. I am all for it. I will open the door for you. But on an affidavit of probable cause to inflict drastic punishment on somebody and make them prove they are not guilty is not, in my humble opinion, the American way.

Mr. Chairman, I yield back the balance of my time.

The CHAIRMAN.

All time for general debate has expired.

The amendment in the nature of a substitute consisting of the bill, modified by the amendments printed in the bill, shall be considered by sections as an original bill for the purpose of amendment and, pursuant to the rule, each section is considered read.

Before consideration of any other amendment, it shall be in order to consider the amendment printed in House Report 106-193 if offered by the gentleman from Illinois (Mr. HYDE) or his designee. That amendment shall be considered read and may amend portions of the bill not yet read for amendment.

No further amendment to the amendment in the nature of a substitute is in order except those printed in the appropriate portion of the CONGRESSIONAL RECORD. Those amendments shall be considered read.

The Chairman of the Committee of the Whole may postpone a request for a recorded vote on any amendment and may reduce to a minimum of 5 minutes the time for voting on any postponed question that immediately follows another vote, provided that the time for voting on the first question shall be a minimum of 15 minutes.

It is now in order to consider the amendment printed in House Report 106- 193.

#### **AMENDMENT OFFERED BY MR. HYDE**

Mr. HYDE.

Mr. Chairman, I offer an amendment made in order by the rule.

The CHAIRMAN.

The Clerk will designate the amendment.

The text of the amendment is as follows:

Amendment offered by Mr. HYDE:

Page 11, strike line 3 and all that follows through line 3 on page 12 and redesignate sections 4, 5, and 6 as sections 3, 4, and 5, respectively.

Page 12, line 17, strike "forfeiture" and insert "forfeiture under any provision of Federal law (other than the Tariff Act of 1930 or the Internal Revenue Code of 1986) providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense".

Page 13, beginning in line 20 strike "under any Act of Congress" and insert "under any provision of Federal law (other than the Tariff Act of 1930 or the Internal Revenue Code of 1986) providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense".

Page 13, line 25, strike "pre-judgment interest" and insert "for pre-judgment interest in a proceeding under any provision of Federal law (other than the Tariff Act of 1930 or the Internal Revenue Code of 1986) providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense".

Page 14, line 17, strike "any intangible benefits" and insert "any intangible benefits in a proceeding under any provision of Federal law (than the Tariff Act of 1930 or the Internal Revenue Code of 1986) providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense".

Mr. HYDE.

Mr. Chairman, it was always the intent to modify the procedures for Federal civil asset forfeitures. This is a purely technical amendment which clarifies in the few cases where the bill may be unclear that we are talking about civil asset forfeiture and not criminal asset forfeiture. I move its adoption.

Mr. FRANK of Massachusetts.

Mr. Chairman, I agree with the gentleman.

The CHAIRMAN.

The question is on the amendment offered by the gentleman from Illinois (Mr. HYDE).

The amendment was agreed to.

The CHAIRMAN.

The Clerk will designate section 1.

The text of section 1 is as follows:

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

## **SECTION 1. SHORT TITLE.**

This Act may be cited as the "Civil Asset Forfeiture Reform Act".

The CHAIRMAN.

Are there any amendments to section 1?

## **AMENDMENT NO. 25 IN THE NATURE OF A SUBSTITUTE OFFERED BY MR. HUTCHINSON**

Mr. HUTCHINSON.

Mr. Chairman, I offer an amendment in the nature of a substitute.

The CHAIRMAN.

The Clerk will designate the amendment in the nature of a substitute.

The text of the amendment in the nature of a substitute is as follows:

Amendment No. 25 in the nature of a substitute offered by Mr. HUTCHINSON:

Strike all after the enacting clause and insert the following:

## **SECTION 1. SHORT TITLE AND TABLE OF CONTENTS.**

**(a) SHORT TITLE.**-This Act may be cited as the "Civil Asset Forfeiture Reform Act".

**(b) TABLE OF CONTENTS.**-The table of contents of this Act is as follows:

Sec. 1. Short title and table of contents.

Sec. 2. Creation of general rules relating to civil forfeiture proceedings.

Sec. 3. Compensation for damage to seized property.

Sec. 4. Prejudgment and postjudgment interest.

Sec. 5. Applicability.

## **SEC. 2. CREATION OF GENERAL RULES RELATING TO CIVIL FORFEITURE PROCEEDINGS.**

(a) IN GENERAL.-Chapter 46 of title 18, United States Code, is amended by inserting the following new section after section 982:

"s983. Civil forfeiture procedures

"(a) ADMINISTRATIVE FORFEITURES.-"(1)(A) In any nonjudicial civil forfeiture proceeding under a civil forfeiture statute, with respect to which the agency conducting a seizure of property must send written notice of the seizure under section 607(a) of the Tariff Act of 1930 (19 U.S.C. 1607(a)), such notice together with information on the applicable procedures shall be sent not later than 60 days after the seizure to each party known to the seizing agency at the time of the seizure to have an ownership or possessory interest, including a lienholder's interest, in the seized article. If a party's identity or interest is not determined until after the seizure but is determined before a declaration of forfeiture is entered, such written notice and information shall be sent to such interested party not later than 60 days after the seizing agency's determination of the identity of the party or the party's interest.

"(B) If the Government does not provide notice of a seizure of property in accordance with subparagraph (A), it shall return the property pending the giving of such notice.

"(2) The Government may apply to a Federal magistrate judge (as defined in the Federal Rules of Criminal Procedure) in any district where venue for a forfeiture action would lie under section 1335(b) of title 28 for an extension of time in which to comply with paragraph (1)(A). Such an extension shall be granted based on a showing of good cause.

"(3) A person with an ownership or possessory interest in the seized article who failed to file a claim within the time period prescribed in subsection (b) may, on motion made not later than 2 years after the date of final publication of notice of seizure of the property, move to set aside a declaration of forfeiture entered pursuant to section 609 of the Tariff Act of 1930 (19 U.S.C. 1609). Such motion shall be granted if-

"(A) the Government failed to take reasonable steps to provide the claimant with notice of the forfeiture; and

"(B) the person otherwise had no actual notice of the seizure within sufficient time to enable the person to file a timely claim under subsection (b).

"(4) If the court grants a motion made under paragraph (3), it shall set aside the declaration of forfeiture as to the moving party's interest pending forfeiture proceedings in accordance with section 602 et seq. of the Tariff Act of 1930 (19 U.S.C. 1602 et seq.), which proceedings shall be instituted within 60 days of the entry of the order granting the motion.

"(5) If, at the time a motion under this subsection is granted, the forfeited property has been disposed of by the Government in accordance with law, the Government shall institute forfeiture proceedings under paragraph (4). The property which will be the subject of the forfeiture proceedings instituted under paragraph (4) shall be a sum of money equal to the value of the forfeited property at the time it was disposed of plus interest.

"(6) The institution of forfeiture proceedings under paragraph (4) shall not be barred by the expiration of the statute of limitations under section 621 of the Tariff Act of 1930 (19 U.S.C. 1621) if the original publication of notice was completed before the expiration of such limitations period.

"(7) A motion made under this subsection shall be the exclusive means of obtaining judicial review of a declaration of forfeiture entered by a seizing agency.\***H4865**

"(b) **FILING A CLAIM.**-

(1) Any person claiming such seized property may file a claim with the appropriate official after the seizure.

"(2) A claim under paragraph (1) may not be filed later than 30 days after-

"(A) the date of final publication of notice of seizure; or

"(B) in the case of a person receiving written notice, the date that such notice is received.

"(3) The claim shall set forth the nature and extent of the claimant's interest in the property.

"(4) Any person may bring a direct claim under subsection (b) without posting bond with respect to the property which is the subject of the claim.

"(c) **FILING A COMPLAINT.**-

(1) In cases where property has been seized or restrained by the Government and a claim has been filed, the Attorney General shall file a complaint for forfeiture in the appropriate court in the manner set forth in the Supplemental Rules for Certain Admiralty and Maritime Claims not later than 90 days after the claim was filed, or return the property pending the filing of a complaint. By mutual agreement between the Government and the claimants, the 90-day filing requirement may be waived.

"(2) The Government may apply to a Federal magistrate judge (as defined in the Federal Rules of Criminal Procedure) in any district where venue for a forfeiture action would lie under section 1335(b) of title 28 for an extension of time in which to comply with paragraph (1). Such an extension shall be granted based on a showing of good cause.

"(3) Upon the filing of a civil complaint, the claimant shall file a claim and answer in accordance with the Supplemental Rules for Certain Admiralty and Maritime Claims.

"(d) **APPOINTMENT OF COUNSEL.**-(1) If the person filing a claim is financially unable to obtain representation by counsel and requests that counsel be appointed, the court may appoint counsel to represent that person with respect to the claim. In determining whether to appoint counsel to represent the person filing the claim, the court shall take into account-

"(A) the nature and value of the property subject to forfeiture, including the hardship to the claimant from the loss of the property seized, compared to the expense of appointing counsel;

"(B) the claimant's standing to contest the forfeiture; and

"(C) whether the claim appears to be made in good faith or to be frivolous.

"(2) The court shall set the compensation for that representation, which shall be the equivalent to that provided for court-appointed representation under section 3006A of this title, and to pay such cost, there are authorized to be appropriated such sums as are necessary as an addition to the funds otherwise appropriated for the appointment of counsel under such section.

"(3) The determination of whether to appoint counsel under this subsection shall be made following a hearing at which the Government shall have an opportunity to present evidence and examine the claimant. The testimony of the claimant at such hearing shall not be admitted in any other proceeding except in accordance with the rules which govern the admissibility of testimony adduced in a hearing on a motion to suppress evidence. Nothing in this paragraph shall be construed to prohibit the admission of any evidence that may be obtained in the course of civil discovery in the forfeiture proceeding or through any other lawful investigative means.

"(e) **BURDEN OF PROOF.**-In all suits or actions brought for the civil forfeiture of any property, the burden of proof at trial is on the United States to establish, by a preponderance of the evidence, that the property is subject to forfeiture. If the

Government proves that the property is subject to forfeiture, the claimant shall have the burden of establishing any affirmative defense by a preponderance of the evidence.

"(f) INNOCENT OWNERS.-(1) An innocent owner's interest in property shall not be forfeited in any civil forfeiture action.

"(2) With respect to a property interest in existence at the time the illegal conduct giving rise to the forfeiture took place, the term 'innocent owner' means an owner who-

"(A) did not know of the conduct giving rise to the forfeiture; or

"(B) upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property.

"(3)(A) With respect to a property interest acquired after the conduct giving rise to the forfeiture has taken place, the term 'innocent owner' means a person who, at the time that person acquired the interest in the property, was a bona fide purchaser for value and was at the time of the purchase reasonably without cause to believe that the property was subject to forfeiture.

"(B) Except as provided in paragraph (4), where the property subject to forfeiture is real property, and the claimant uses the property as his or her primary residence and is the spouse or minor child of the person who committed the offense giving rise to the forfeiture, an otherwise valid innocent owner claim shall not be denied on the ground that the claimant acquired the interest in the property-

"(i) in the case of a spouse, through dissolution of marriage or by operation of law, or

"(ii) in the case of a minor child, as an inheritance upon the death of a parent, and not through a purchase. However, the claimant must establish, in accordance with subparagraph (A), that at the time of the acquisition of the property interest, the claimant was reasonably without cause to believe that the property was subject to forfeiture, and was an owner of the property, as defined in paragraph (6).

"(4) Notwithstanding any provision of this section, no person may assert an ownership interest under this section-

"(A) in contraband or other property that it is illegal to possess; or

"(B) in the illegal proceeds of a criminal act unless such person was a bona fide purchaser for value who was reasonably without cause to believe that the property was subject to forfeiture.

"(5) For the purposes of paragraph (2) of this subsection a person does all that reasonably can be expected if the person takes all steps that a reasonable person would take in the circumstances to prevent or terminate the illegal use of the person's property. There is a rebuttable presumption that a property owner took all the steps that a reasonable person would take if the property owner-

"(A) gave timely notice to an appropriate law enforcement agency of information that led to the claimant to know the conduct giving rise to a forfeiture would occur or has occurred; and

"(B) in a timely fashion, revoked permission for those engaging in such conduct to use the property or took reasonable steps in consultation with a law enforcement agency to discourage or prevent the illegal use of the property.

The person is not required to take extraordinary steps that the person reasonably believes would be likely to subject the person to physical danger.

"(6) As used in this subsection-

"(A) the term 'civil forfeiture statute' means any provision of Federal law (other than the Tariff Act of 1930 or the Internal Revenue Code of 1986) providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense.

"(B) the term 'owner' means a person with an ownership interest in the specific property sought to be forfeited, including a lien, mortgage, recorded security device, or valid assignment of an ownership interest. Such term does not include-

"(i) a person with only a general unsecured interest in, or claim against, the property or estate of another;

"(ii) a bailee unless the bailor is identified and the bailee shows a colorable legitimate interest in the property seized; or

"(iii) a nominee who exercises no dominion or control over the property;

"(C) a person shall be considered to have known that the person's property was being used or was likely to be used in the commission of an illegal act if the person was willfully blind.

"(7) If the court determines, in accordance with this subsection, 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-

"(A) severing the property;

"(B) 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

"(C) 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, that will permit the Government to realize its forfeitable interest if the property is transferred to another person.

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.

"(8) An innocent owner defense under this subsection is an affirmative defense.

"(g) MOTION TO SUPPRESS SEIZED EVIDENCE.-At any time after a claim and answer are filed in a judicial forfeiture proceeding, a claimant with standing to contest the seizure of the property may move to suppress the fruits of the seizure in accordance with the normal rules regarding the suppression of illegally seized evidence. If the claimant prevails on such motion, the fruits of the seizure shall not be admitted into evidence as to that claimant at the forfeiture trial. However, a finding that evidence 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 in which the governing standard is probable cause, the court may accept and consider hearsay otherwise inadmissible under the Federal Rules of Evidence.

"(i) 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.

"(j) 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-\***H4866**

"(1) enter any restraining order or injunction in the manner set forth in section 413(e) 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.

"(k) EXCESSIVE FINES.-**(1)** At the conclusion of the trial and following the entry of a verdict of forfeiture, or upon the entry of summary judgment for the Government as to the forfeitability of the property, 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.

"(2) The claimant may not object to the forfeiture on Eighth Amendment grounds other than as set forth in paragraph (1), except that a claimant may, at any time, file a motion for summary judgment asserting that even if the property is subject to forfeiture, the forfeiture would be excessive. The court shall rule on such motion for summary judgment only after the Government has had an opportunity-

"(A) to conduct full discovery on the Eighth Amendment issue; and

"(B) to place such evidence as may be relevant to the excessive fines determination before the court in affidavits or at an evidentiary hearing.

"(l) PRE-DISCOVERY STANDARD.-In a judicial proceeding on the forfeiture of property, the Government shall not be required to establish the forfeitability of the property before the completion of discovery pursuant to the Federal Rules of Civil Procedure, particularly Rule 56(f) as may be ordered by the court or if no discovery is ordered before trial.

"(m) APPLICABILITY.-The procedures set forth in this section apply to any civil forfeiture action brought under any provision of this title, the Controlled Substances Act, or the Immigration and Naturalization Act.".

(b) RELEASE OF PROPERTY.-Chapter 46 of title 18, United States Code, is amended to add the following section after section 984:

"s985. Release of property to avoid hardship

"(a) A person who has filed a claim under section 983 is entitled to release pursuant to subsection (b) of seized property pending trial if-

"(1) the claimant has a possessory interest in the property sufficient to establish standing to contest forfeiture and has filed a nonfrivolous claim on the merits of the forfeiture action;

"(2) the claimant has sufficient ties to the community to provide assurance that the property will be available at the time of the trial;

"(3) the continued possession by the United States Government pending the final disposition of forfeiture proceedings will cause substantial hardship to the claimant, such as preventing the claimant from working, leaving the claimant homeless, or preventing the functioning of a business;

"(4) the claimant's hardship outweighs the risk that the property will be destroyed, damaged, lost, concealed, diminished in value or transferred if it is returned to the claimant during the pendency of the proceeding; and

"(5) none of the conditions set forth in subsection (c) applies;

"(b)(1) The claimant may make a request for the release of property under this subsection at any time after the claim is filed. If, at the time the request is made, the seizing agency has not yet referred the claim to a United States Attorney pursuant to section 608 of the Tariff Act of 1930 (19 U.S.C. 1608), the request may be filed with the seizing agency; otherwise the request must be filed with the United States Attorney to whom the claim was referred. In either case, the request must set forth the basis on which the requirements of subsection (a)(1) are met.

"(2) If the seizing agency, or the United States Attorney, as the case may be, denies the request or fails to act on the request within 20 days, the claimant may file the request as a motion for the return of seized property in the district court for the district represented by the United States Attorney to whom the claim was referred, or if the claim has not yet been referred, in the district court that issued the seizure warrant for the property, or if no warrant was issued, in any district court that would have jurisdiction to consider a motion for the return of seized property under Rule 41(e), Federal Rules of Criminal Procedure. The motion must set forth the basis on which the requirements of subsection (a) have been met and the steps the claimant has taken to secure the release of the property from the appropriate official.

"(3) The district court must act on a motion made pursuant to this subsection within 30 days or as soon thereafter as practicable, and must grant the motion if the claimant establishes that the requirements of subsection (a) have been met. If the court grants the motion, the court must enter any order necessary to ensure that the value of the property is maintained while the forfeiture action is pending, including permitting the inspection, photographing and inventory of the property, and the court may take action in accordance with Rule E of the Supplemental Rules for Certain Admiralty and Maritime Cases.

The Government is authorized to place a lien against the property or to file a lis pendens to ensure that it is not transferred to another person.

"(4) If property returned to the claimant under this section is lost, stolen, or diminished in value, any insurance proceeds shall be paid to the United States and such proceeds shall be subject to forfeiture in place of the property originally seized.

"(c) This section shall not apply if the seized property-

"(1) is contraband, currency or other monetary instrument, or electronic funds unless such currency or other monetary instrument or electronic funds constitutes the assets of a business which has been seized,

"(2) is evidence of a violation of the law,

"(3) by reason of design or other characteristic, is particularly suited for use in illegal activities; or

"(4) is likely to be used to commit additional criminal acts if returned to the claimant."

"(d) Once a motion for the release of property under this section is filed, the person filing the motion may request that the motion be transferred to another district where venue for the forfeiture action would lie under section 1355(b) of title 28 pursuant to the change of venue provisions in section 1404 of title 28."

(c) **CHAPTER ANALYSIS.**-The chapter analysis for chapter 46 of title 18, United States Code, is amended-

(1) by inserting after the item relating to section 982 the following:

"983. Civil forfeiture procedures"; and

(2) by inserting after the item relating to section 984 the following:

"985. Release of property to avoid hardship".

(f) **CIVIL FORFEITURE OF PROCEEDS.**-Section 981(a)(1) of title 18, United States Code, is amended-

(1) in subparagraph (C) by inserting before the period the following: "or any offense constituting 'specified unlawful activity' as defined in section 1956(c)(7) of this title or a conspiracy to commit such offense"; and

(2) by striking subparagraph (E).

(d) **UNIFORM DEFINITION OF PROCEEDS.**-Section 981(a) of title 18, United States Code, as amended by subsection (c), is amended-

(A) in paragraph (1), by striking "gross receipts" and "gross proceeds" wherever those terms appear and inserting "proceeds"; and

(B) by adding the following after paragraph (1):

"(2) For purposes of paragraph (1), the term 'proceeds' means property of any kind obtained, directly or indirectly, as the result of the commission of the offense giving rise to forfeiture, and any property traceable thereto, and is not limited to the net gain or profit realized from the commission of the offense. In a case involving the forfeiture of proceeds of a fraud or false claim under paragraph (1)(C) involving billing for goods or services part of which are legitimate and part of which are not legitimate, the court shall allow the claimant a deduction from the forfeiture for the amount obtained in exchange for the legitimate goods or services. In a case involving goods or services provided by a health care provider, such goods or services are not 'legitimate' if they were unnecessary.

"(3) For purposes of the provisions of subparagraphs (B) through (H) of paragraph (1) which provide for the forfeiture of proceeds of an offense or property traceable thereto, where the proceeds have been commingled with or invested in real or personal property, only the portion of such property derived from the proceeds shall be regarded as property traceable to the forfeitable proceeds. Where the proceeds of the offense have been invested in real or personal property that has appreciated in value, whether the relationship of the property to the proceeds is too attenuated to support the forfeiture of such property shall be determined in accordance with the excessive fines clause of the Eighth Amendment."

**SEC. 3. COMPENSATION FOR DAMAGE TO SEIZED PROPERTY**

(a) TORT CLAIMS ACT .-Section 2680(c) of title 28, United States Code, is amended-

(1) by striking "law-enforcement" and inserting "law enforcement"; and

(2) by inserting before the period the following: ", except that the provisions of this chapter and section 1346(b) of this title do apply to any claim based on the destruction, injury, or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if the property was seized for the purpose of forfeiture under any provision of Federal law (other than the Tariff Act of 1930 or the Internal Revenue Code of 1986) providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense but the interest of the claimant is not forfeited.

(b) DEPARTMENT OF JUSTICE.-

(1) IN GENERAL.-With respect to a claim that cannot be settled under chapter 171 of title 28, United States Code, the Attorney General may settle, for not more than \$50,000 in any case, a claim for damage to, or loss of, \*H4867 privately owned property caused by an investigative or law enforcement officer (as defined in section 2680(h) of title 28, United States Code) who is employed by the Department of Justice acting within the scope of his or her employment.

(2) LIMITATIONS.-The Attorney General may not pay a claim under paragraph (1) that-

(A) is presented to the Attorney General more than 1 year after it occurs; or

(B) is presented by an officer or employee of the United States Government and arose within the scope of employment.

**SEC. 4. PREJUDGMENT AND POSTJUDGMENT INTEREST.**

Section 2465 of title 28, United States Code, is amended-

(1) by inserting "(a)" before "Upon"; and

(2) adding at the end the following:

"(b) INTEREST.-

"(1) POST-JUDGMENT.-Upon entry of judgment for the claimant in any proceeding to condemn or forfeit property seized or arrested under any provision of Federal law (other than the Tariff Act of 1930 or the Internal Revenue Code of 1986) providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense, the United States shall be liable for post-judgment interest as set forth in section 1961 of this title.

"(2) PRE-JUDGMENT.-The United States shall not be liable for prejudgment interest in a proceeding under any provision of Federal law (other than the Tariff Act of 1930 or the Internal Revenue Code of 1986) providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense, except that in cases involving currency, other negotiable instruments, or the proceeds of an interlocutory sale, the United States shall disgorge to the claimant any funds representing-

"(A) 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; and

"(B) for any period during which no interest is actually paid, an imputed amount of interest that such currency, instruments, or proceeds would have earned at the rate described in section 1961.

"(3) LIMITATION ON OTHER PAYMENTS.-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.".

**SEC. 5. APPLICABILITY.**

Unless otherwise specified in this Act, the amendments made by this Act apply with respect to claims, suits, and actions filed on or after the date of the enactment of this Act.

Mr. HUTCHINSON.

Mr. Chairman, it was Ronald Reagan who understood how to fight and win the war on drugs. It was President Reagan who knew that you had to seize the drug dealers' cars, boats, airplanes and cash that were used to carry on the drug business in order to hit them where it hurts.

Asset forfeiture has proven without any doubt to be an effective weapon in the war on drugs. This is not the time to disarm our soldiers and to demoralize our police on the front line and it is certainly not the right time to send the signal to the drug dealers that we are weakening our resolve.

For that reason, I, along with the gentleman from New York (Mr. WEINER) and the gentleman from New York (Mr. SWEENEY) have offered a substitute to H.R. 1658 which would accomplish the reform that the gentleman from Illinois has worked so valiantly for but at the same time our substitute will not cripple our drug enforcement agents who put their lives on the line every day.

I agree that no innocent citizen should have to prove his or her innocence to the government in order to protect their property from government seizure. It should not be probable cause as the gentleman from Illinois pointed out. This substitute includes the identical provisions in the base bill on shifting the burden of proof to the government, eliminating the necessity of a cost bond, providing a means to recovery for citizens who have their property damaged, and it pays interest on assets returned. We can all be for protection of our citizens and for reform while also going after the drug dealers. And so there are some corrections in the substitute that provides balance to this legislation.

For example, the drug trafficker who unloads shiploads of cocaine upon our Nation's youth should not be afforded more protection than a student who defaults on his loan. The government has to prove the case by a preponderance against the student, but there is a higher standard when going after the assets of drug dealers by clear and convincing evidence.

Now, as pointed out, that we do not know they are a drug dealer. Eighty percent of the cases there is an arrest or a charge against the individual. But in some instances we will have assets abandoned by people who are clearly engaging in drug trafficking, but they will go across the border. We will have someone who is not prosecutable because we do not have good extradition laws, and so we can still seize their assets under those circumstances. This makes sense, and the substitute corrects the problem.

Now, if there was a medal of honor to be given to someone in the war on drugs, it would be to Tom Constantine, the DEA Administrator. Listen to what he has to say:

Drug trafficking is not a crime of passion, but one of greed. The DEA and the law enforcement community know that to dissolve a drug trafficking organization we must eliminate the financial base and profit. The enactment of H.R. 1658 would severely limit DEA's ability to use its effective law enforcement tool.

He goes on to say that the broad brush of H.R. 1658 would destroy or severely limit the ability of law enforcement to attack drug traffickers and other criminal elements.

This is the DEA Administrator.

I think we have to be consistent here in this Congress. How does disarming law enforcement fit into the war on drugs? We push other countries to adopt laws that allow seizure of assets; we push them to do that, and then we back off from our own commitment to take drug dealers' assets. We form a Speaker's Task Force for a Drug-free America. We want to de-certify Mexico. We get upset about the lack of commitment from other countries. Then we throw up our hands and say that we want to overreact and back off from our support of law enforcement.

We need to ask ourselves how can we weaken the forfeiture laws to such an extent that we discourage law enforcement. We are telling them that we do not have the resolve. We are telling the DEA that we are not going to help them. We cannot demoralize the courageous law enforcement men and women who are trying to save the lives of our teenagers and the next generation.

The bill of the gentleman from Illinois (Mr. HYDE) does extraordinary good to what we are trying to accomplish in making sure citizens are protected, but the reasonable Hutchinson-Weiner-Sweeney amendment makes it a balance so that we do not hamper the legitimate efforts of law enforcement.

So I would ask my colleagues to support this substitute that is offered that would bring reason to the appointment of attorneys, that would make sure that it is not simply retroactive in application, it does not affect pending cases, as the base bill does. Our bill would say it would apply after the date of enactment. It is much a more commonsense approach to the enactment of a bill. Whenever it comes to the hardship cases, we make it clear that there is a difference between the cash

and those things that are used for drug crimes during the pendency of an action versus otherwise, and so I ask my colleagues to support this reasonable substitute.

Mr. WEINER.

Mr. Chairman, I rise in support of the Hutchinson amendment.

Mr. Chairman, the gentleman from Arkansas (Mr. HUTCHINSON) has outlined for us in great detail how we are simply seeking to make the civil asset forfeiture law, make it a little bit more fair and to make it so it can be used by law enforcement authorities. But there has been some argument here about whether or not we should have civil asset forfeiture at all, and I would like to spend a moment or two just reviewing some of the circumstances that perhaps my colleagues have not considered where civil asset forfeiture is the only way to really get at the root of crime, and it is the reason why we have had such great results against crime in many localities around the country.

First of all, criminal forfeiture, which is something that my colleague from Massachusetts has argued in support of, and frankly I believe we all believe that criminal forfeiture where it is written into the law is the most important tool that should be used against a criminal is useless if the criminal is either dead or fugitive from the law. If someone leaves the scene of a crime, if we are in pursuit of them and they leave behind a sack of money and drugs, under the argument that has been made here we would not be able to seize that unless, of course, we **\*H4868** are able to reach a much higher standard than presently exists.

Secondly, criminal forfeiture is limited to the property of the defendant, and just as I said earlier, there are very frequently times, especially in the locality that I am from in New York City where we have homes, where we have apartments, where we have houses that are used for illegal activity and sometimes even used for illegal activity with the knowledge of the occupant. But since the occupant or the owner is not the person that does that criminal activity, civil asset forfeiture is frequently the only way that we can get it. If an airplane that is used for drug smuggling, for example, belongs to the wife of the defendant or belongs to a corporation or to his partner, this is a way that we can get at that article of crime.

Also, civil forfeiture is the only way to seize drug money that is carried by a courier when there is no way to know exactly which drug dealer it belongs to. Eighty-five percent of such civil forfeiture cases are uncontested. Without civil forfeiture this money would have to be released to the courier.

Again civil forfeiture is the only way to shut down a crack house or a property. Civil forfeiture is needed when we do not, we are not, when we are seizing something under federal law when the crime has happened under State law.

Mr. FRANK of Massachusetts.

Mr. Chairman, will the gentleman yield?

Mr. WEINER.

I yield to the gentleman from Massachusetts.

Mr. FRANK of Massachusetts.

He said, and I thank the gentleman for yielding; he said that some of the 85 percent of them were uncontested. Is the gentleman telling us that one could not meet the standard of clear and convincing in an uncontested case?

Mr. WEINER.

If I can reclaim my time, what I am arguing to the gentleman from Massachusetts is that there are some people who have looked on and listened to the debate and said why is it that we should have civil forfeiture statutes at all? Why is it necessary that they exist in the law?

The gentleman from Illinois, the distinguished chairman, raised a very interesting question about whether it is indeed an un-American thing to do, and what I am trying to do is lay out the ways in the real world law enforcement authorities all across this country who from A to Z have lined up in favor of the Hutchinson-Weiner-Sweeney amendment are using it.

Mr. FRANK of Massachusetts.

Mr. Chairman, will the gentleman yield again?

Mr. WEINER.

I yield to the gentleman from Massachusetts.

Mr. FRANK of Massachusetts.

I understand, but the amendment is to a bill which leaves civil forfeiture in place, and the gentleman just cited as an argument for the amendment, presumably, that many, many of these are uncontested.

Now the underlying bill says they just have to meet the clear and convincing standard, and I am arguing that in an uncontested case one does not have to be a crack lawyer to meet the standard of clear and convincing, so that is an irrelevancy on the question of the amendment versus the underlying bill.

Mr. WEINER.

As I reclaim my time, I guess I understand from that question and that argument that the gentleman from Massachusetts supports civil forfeiture in those cases.

Mr. FRANK of Massachusetts.

If the gentleman would yield, I congratulate the gentleman on getting me to acknowledge what has been my policy for years and what is the Chairman's policy. The gentleman is flailing away at a straw man. I do not see anything on here that totally abolishes civil forfeiture anywhere.

Mr. WEINER.

In fact, I would say to the gentleman from Massachusetts, the straw man here is the argument that these abuses represent the true state of civil forfeiture law in this country. In fact, these things that I am listing are how indeed law enforcement authorities every day are using the civil forfeiture statute. The abuses that exist, and they do, they represent the straw man in this debate because indeed we all want to do away with the abuses.

The question becomes do we then say by doing away with these abuses do we obviate all civil forfeiture statutes? The gentleman from Illinois, the very distinguished chairman, argued on the well of this House that it was un-American in some way, and all I am trying to delineate for the American people and for the folks in this Chamber; the fundamental argument has emerged: Should we have civil forfeiture, and I believe we should.

Mr. HYDE.

Mr. Chairman, I move to strike the last word.

As my colleagues know, we have a lot of fevered debate around here by well-meaning people, and that is fine, that is what this place is all about. So I just want to say a few things about the amendment offered by my good friend, the gentleman from Arkansas (Mr. HUTCHINSON), the gentleman from New York (Mr. SWEENEY), and the gentleman from New York (Mr. WEINER). It is so unfair, it is unfair.

Mr. Chairman, I will tell my colleagues why it is unfair. The bill, the underlying bill, guarantees a property owner is considered an innocent owner and receives protection from forfeiture if he or she notifies the police of the unauthorized illegal use of his or her property by others and revokes their permission to use the property. That is the innocent owner defense. Is that fair? Well, I think it is, but it is not in their bill. They do not permit an innocent owner who has gone to the police and said, "Some of my tenants are selling dope, and I have tried to evict them, and they threw a knife at me." Well, he loses his building because they do not have an innocent owner defense in their substitute.

Now, they do not protect innocent heirs. Somebody inherits something, and 10 years ago it was used in a crime, he does not know about it, totally innocent; he loses his property. I know the police like that; they like those assets. I understand that. The substitute does not require the government to establish the forfeitability of the property before completion of discovery. As the gentleman from Michigan (Mr. CONYERS) said, seize now and prove later. That is a wonderful idea; that is very fair.

The substitute dramatically expands the field of civil asset forfeiture; no hearings on that at all. It weakens almost all of our reforms. The burden of proof belongs with the government when they are punishing someone, and this is punishment. It has been held to be punishment, quasi criminal, and therefore their standard ought to be, ought to be, clear and convincing.

Now, Mr. Constantine had an interesting quote there, and I have nothing but admiration for people who are fighting the drug battle, but I did not hear a peep out of those people while all of these abuses were going on, while people had their property confiscated on probable cause. I would think more of their essential fairness had they brought this to our attention and not some newspaper man.

Mr. WEINER.

Mr. Chairman, will the gentleman yield?

Mr. HYDE.

I yield to the gentleman from New York.

Mr. WEINER.

Mr. Chairman, first of all just a point of correction on a couple of points.

We do indeed have an innocent owner defense in the Sweeney-Hutchinson-Weiner substitute, and as to the point that there were not hearings on the bill, this virtually identical bill passed by 26 to 1 last year in the Committee on the Judiciary of this House.

Mr. HYDE.

Mr. Chairman, I did not hear the gentleman.

Mr. WEINER.

Our substitute passed 26 to 1 last year in the Committee on the Judiciary of this House.

Mr. HYDE.

Last year I tried to compromise with the Justice Department. I bent over backwards trying to accommodate everybody, and the more their bill grew and was distorted into areas where I did not want it to go, I lost support, and finally I had a nice shell of nothing. So I decided to get pure and go back to the original bill, and that is what we are doing.

Mr. WEINER.

I just want a clarification on the notion that there was no hearings because indeed there were.

Mr. HYDE.

There were no hearings on the burden of proof and things like that, and the gentleman from New York was not here.

Mrs. MEEK of Florida.

Mr. Chairman, I move to strike the requisite number of words.

Mr. Chairman, I have an amendment at the desk.

The CHAIRMAN.

The gentlewoman's amendment can be considered during a later section in the bill.

Mrs. MEEK of Florida.

That is true, but I amended both of them. I amended \*H4869 this particular bill as well as the later bill.

## PARLIAMENTARY INQUIRY

Mr. FRANK of Massachusetts.

Parliamentary inquiry, Mr. Chairman.

The CHAIRMAN.

The gentleman will state his parliamentary inquiry.

Mr. FRANK of Massachusetts.

Mr. Chairman, if there were to be unanimous consent for it to be offered now since it might not get too far along, would that be in order, to ask for unanimous consent that the gentlewoman be allowed to offer it now?

The CHAIRMAN.

Does the gentlewoman from Florida have an amendment to this amendment?

Mrs. MEEK of Florida.

Yes, I do.

The CHAIRMAN.

Would she present it to the Clerk?

Mrs. MEEK of Florida.

Yes, it has been presented, and it is preprinted in the CONGRESSIONAL RECORD.

**AMENDMENT OFFERED BY MRS. MEEK OF FLORIDA TO THE AMENDMENT IN THE NATURE OF A SUBSTITUTE OFFERED BY MR. HUTCHINSON**

Mrs. MEEK of Florida.

Mr. Chairman, I offer an amendment to the amendment in the nature of a substitute.

The Clerk read as follows:

Amendment offered by Mrs. MEEK of Florida to the amendment in the nature of a substitute offered by Mr. HUTCHINSON:

At the end add the following:

**SEC. 5. FORFEITURE FOR ALIEN SMUGGLING.**

Section 981(a)(1) of title 18, United States Code, is amended by adding at the end the following:

"(l)(1) Any conveyance, including any vessel, vehicle, or aircraft which has been used or is being used in commission of a violation of section 274(a) of the Immigration and Nationality Act (8 U.S.C. 1324(a)); and

"(2) Any property, real or personal that-

"(A) constitutes, is derived from, or is traceable to the proceeds obtained, directly or indirectly, from the commission of a violation of section 274(a) of the Immigration and Nationality Act (8 U.S.C. 1324(a)); or

"(B) is used to facilitate, or is intended to be used to facilitate, the commission of a violation of such section.

Mrs. MEEK of Florida (during the reading).

Mr. Chairman, I ask unanimous consent that the amendment be considered as read and printed in the RECORD.

The CHAIRMAN.

Is there objection to the request of the gentlewoman from Florida?

There was no objection.

Mrs. MEEK of Florida.

Mr. Chairman, my amendment addresses the pernicious practice of alien smuggling which is so often experienced in my area of south Florida. It is a huge problem there, especially those who bring passengers in from Haiti and Cuba to south Florida, frequently on unsafe and rickety boats, and many times under dangerous conditions, and many times with the loss of life.

For example, in March of this year, Mr. Chairman, an alien smuggler's boat sank off the coast of West Palm Beach, Florida, and depending upon whether or not the Coast Guard or press reports of this horrendous tragedy, whether those reports are correct, there were some 15 to 40 Haitian passengers who drowned because of that illegal smuggling act of bringing these poor and disadvantaged people from Haiti.

These heartless and inhumane alien smugglers are really parasites. They are making huge sums of money from these poor people who are fleeing from very bad conditions in their own countries. They seek to come to this country by any means because of their desperate condition, and they become easy prey for the smugglers, and they want to come to the United States.

We must provide law enforcement with some available remedies to assure that the smugglers cannot continue to exploit vulnerable communities such as the Haitians and the Cubans. Unfortunately, the existing civil asset forfeiture provisions for alien smuggling, they are far more limited than those available to address drug offenses, and there is a considerable need here for stronger, stricter regulations on these alien smugglers.

Current law authorizes the forfeiture of vehicles, vessels, and aircraft used to commit alien smuggling offenses. This has proven to be a very good law enforcement tool that the INS uses more than 12,000 times a year. But the law itself has some very glaring loopholes. We know that there are other types of property other than vessels and vehicles and aircraft that will facilitate the kind of illegal stuff that the smugglers are doing. But this type of property right now is not subject to civil asset forfeiture.

To give just one example of that, alien smugglers use electronic gear to monitor law enforcement activity directed against alien smuggling. The smugglers also use very large and well-equipped warehouses where vehicles, vessels and even human beings, many times, are stashed to avoid detection by the Coast Guard or the Border Patrol. Yet these other types of property currently are not subject to civil asset forfeiture.

Suffice it to say, Mr. Chairman, that there is an arena where current laws do not cover what is going on with these people who are dealing in human cargo. So my amendment seeks to correct these deficiencies by expanding the scope of permissible civil asset forfeiture in alien smuggling.

Law enforcement should have the ability to reach any property that is owned by the smugglers. Right now they do not. There is no logical reason why they cannot.

I thank the distinguished chairman, and I thank the people who are offering this substitute amendment, Mr. Chairman, for expressing their willingness to address this major problem that I have brought up between now and conference.

Mr. Chairman, based upon their statements and upon my understanding of what they have said, that they will address this later, I ask unanimous consent to withdraw my amendment.

The CHAIRMAN.

Is there objection to the request of the gentlewoman from Florida?

There was no objection.

Mr. GILMAN.

Mr. Chairman, I move to strike the requisite number of words.

(Mr. GILMAN asked and was given permission to revise and extend his remarks.)

Mr. GILMAN.

Mr. Chairman, I rise in support of the substitute presently before us, and I urge my colleagues to support it as well. It is a carefully drawn proposal with the input of the Department of Justice and the law enforcement community. It, too, has an

innocent owner defense. It also works to make certain that the defense will not be used by any criminals to shield their property.

The underlying Hyde bill is opposed by the DEA, the International Association of Chiefs of Police, by the New York State Police, the New York attorneys general, the New York State District Attorneys Association, the National Sheriffs Association, the Fraternal Order of Police, the national drug enforcement officers, among just a few in our law enforcement community. These are the frontline forces in our fight against illicit drugs and crime. We should heed their sound advice and be wary of anything that can make their already difficult job any harder.

Our superintendent of the New York State Police, an outstanding and dedicated police officer, and who once served in my district, put this whole debate in proper perspective when he wrote me on June 18 stating, and I quote, we are aware of no instance since the inception of the Federal equitable forfeiture sharing program of any case involving this agency whereby a hardship was endured by any innocent owner, close quote.

Let us not throw out the baby with the bath water while we try to reform asset forfeiture. Accordingly, I urge a vote for the Hutchinson-Weiner-Sweeney substitute. I think it is a well-crafted and well-thought-out compromise that was developed last year with the input of those who have been fighting the scourge of drugs and crime each and every day all across our Nation.

Mr. Chairman, I insert the following correspondence for the RECORD:

**STATE OF NEW YORK, EXECUTIVE CHAMBER, New York, NY, June 23, 1999.**

Hon. BENJAMIN A. GILMAN, U.S. House of Representatives, Rayburn Office Building, Washington, DC.

DEAR CONGRESSMAN GILMAN: I take this opportunity to express New York State's concern with regard to H.R. 1658 which is imminently scheduled to come before the full House of Representatives for vote. Passage of H.R. 1658 will seriously impair law enforcement's ability to seize assets of criminal enterprises. As such, when Congressman Hyde offers H.R. 1658 to address criminal asset forfeitures, I strongly urge members to support the substitute amendment being offered by Congressman Sweeney, Weiner and Hutchinson.\***H4870**

One of the most potent weapons in our efforts to combat illegal drugs and other organized criminal activity has been comprehensive Federal forfeiture statutes that strip criminal enterprises of their accumulated wealth and distribute it to state and local law enforcement agencies. The forfeited assets are then utilized by law enforcement agencies to augment their capacity to combat a broad array of criminal activity.

New York has been the major recipient of these shared forfeited assets. Indeed, since inception of this program in 1985, New York State law enforcement agencies have received over \$380 million in forfeited assets, more than three times the amount of any other state. The New York State Police, alone, have received in excess of \$100 million, enabling the agency to build a new \$25 million Forensic Investigation Center funded entirely by forfeited assets returned to New York State. State and local police and prosecutors throughout the State received over \$28 million in federally forfeited criminal proceeds in 1998 alone.

Unfortunately, this very laudable and effective program is threatened by H.R. 1658 as introduced by Congressman Hyde which, in my view, has the potential of decimating the forfeited asset sharing program in New York and across the nation.

Under the legitimate guise of protecting the rights of "innocent" owners, the bill unfortunately goes far beyond what is reasonably necessary to accomplish that goal and restructures the Federal forfeiture law in a manner that tips the scale sharply in favor of the criminal. The unrealistically high burdens of proof the Hyde language places upon police officers and the government, its provisions that eliminate cost bonds, permit transfer of assets to relatives, and permit the utilization of seized assets for legal fees will, I believe, hasten the demise of an outstanding program, and result in millions of dollars of tainted criminal assets being retained by organized criminal enterprises. It is, therefore, no surprise that H.R. 1658 is strongly opposed by virtually every law enforcement organization in the country, as well as the United States Department of Justice.

Fortunately, to the extent that minor corrective measures are needed with regard to Federal forfeiture, there are realistic alternatives to H.R. 1658 which deserve your consideration and support. The substitute amendment being offered by Congressmen Sweeney, Hutchinson, and Weiner, strengthens the procedures that protect truly innocent owners, while preserving the inherent integrity of the forfeiture laws.

I respectfully request that you vote against H.R. 1658, unless the Sweeney/Weiner/Hutchinson amendment passes.

Please contact me if I can provide further information. Thank you for your assistance.

Sincerely,

KATHERINE N. LAPP.

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**NEW YORK STATE POLICE, STATE CAMPUS, Albany, NY, June 18, 1999.**

Hon. BENJAMIN A. GILMAN, Member of Congress, U.S. House of Representatives, Rayburn House Office Building, Washington, DC.

Re: H.R. 1658.

DEAR CONGRESSMAN GILMAN: As you know, I have expressed our strong opposition to the above-referenced measure. As a result of follow-up discussions by counsel from our respective offices, I would like to reiterate one particular point that has surfaced in relationship to this bill.

We are aware of no instance, since the inception of the federal equitable forfeiture sharing program, of any case involving this agency whereby a hardship was endured by a truly innocent owner.

It is not the intention of this agency, nor, in my opinion, the intention of law enforcement in general, to deprive truly innocent owners of property due to the illegal use of the property by criminals.

I would have no difficulty supporting a measure that protects legitimate innocent owners such as bona-fide purchasers or parents who have no involvement of knowledge of the criminal activity. I do believe however, that the above-referenced measure goes too far in permitting the divestiture of property to others in order to avoid forfeiture.

Thank you for your assistance.

Sincerely,

JAMES W. MCMAHON, Superintendent.

Mr. FRANK of Massachusetts.

Mr. Chairman, I move to strike the requisite number of words.

Mr. Chairman, I want to speak on the amendment. I say that because not all of the conversation we have had was on the amendment. My colleague from New York brilliantly argued against a nonexistent proposition, at least existent in the current context; namely, that we should do away with civil asset forfeiture. There was an agreement that we should have it.

The questions are several. One, should the standard that the government has to meet to take someone's property because that person has either committed a crime or not prevented a crime, should the standard be the lowest possible, preponderance of the evidence, or should it be the intermediate standard of clear and convincing?

We are in an ironic situation now, and we will be even after the bill is passed, as I hope it will be, because I do not think it should be changed from that; it is now harder to prove that one is guilty of the crime than to take away one's property, even though the property may be more. In fact, we have this situation: One may be punished here substantially by the loss of one's property not for committing a crime, but for failing to prevent a crime from being committed. One forfeits one's innocent-owner defense if one has not taken steps to prevent the crime from being committed.

Now, the government need only prove, according to the amendment to the amendment, by a preponderance of the evidence that one failed to prevent the crime from being committed, and it can take one's property. That seems to me to be quite astonishing, that there is a lower standard for punishing someone for simply not stopping someone else from committing a crime than from committing the crime. It seems to me one is more culpable if one commits the crime, but it is easier to go after someone in the other circumstance.

Again, I want to stress, the notion that there is some division between losing one's property in a civil forfeiture and losing it in a criminal proceeding exists in very few minds and in no reality. There is no difference between having one's property taken.

The debate here is clear and convincing versus preponderance. The gentleman from New York said, in 85 percent of the cases, they are uncontested. Well, I submit that in 85 percent of the cases, if they are uncontested, establishing this to occur under a clear and convincing standard would not be that hard. One cannot lose, it seems to me, an uncontested case simply because the standard of truth is too high. We could probably meet beyond a reasonable doubt. We could probably meet absolute certainty, but we could certainly meet clear and convincing. So in those cases which are uncontested, the amendment is, of course, irrelevant. In those cases which are uncontested, there is no dispute, and one could easily win.

Mr. WEINER.

Mr. Chairman, will the gentleman yield?

Mr. FRANK of Massachusetts.

I yield to the gentleman from New York.

Mr. WEINER.

Mr. Chairman, we seem to have a problem about the premise. The gentleman seems to believe that the premise of civil asset forfeiture is always to be punitive, to penalize someone. In fact, the way it is most often used, as I described in the examples, is if there is a crack house in the middle of a block that is by being there, that is by its very existence, because someone fails to take action, what the Fed, in cooperation with the city and State authorities, are seeking to do, is take that crack house out of circulation.

Mr. FRANK of Massachusetts.

Mr. Chairman, reclaiming my time, the gentleman is off the point, and I am not going to let him get off the point in my time.

The question was, should they have to meet the standard of clear and convincing or beyond reasonable doubt. I was quoting the gentleman where he said, in 85 percent of the cases they are uncontested. And my point, which I thought would be uncontested, is that an uncontested case, it is not that hard to meet the standard of clear and convincing, so the gentleman's crack houses would, in fact, be closed down.

But the notion that it is not punitive I would have to reject. It is always punitive for the government to come and take away one's property. The notion that there is this nonpunitive confiscation is what is at the heart of this. The notion that one is found by the government to have done something terrible, and, as a result of that, one is going to lose one's property, and one is, therefore, not punished does not make any sense.

There are a couple of other arguments I want to make. One, the gentleman said that he dislikes this because it covers pending cases. If the gentleman agrees that the current system is unfair, as they say they have, why do we not want to cover pending cases? Is the government entitled to a remaining quota of unfairness? How can one agree that the current system is wrong and needs changing and then **\*H4871** say, oh, but all of the poor guys who got caught in this current one, we do not help them. I would think that is a rather contradictory argument.

The final point is the business about a lawyer. Again, we ought to stress, opponents of the bill, supporters of the amendment keep talking about the drug dealer. We are not here talking about drug dealers. We are talking about people who have been accused either of being drug dealers or of not stopping other people from being drug dealers. And the question is not how do we punish acknowledged drug dealers, the question is, by what procedure does the government determine whether or not one is a drug dealer or someone who aided a drug dealer. That is why the underlying bill is so much better than the amendment.

Mr. SWEENEY.

Mr. Chairman, I move to strike the requisite number of words.

Mr. Chairman, I rise in strong support of the Hutchinson-Weiner-Sweeney substitute. This substitute will provide meaningful reform to asset forfeiture without removing the teeth from the most valuable tool in what seems to be a losing war against drugs.

I have been here most of the afternoon listening to the debate, and I recognize that well-meaning people on both sides of this issue, including our chairman, the gentleman from Massachusetts (Mr. FRANK), and the gentleman from Michigan (Mr. CONYERS), have attempted to define and seek what is the balance between protecting the private property rights of innocent individuals, and also, at the same time, give law enforcement the tools they need to combat criminal enterprises.

What we seek in offering this substitute is to define and find those fine points, because we recognize that we are losing ground on the war on drugs, and now, I believe, unfortunately, H.R. 1658 will take us a step backwards when we really should be moving forward, Mr. Chairman.

H.R. 1658, while it protects the rights of law-abiding property owners, and that is its intention, and that is in part what it does do, it also protects law-breaking property owners as well. Is this what we want in the crosshairs in the middle of the battle on drugs? I do not think so.

Mr. Chairman, H.R. 1658 rewards criminals by allowing them to challenge every forfeiture action, regardless of merit, and provides a free lawyer to do so, inundating the already overburdened Federal court system with frivolous claims. I have heard the Chairman argue that these folks are not criminals because they have not been proven guilty, but as the gentleman from New York (Mr. WEINER) pointed out, in 85 percent of the cases, claims are not made. The Supreme Court has ruled on 11 different forfeiture cases upholding virtually in every one that the constitutional rights of individuals that have broad claims have not been violated.

We seek balance here. Can we not strike a balance between free enterprise and criminal enterprise? I think we can, and I think this substitute achieves that.

The Hutchinson-Weiner-Sweeney substitute is a rational alternative providing rational reform and uniform standards without crippling and tying the hands of law enforcement in the war against drugs.

Now, moving from the rational to the excessive, the most outrageous aspect, in my view, of H.R. 1658 is a provision that allows heirs to inherit drug fortunes. We have a hard enough time as it is in this country allowing legitimate estates to pass to legitimate heirs without making it easier for criminals to literally take the money and run, and that is what we attempt to close here in this substitute.

The loophole in H.R. 1658 would allow drug kingpins and other criminals who have amassed illegal fortunes to pass their wealth to their heirs, not just wives and children, but also friends, mistresses and business associates.

Mr. Chairman, this substitute protects legitimate, innocent owners such as bona fide purchasers, or parents who have no involvement in or knowledge of criminal activity, without undercutting the ability of law enforcement to forfeit property from drug dealers, terrorists, alien smugglers and other criminals.

At a time when the street price of heroin has dropped dramatically and the supply has increased, we must not weaken law enforcement's ability to fight drugs. I rise, therefore, in strong support of this substitute because it brings about balanced reforms to civil asset forfeiture without compromising law enforcement's ability to seize the assets of drug dealers and racketeers. When the heroin market rivals the stock market, why would we want to scale back the efforts of our police?

Law enforcement officers risk their lives every day to keep our neighborhoods safe. They patrol the dark ally, raid the drug dens and meth labs, and they patrol the borders in the dark of night. Many men and women do these things every day, risking their lives to make our neighborhoods safer.

I am not prepared to undercut the good work of law enforcement, Mr. Chairman. That is why I support this substitute, and strongly urge my colleagues to do the same.

If Members seek safer streets, support this substitute. If they believe that we ought to be tougher on criminals than on innocent people, support the Hutchinson-Weiner-Sweeney substitute. If Members support the good work of law enforcement, they should support this substitute. If they seek to do the right thing for America, support this substitute.

Mr. Chairman, I urge my colleagues to do that.

**AMENDMENT NO. 15 IN THE NATURE OF A SUBSTITUTE OFFERED BY MR. PAUL AS A SUBSTITUTE FOR AMENDMENT NO. 25 IN THE NATURE OF A SUBSTITUTE OFFERED BY MR. HUTCHINSON**

Mr. PAUL.

Mr. Chairman, I offer an amendment in the nature of a substitute as a substitute for amendment the in the nature of a substitute.

The Clerk read as follows:

Amendment No. 15 in the nature of a substitute offered by Mr. PAUL as a substitute for amendment No. 25 in the nature of a substitute offered by Mr. HUTCHINSON:

Strike all after the enacting clause and insert the following:

**SECTION 1. FORFEITURE CONDITION.**

No property may be forfeited under any civil asset forfeiture law unless the property's owner has first been convicted of the criminal offense that makes the property subject to forfeiture. The term "civil forfeiture law" refers to any provision of Federal law (other than the Tariff Act of 1930 or the Internal Revenue Code of 1986) providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense.

(Mr. PAUL asked and was given permission to revise and extend his remarks.)

Mr. PAUL.

Mr. Chairman, I rise to offer a substitute amendment for the Hutchinson amendment. My understanding is that the Hyde amendment would improve current situations very much when it comes to seizure and forfeiture, and I strongly endorse the motivation of the gentleman from Illinois (Mr. HYDE) in his bill. I have a suggestion in my amendment to make this somewhat better.

But I rise in strong opposition to the Hutchinson amendment, because not only do I believe that the Hutchinson amendment would undo everything that the gentleman from Illinois (Mr. HYDE) is trying to do, but I sincerely believe that the Hutchinson amendment would make current law worse. I think it is very important that we make a decision here on whether or not we want to continue the effort to build an armed police force out of Washington, D.C.

The trends have been very negative over the last 20 or 30 years. It has to do a lot with the exuberance we show with our drug laws. I know they are all well-intended, but since 1976, when I recall the first criminal law that we passed here, they always pass nearly unanimously. Everyone is for law and order. But I think this is a perfect example of unintended consequences, the problems that we are dealing with today, because it is not the guilty that suffer. So often it is the innocent who suffer.

I guess if Members are for a powerful national police and they want to be casual about the civil liberties of innocent people, I imagine they could go along and ruin this bill by passing the Hutchinson amendment.

I think it is very important to consider another alternative. Mine addresses this, because in spite of how the gentleman from Illinois (Mr. HYDE) addresses this, which is in a very positive way, I really would like to go one step further. My bill, my substitute **\*H4872** amendment, says this: "No property may be forfeited under any Federal civil asset forfeiture law unless the property owner has first been convicted of the criminal offense that makes the property subject to forfeiture."

Is that too much to ask in America, that we do not take people's property if they are not even convicted of a crime? That seems to be a rather modest request. That is the way it used to be. We used to never even deal with laws like this at the national level. It is only recently that we decided we had to take away the State's right and obligation to enforce criminal law.

I think it is time we thought about going in another direction. That is why I am very, very pleased with this bill on the floor today in moving in this direction. I do not think we should have a nationalized police force. I think that we should be very cautious in everything that we do as we promote law.

This bill of the gentleman from Illinois (Mr. HYDE) could be strengthened with my amendment by saying that no forfeiture should occur, but the Hutchinson amendment makes it just the preponderance of evidence that they can take

property. This is not right. This is not what America is all about. We are supposed to be innocent until proven guilty, but property is being taken from the American people with no charge of crime.

They lose their property and they never get it back. They cannot afford to fight the courts, and there is a lot of frustration in this country today over this. This is why this bill is on this floor today. I am delighted it is here on this floor.

I ask people to vote for my amendment, which would even make this a better bill, but certainly I think it would be wise not to vote for the Hutchinson amendment to make it much worse. I certainly think that on final passage, we certainly should support the Hyde bill.

Mr. FRANK of Massachusetts.

Mr. Chairman, I move to strike the last word.

Mr. Chairman, I appreciate the spirit of the gentleman from Texas. I think it goes further than it ought to. I do not think we ought to restrict this only to cases where there was a criminal conviction, but the gentleman does highlight once again the importance of fundamental reform.

There is one aspect of the issue that I wanted to go into further. That is, in the substitute offered by the gentleman from Arkansas and the two gentlemen from New York, one of the things that seems to me most egregious was this notion that yes, we will appoint you a lawyer, but before we will appoint you a lawyer our lawyer gets to question you. It really is quite an extraordinary notion.

The current situation is one in which people, in some cases who have been convicted of nothing whatsoever, and who may, remember, only be accused, and again, let us be clear about this because of the innocent owner issue, they may be accused not of doing anything wrong, but of not sufficiently working to stop someone else. The someone else may be a very dangerous person.

So one of the things we need to calibrate here is that if other armed people, dangerous people, bad people are doing something wrong and someone knows about it, and maybe they are using their property, you have to calibrate how much risk you have to take to stop it. You may be accused of not having done enough because you may have tried to do something anonymously, and you may not have wanted to acknowledge that.

Mr. HUTCHINSON.

Mr. Chairman, will the gentleman yield?

Mr. FRANK of Massachusetts.

I yield to the gentleman from Arkansas.

Mr. HUTCHINSON.

Mr. Chairman, I just wanted to ask the gentleman from Massachusetts, in reference to the statement that you can question a claimant who seeks an appointment of attorney, there is a provision in the substitute that says the testimony of the claimant at such a hearing shall not be admitted in any other proceeding except in accordance with the rules which govern the testimony.

So it is excluded, it would appear to me. That was the intent.

Mr. FRANK of Massachusetts.

I understand that. The gentleman is correct. One can only further terrify this unsophisticated and impoverished individual whose property you have taken, and you cannot use that in certain circumstances.

Again, I want to go back to where I was. We are talking about someone here who is not even accused of a crime. We are talking about someone who is accused of not having been sufficiently enterprising in stopping someone else who may have been a very dangerous person or persons from committing a crime.

The person who failed to be enough of an aggressive stopper has property taken. And because that property is taken, and this individual now has to prove that he or she is innocent to get the property back, the person who is accused of not having been vigorous enough in stopping a crime has his or her property taken. He or she then has to prove that they were innocent

and that they really did try to stop it to get the property back. And they cannot afford a lawyer, and probably because the property which they maybe would have used to pay a lawyer has been seized and is held by the government, to get the property back, first of all they have to prove that the property that was seized is worth enough compared to what a lawyer might cost. That seems to me outrageous.

Secondly, they can then be questioned by the people who seized their property. So they set up this extraordinarily intimidating situation and say, do not worry, we took your property because we did not think you worked hard enough to stop somebody dangerous from doing something bad, and we know you cannot afford a lawyer. Maybe we will appoint you a lawyer, but first, the people who took your property are going to question you about things. But do not worry, they will not use it against you.

That is a statement that is less likely to be believed, and we can in fact chill people out of the effective exercise of their rights.

Mr. HUTCHINSON.

If the gentleman will yield further, Mr. Chairman, the gentleman made the statement that this person would not be under indictment. A person under indictment could also be subject to a seizure of assets and there could be a hearing. This person very well would be under criminal indictment.

Mr. FRANK of Massachusetts.

I would say two things to the gentleman. First of all, I invite him to read the RECORD. I have poor diction, but I never said indictment. I never used that. I don't know where it came from. That is not what I said.

I am talking about someone who would not even be indictable because under the gentleman's innocent owner defense, he is talking about someone, again, and we are making the law for everybody, we are talking about people who are not even accused of a crime. They are accused of, and my friend, the gentleman from New York, cited these people, they own a piece of property that was being used by someone else for a crime, and the people using it might not be the nicest people in the world. They might be people who are a little intimidating. You could lose your property if you were not sufficiently vigorous in trying to stop them.

What if you tried to stop them through an anonymous phone call because you did not want to have your name used, and they did not know you made the anonymous phone call? You would then have this difficult situation.

Mr. RAMSTAD.

Mr. Chairman, I move to strike the requisite number of words.

Mr. Chairman, I rise in support of the substitute amendment offered by my colleague, the gentleman from Arkansas (Mr. HUTCHINSON).

Let me say first that I have the deepest respect and admiration for the author of the underlying bill, the gentleman from Illinois (Chairman HYDE). During my 4 years on the Committee on the Judiciary, I saw firsthand his absolute integrity and effective leadership, and as I have said hundreds of times before, nobody in this body represents more integrity or greater character than our beloved gentleman from Illinois (Chairman HYDE).

However, that does not mean he is always right. As chair of the House Law Enforcement Caucus, I have serious concerns about the effect that the Civil Asset Forfeiture Reform Act would have on the law enforcement community's antidrug efforts. \*H4873

As Hennepin County Sheriff Pat McGowan, Hennepin County in Minnesota, in my district, Sheriff Pat McGowan told me recently, this legislation would absolutely gut the most important tool of law enforcement in the war against drugs. Make no mistake about it, this forfeiture law as it currently exists is the most important tool of law enforcement in fighting the war on drugs on the supply side.

The clear and convincing standard would deprive law enforcement officers of a crucial deterrent, as was explained to me by Sheriff McGowan and others, while the substantial hardship exemption in the underlying bill would let drug dealers hide their assets before trial and allow them to continue dealing drugs pending trial.

Also, frivolous claims would be encouraged by this legislation, and would further damage enforcement of drug laws. According to many law enforcement officers with whom I have spoken about this legislation, the so-called buy money to

enforce drug laws would essentially dry up, because much if not most of the buy money comes from forfeiture of these assets.

I think Congress needs to listen to the men and women of the Fraternal Order of Police who put their lives on the line every day in fighting the drug war. We need to help the police and not hurt them by adopting the preponderance of the evidence standard of proof in the Hutchinson amendment, which is eminently reasonable, and eliminating some of the other extreme restrictions on law enforcement in the underlying bill.

As a former Criminal Justice Act attorney, Mr. Speaker, a former adjunct professor of civil rights and liberties, certainly, like every Member of this body, I support individual rights under our Bill of Rights.

However, the current law has consistently been upheld as constitutional. Furthermore, Congress should not aid and abet drug dealers so they can profit from their illegal actions by weakening this important law.

Yes, there have been some abuses under current law. We all know that. But several unfortunate anecdotal experiences do not justify legislation that would turn back the clock in the war against drugs.

Let us be smarter than that. Let us support our police officers and other drug enforcement officers on the front lines every day in this battle. Support the Hutchinson amendment, that represents the original compromise. Let us not tie the hands of law enforcement. Let us not make their difficult and dangerous jobs even harder. Vote for the Hutchinson substitute.

Mr. HYDE.

Mr. Chairman, will the gentleman yield?

Mr. RAMSTAD.

I yield to the gentleman from Illinois.

Mr. HYDE.

Mr. Chairman, I just want to express the fact that I heartily disagree with the statement that we are helping drug dealers. The gentleman is assuming a fact that is not in evidence.

The civil asset forfeiture involves no drug dealers. It involves people who are accused of something at the level of probable cause, and it is punishing them before they have been adjudicated guilty by confiscating their property. That is the Soviet Union's way of justice, not America, where one should be, even if one is accused of being a drug dealer, innocent until one is proven guilty. It is quasi criminal. It is punishment. The Supreme Court has said that, and that is why we need clear and convincing rather than preponderance.

Mr. RAMSTAD.

Mr. Chairman, reclaiming whatever time might remain, the current law, I am sure the gentleman will agree, has been upheld consistently as constitutional and not violative of the First, Fourth, Fifth, Sixth, Eighth or Fourteenth Amendments, any of the amendments in the Bill of Rights that give us our precious civil rights and liberties.

Virtually every police officer with whom I have spoken, both in Minnesota and nationally, as well as FBI Director Freeh, have stressed the urgency of retaining present law here. That is what I mean by weakening law enforcement's efforts by tying their hands. Let us not do that. Let us accept the Hutchinson amendment.

Mr. BARR of Georgia.

Mr. Chairman, I move to strike the requisite number of words.

Mr. Chairman, with regard to the last speaker, I would cite a recent case just in the last year by the Supreme Court, United States versus Bajakhaian, whatever in the heck that is pronounced, B-A-J-A-K-H-A-I-A-N. Its significance lies, not in its spelling, but in holding that there is a specific amendment to the Constitution, the Eighth Amendment, that indeed was the basis just last year in an opinion by Justice Clarence Thomas of the United States Supreme Court that struck down forfeiture on Eighth Amendment excessiveness grounds.

So there is very strong judicial authority for the proposal underlying H.R. 1658 as put forward by myself, the gentleman from Massachusetts (Mr. FRANK), the gentleman from Michigan (Mr. CON YERS), the gentleman from Illinois (Mr. HYDE), and others that, indeed, our civil forfeiture laws do need to be reformed. Reform is what we are trying to do here. But let us again be very clear.

Yes, as the gentleman from Illinois (Mr. HYDE) has stated, if H.R. 1658 is passed by the House, passed by the Senate, and signed by the President, there will be some slight crimping in the style of law enforcement in terms of proceeding civilly against seized assets in order to forfeit them. But it will not in any way, shape, or form stop or take away the important tool that law enforcement has and needs.

H.R. 1658 reforms, it does not eviscerate, it does not kill, it does not repeal, and it will not result in the repeal, the killing, or the gutting of civil asset forfeiture as a tool for Federal prosecutors.

Of course, remember also, Mr. Chairman, that this does not reach State forfeitures. We are only talking about Federal civil asset forfeitures here.

This proposal, H.R. 1658 reforms it. It does not do away with it. If, however, somebody likes civil asset forfeiture reform, then they will love the Hutchinson amendment, because the Hutchinson amendment, in addition to not truly reforming civil asset forfeiture at its core, vastly, vastly, Mr. Chairman, expands the scope of civil asset forfeiture powers of this government.

Let me repeat that. The Hutchinson amendment vastly expands the scope, the jurisdiction, the reach of the Federal Government's current civil asset forfeiture power. The power, the scope currently that the Federal Government enjoys is already extensive. We are not arguing that today. It is extensive. It reaches many different provisions of title 18, which is the Criminal Code.

If, however, one makes even a cursory reading, Mr. Chairman, of the Hutchinson amendment, they will see very readily that it expands exponentially, as the Chairman said previously in his remarks, the scope, the power, the jurisdiction of the Federal Government to civilly seize and forfeit assets.

At pages 772 and 773 of the Federal Criminal Code and Rules, published by the West Group, one can see very clearly, I could hold this up, but the Chairman could not read it, because the writing, the printing of the United States Criminal Code is indeed very small. Yet, the list of the additional predicates or that is base offenses for which civil asset forfeiture rely cover almost two pages, almost two full columns of the United States Criminal Code listing line after line after line after line after line after line of additional offenses for which the government can use civil asset forfeiture powers.

Therefore, let me repeat this, the Hutchinson amendment, for anybody who wishes to reform, reign in, and refocus back to its original purpose, which was an extraordinary remedy for law enforcement, the civil asset forfeiture powers of the government, they must vote against the Hutchinson amendment, because the Hutchinson amendment vastly expands the asset forfeiture power of the government. There is no way getting around that. It is crystal clear on its face, and that is a defect in addition to the others that the Chairman and others have already pointed out reasons why this amendment proposed in the nature of a substitute to H.R. 1658 must be rejected in favor of the underlying bill, H.R. 1658, which does indeed reform, but does not take away the ability of our Federal prosecutors and law enforcement to seize truly those aspects of criminal endeavor, the assets that are truly used in furtherance of criminal activity. **\*H4874**

I urge rejection of the proposed amendment in the nature of a substitute, and adoption of the underlying bill, H.R. 1658.

Mr. CANADY of Florida.

Mr. Chairman I move to strike the requisite number of words.

Mr. Chairman, I rise in opposition to the amendment in the nature of a substitute which has been offered by the gentleman from Arkansas (Mr. HUTCHINSON). I want to begin by thanking the gentleman from Illinois (Mr. HYDE) for his outstanding leadership on this important issue. This is the sort of issue that the Committee on the Judiciary should be very much concerned about, and I am very pleased that the Chairman has made this issue a priority.

I also want to thank my constituent, Mr. David Pobjecky, who brought to my attention a case that highlights the need for the legislation of the gentleman from Illinois (Mr. HYDE) and the importance of not weakening the legislation that the gentleman from Illinois (Mr. HYDE) has brought to the floor.

Mr. Pobjecky, my constituent, is an attorney who has represented the Jones family of Glades County, Florida, whose property was seized by the Federal Government. It took that family 6 years to gain control of their property even though they were innocent of any wrongdoing.

In September of 1988, the United States Government seized 4,346 acres of the Jones family ranchland and filed a civil forfeiture action against the ranch based on a plane crash that occurred 2 1/2 years earlier and on property a quarter of a mile from their ranch.

The government alleged that the property was intended to be used as a landing site for cocaine smugglers. The Jones family denied any knowledge, consent, or participation in the alleged wrongful acts.

The case went to trial 5 years later in October of 1993. In May of 1994, the U.S. District Court for the Southern District of Florida found for the owners of the ranch. The court ruled that the case presented by the claimants is so clear, and the response by the United States is sufficiently wanting, that the court has determined that the claimants are, indeed, innocent owners entitled to the remedy and return of their property.

Judge Hoover who wrote for the court noted that fundamental rights of ownership and the loss of those rights were the core of this case and concluded with this caution, "in the understandable zeal to enforce the criminal laws, constant vigilance must be exercised to protect the rights of all, especially those who may be caught up in a net loosely thrown around those who are guilty."

The same court subsequently awarded attorneys' fees and costs to the Jones family for their claim filed Under the Equal Access to Justice Act. The court found that the United States did not have a reasonable basis in law or fact for bringing the case to trial and should have concluded that the owners of the ranch could establish an innocent owner defense.

The legislation we are considering today would have ensured that the Jones family would not have suffered this injustice at the hands of the government. The bill would change the standard of proof to be satisfied by the government from probable cause to clear and convincing evidence, as we have been discussing here. The bill would require the government to prove its case and would eliminate the requirement that a property owner prove his innocence.

The seizure of the Jones family ranch never would have been approved if the United States had been required to prove by clear and convincing evidence that the ranch was subject to forfeiture.

In 1994 when he finally decided for the Jones family, Judge Hoover said that it is questionable whether this forfeiture action ever really had a valid basis. That is the kind of cases that are being brought. Those are the kind of cases where people are having their property tied up for year after year after year, and it is not right.

Now, this bill would also allow a property owner who prevails in a forfeiture action to sue the government for any destruction or damage to his property. I go back to the Jones case. The Jones family was unable to maintain their land, more than 4,000 acres of their ranch from September of 1988 to May of 1994. This resulted in significant damage to the property, since ranchland needs to be constantly maintained.

Under current law, the Jones family can sue the United States for damage to their land. The bill before the House today would provide the Jones family with at least the possibility of recovering compensation for resulting damage to their property.

The case of the Jones family is only one example of innocent Americans who have had to undergo lengthy and costly battles to regain their property. No one in the United States of America should have to go through a legal nightmare like this. No one in America should be treated this way by the government of the United States. No one in America should be subjected to such an arbitrary and destructive use of governmental power.

Now, I want to conclude by urging the rejection of the substitute offered by the gentleman from Arkansas (Mr. HUTCHINSON). I believe that the gentleman has a proposal here that falls short of solving the problem with current law and in some respects actually makes the problem worse. I understand he is operating under the best of intentions, but I think his proposal does fall short in those respects.

I would also urge the rejection of the amendment offered by the gentleman from Texas (Mr. PAUL). I believe that there is a proper place for civil asset forfeiture, and his amendment should be rejected, and the Hyde proposal should be adopted.

Mr. FRANK of Massachusetts.

Mr. Chairman, having consulted with various parties, I ask unanimous consent that debate on this substitute and all amendments thereto end at 4:45 p.m., with the remaining time to be divided equally between the gentleman from Arkansas (Mr. HUTCHINSON) and the gentleman from Illinois (Mr. HYDE), chairman of the committee.

The CHAIRMAN.

Is there objection to the request of the gentleman from Massachusetts?

There was no objection.

The CHAIRMAN.

Under the terms of the unanimous consent agreement, the gentleman from Arkansas (Mr. HUTCHINSON) and the gentleman from Illinois (Mr. HYDE) each will control 15 minutes. Debate will conclude at 4:45 p.m.

Mr. HUTCHINSON.

Mr. Chairman, I yield 4 minutes to the gentleman from Florida (Mr. MICA).

Mr. MICA.

Mr. Chairman, I thank the gentleman from Arkansas for yielding to me.

Mr. Chairman, I rise in opposition to the amendment offered by the gentleman from Texas (Mr. PAUL) in support of the amendment offered by the gentleman from Arkansas (Mr. HUTCHINSON) in opposition to H.R. 1658.

I think the good Lord knows that, any time we have the distinguished gentleman from Illinois (Mr. HYDE), the chairman of the Committee on the Judiciary, as an advocate in alliance with the distinguished gentleman from Massachusetts (Mr. FRANK), and the gentleman from Georgia (Mr. BARR), we have formidable proponents for any proposition. I reluctantly rise in opposition to their proposal, H.R. 1658.

I chair the Subcommittee on Criminal Justice, Drug Policy, and Human Resources dealing with illegal narcotics. I can only say that I have never been so inundated in the past number of months on any issue as much as in opposition to H.R. 1658 than by those in our law enforcement community. So I am reluctant to rise in opposition, but let me make a few comments.

Asset forfeiture is a very critical tool in law enforcement. It allows law enforcement to take the profit out of crime and pay restitution to victims of crime. Forfeiture is a critical element in the fight against drug trafficking, and it literally ensures that crime does not pay.

In the vast majority of cases, the asset forfeiture laws, as we have heard, have been very fairly applied and effectively applied for the benefit of both law enforcement and the public and our citizens. Forfeiture is an essential component on the war on drugs today. Weakening the laws or placing any unnecessary procedural hurdles in the paths of prosecutors could undercut these law enforcement efforts and could provide a windfall to criminal organizations that commit crime for profit.

**\*H4875**

These are not just my words. This is what is being said about this proposed legislation, H.R. 1658, to me by those in the law enforcement community.

They say that the burden of proof is too high; that H.R. 1658 forces the government to prove its case by clear and convincing evidence. The usual standard for civil enforcement actions involving property is the preponderance of evidence. Thus, 1658 makes the government's burden in drug cases higher than it does in cases involving bank fraud, health care fraud or procurement fraud, giving, in this instance, those who deal in drugs more protection than bankers, doctors and defense contractors.

Again, this is what is being said to me by the law enforcement community.

They also charge that this proposal could encourage the filing of thousands of frivolous claims by criminals, their families, their friends and associates. They also are telling me, again, that H.R. 1658 lets criminals abscond potentially with cash, vehicles and airplanes. The Hutchinson amendment, I might say, addresses each of these concerns that have been raised by the law enforcement community.

Also, they say that H.R. 1658 allows drug dealers to pass drug profits on to their heirs, and this provision is eliminated by the Hutchinson proposal. And, finally, they are telling me that this could provide a windfall to criminals that we should eliminate.

Mr. HYDE.

Mr. Chairman, I yield 2 minutes to the gentleman from Massachusetts (Mr. DELAHUNT).

Mr. DELAHUNT.

Mr. Chairman, I thank the gentleman for yielding me this time. I think this is important because we continue to hear about the issue of the burden of proof being a preponderance of the evidence. Well, that is true in most civil litigation. But this is not purely civil litigation, and I think it is important that my colleagues and the American public understand that.

In asset forfeiture cases it has been clearly described by the United States Supreme Court as quasi-criminal in nature. This is a decision that was promulgated by the United States Supreme Court. And I daresay to equate the customary civil litigation that is transacted daily in our Federal courts with the kind of proceeding that we are discussing here today on the floor of the House, asset forfeiture, is absolutely incorrect. It is inaccurate. It is quasi-criminal in nature.

To suggest that a standard of proof of clear and convincing is a burden that cannot be met by prosecutors, I daresay, is not an argument that holds water. Because in the vast majority of these cases the seizure of the asset is done in conjunction with a criminal investigation, and hopefully, hopefully, that investigation will produce an indictment which will meet an even higher standard, proof beyond a reasonable doubt.

So I have to conclude that clear and convincing is an acceptable burden of proof in these cases.

Mr. MCCOLLUM.

Mr. Chairman, I wish to make just a few points.

First, I want to salute Chairman HYDE's commitment to reforming asset forfeiture. He has long been guided by a principled commitment to civil liberties for all citizens and a genuine concern that our forfeiture laws not be abused. He has been a leader in pursuing needed reforms of our forfeiture laws, and I want to commend his efforts to bring this bill to the floor. I share Chairman HYDE's concerns. We may disagree on some of the specifics, but I support his goal and the core reforms contained in H.R. 1658.

Second, I want to note that H.R. 1658 is actually part of a larger trend to reform asset forfeiture that has been underway for most of this decade. Indeed, over the last 7 years the U.S. Supreme Court has handed down 11 asset forfeiture cases, that, taken together, have led to substantial reforms of our asset forfeiture laws and increased the due process protections afforded individuals. These cases, in turn, have led the Departments of Justice and Treasury to substantially revise their seizure and forfeiture policies.

Because of these shifts over the last 7 years, it is now the case that under current law, property owners have a right to a jury trial in civil forfeiture cases; real property may not be seized without prior notice and a hearing; and all forfeitures must be proportional to the gravity of the underlying criminal offense. In other words: the law has been evolving to reflect more and more the concerns of Mr. HYDE. Changes to the law have anticipated his criticism.

Mr. Chairman, now more than ever, asset forfeiture is a vital law enforcement tool. In my home state of Florida it may well be the single most important weapon that Federal, State and local law enforcement use in their heroic efforts to combat the illegal drug trade.

And that, Mr. Chairman, continues to be my principal concern when we talk about reforming asset forfeiture: Will our ability to effectively combat the flood of illegal drugs into our country be unduly hampered by the proposed reforms?

Heroin and cocaine continue to pour into the United States from abroad, endangering the future of our children and spreading fear through countless neighborhoods and communities. Clandestine methamphetamine labs are now operating throughout the entire country, pumping out their poison that destroys people and pollutes our environment.

Today, on the streets of our country drug quantity is up, drug purity is at all-time highs and the price is down. We shouldn't be surprised then to learn that drug use among our children is skyrocketing. Indeed, there is a drug crisis engulfing our young people today. The numbers are simply shocking. From 1992-1997, drug use among youth aged 12 to 17 has more than doubled. It's up 120%! That's an increase of 27% in the last year alone. For kids aged 12 to 17, first-time

heroin use has increased 875% from 1991 to 1996! From 1992 to 1996, marijuana use increased by 253 percent among eighth-graders, 151 percent among tenth-graders, and 84 percent among twelfth-graders. Overall, among kids aged 12 to 17, marijuana smoking has jumped 125% from 1991 to 1997!

Mr. Chairman, I believe this is unacceptable. We owe our children every effort to rid our streets and schools of drugs and the violence that accompany the drug trade. We must rededicate ourselves to a drug-free America.

And that means we must take care when we seek to reform our forfeiture laws that we do not render them ineffective.

Last Congress, I supported the compromise forfeiture bill that Mr. HYDE steered through the Judiciary Committee by a vote of 26 to 1. That bill contained the core reforms that are in H.R. 1658. It also won the support of the law enforcement community as a balanced set of reforms that left forfeiture a viable tool. I continue to support the provisions from that bill, and for that reason, I will be supporting the Hutchinson amendment which reflects the key provisions of that compromise bill. I believe that H.R. 1658, as amended by the Hutchinson amendment, reforms our forfeiture laws while leaving them still useful in our nation's counter-drug efforts.

Mr. PICKERING.

Mr. Chairman, I rise in support of Mr. HUTCHINSON'S substitute to H.R. 1658, the Asset Forfeiture Bill.

We all agree the fundamental principle of fairness should play a central role in asset forfeiture proceedings: the burden of proof should be on the government; the government should not hold property without probable cause; a property owner should have an early opportunity to challenge a seizure of assets and innocent owners should be protected.

These examples of fairness are already important features of current asset forfeiture law, and are advanced in the Hutchinson substitute without undermining the important role asset forfeiture law plays in modern law enforcement.

Today in my district, State and Local Law Enforcement officials confront sophisticated criminals and criminal enterprises in possession of illegal property, and in many circumstances, controlling vast ill-gotten resources. Asset forfeiture law allows State and Local law enforcement officials to separate these criminals and enterprises from their illegal resources, denying them the use of these resources to continue their criminal businesses or defend themselves from personal criminal charges. Any modification in asset forfeiture law should preserve this important effect of asset forfeiture on criminals.

While reform of asset forfeiture law to reduce the already infrequent, occasional unfair outcome for a particular individual is appropriate, criminals should not benefit from the modifications designed to improve and bolster the rights of innocent property owners and law abiding citizens.

The Hutchinson substitute produces this sensible reform without removing from our local law enforcement officials one of their most important and effective tools against criminals and their crack houses, drug money, drug vehicles and the myriad of other resources and property criminals possess.

It is important to remember the focus of asset forfeiture law is the illegal property. The illegal property itself, be it drug money or its proceeds in the form of cars, or planes or houses, is subject to forfeiture because it constitutes the bounty of a criminal enterprise, and thus is illegal. It is illegal in and of itself, like heroin in itself, or cocaine, and thus similarly **\*H4876** subject to forfeiture. Insofar as a person unconnected to the criminal enterprise has a legal property interest in the property, he or she may state their claim and reclaim their property.

Under current law, criminals and those with illegal interests in the property are distinguished from those with legal interests by procedures in the law which the Substitute preserves. Unlike the bill advanced by the respected Chairman of the Judiciary Committee, the substitute strengthens this distinction, protecting the innocent while disentitling the criminal. I urge passage of the Hutchinson substitute.

Mr. HYDE.

Mr. Chairman, I yield back the balance of my time.

Mr. HUTCHINSON.

Mr. Chairman, I yield back the balance of my time.

The CHAIRMAN.

The question is on the amendment in the nature of a substitute offered by the gentleman from Texas (Mr. PAUL) as a substitute for the amendment in the nature of a substitute offered by the gentleman from Arkansas (Mr. HUTCHINSON).

The amendment in the nature of a substitute offered as a substitute for the amendment in the nature of a substitute was rejected.

The CHAIRMAN.

The question is on the amendment in the nature of a substitute offered by the gentleman from Arkansas (Mr. HUTCHINSON).

The question was taken; and the Chairman announced that the noes appeared to have it.

RECORDED VOTE

Mr. HUTCHINSON.

Mr. Chairman, I demand a recorded vote.

A recorded vote was ordered.

The vote was taken by electronic device, and there were-ayes 155, noes 268, not voting 11, as follows:

<Roll No. 254>

AYES-155

Allen Andrews Bachus Baird Ballenger Barcia Barrett (WI) Barton Bateman Bilbray Blagojevich Blumenauer Blunt Boehlert Bonior Boswell Boyd Brady (TX) Bryant Buyer Calvert Capps Cardin Castle Chambliss Coburn Collins Condit Cooksey Cramer Crowley Cubin Deal Deutsch Dickey Dixon Doggett Dooley Dunn Edwards Ehlers Ehrlich Etheridge Fowler Frelinghuysen Gekas Gilman Gordon Goss Green (WI) Greenwood Gutierrez Hayes Herger Hill (IN) Hildebrand Hoeffel Holden Holt Hooley Horn Houghton Hoyer Hulshof Hutchinson Inslee Isakson John Johnson (CT) Jones (NC) Jones (OH) Kildeee Kind (WI) Kleczka Knollenberg Kuykendall Larson Latham Leach Levin Lowey Luther Maloney (CT) Maloney (NY) McCarthy (NY) McCollum McCrery McDermott McHugh McIntyre McNulty Mica Miller (FL) Moore Moran (KS) Moran (VA) Morella Myrick Norwood Nussle Ose Oxley Pallone Pascrell Peterson (MN) Pickering Pomeroy Porter Portman Pryce (OH) Quinn Ramstad Regula Reyes Reynolds Rogers Ros-Lehtinen Rothman Roukema Salmon Sanchez Saxton Shaw Shays Sherman Shows Sisisky Slaughter Smith (WA) Souder Stabenow Stearns Stupak Sweeney Taylor (MS) Terry Thomas Thompson (CA) Thornberry Thune Thurman Turner Visclosky Vitter Walden Walsh Waxman Weiner Weldon (FL) Weldon (PA) Weygand Whitfield Wolf Wu Young (FL)

NOES-268

Abercrombie Ackerman Aderholt Archer Arvey Baker Baldacci Baldwin Barr Barrett (NE) Bartlett Bass Becerra Bentsen Bereuter Berkley Berry Biggert Bilirakis Bishop Bliley Boehner Bonilla Bono Borski Boucher Brady (PA) Brown (FL) Brown (OH) Burr Burton Callahan Camp Campbell Canady Cannon Capuano Carson Chabot Chenoweth Clay Clayton Clement Clyburn Coble Combest Conyers Cook Cox Coyne Crane Cummings Cunningham Danner Davis (FL) Davis (IL) Davis (VA) DeFazio DeGette Delahunt DeLauro DeLay DeMint Diaz-Balart Dicks Dingell Doolittle Doyle Dreier Duncan Emerson Engel English Eshoo Evans Everett Ewing Farr Fattah Filner Fletcher Foley Forbes Ford Fossella Frank (MA) Franks (NJ) Frost Gallegly Ganske Gejdenson Gephardt Gibbons Gillmor Gonzalez Goode Goodlatte Goodling Graham Granger Green (TX) Gutknecht Hall (OH) Hall (TX) Hansen Hastings (FL) Hastings (WA) Hayworth Hefley Hill (MT) Hilliard Hinckley Hinojosa Hobson Hoekstra Hostettler Hunter Hyde Istook Jackson (IL) Jackson-Lee (TX) Jefferson Jenkins Johnson, E. B. Johnson, Sam Kanjorski Kaptur Kelly Kennedy Kilpatrick King (NY) Kingston Klink Kolbe Kucinich LaFalce LaHood Lampson Lantos LaTourette Lee Lewis (CA) Lewis (GA) Lewis (KY) Linder Lipinski LoBiondo Lofgren Lucas (KY) Lucas (OK) Manzullo Markey Martinez Mascara Matsui McCarthy (MO) McGovern McIntosh McKeon McKinney Meehan Meek (FL) Meeks (NY) Menendez Metcalf Millender-McDonald Miller, Gary Miller, George Minge Mink Moakley Murtha Nadler Napolitano Neal Nethercutt Ney Northup Oberstar Obey Olver Ortiz Owens Pastor Paul Payne Pease Pelosi Peterson (PA) Petri Phelps Pickett Pitts Pombo Price (NC) Radanovich Rahall Rangel Riley Rivers Rodriguez Roemer Rogan Rohrabacher Roybal-Allard Royce Rush Ryan (WI) Ryun (KS) Sabo Sanders Sandlin Sanford Sawyer Scarborough Schaffer Schakowsky Scott Sensenbrenner Serrano Sessions Shadegg Sherwood Shimkus Shuster Simpson Skeen Skelton Smith (MI) Smith (NJ) Smith (TX) Snyder Spence Spratt Stark Stenholm Strickland Stump Sununu Talent Tancredo Tanner Tauscher Tauzin Taylor (NC) Thompson (MS) Tiahrt Tierney Toomey Towns Traficant Udall (CO) Udall (NM) Upton Velazquez Vento Wamp Waters Watkins Watt (NC) Watts (OK) Weller Wexler Wicker Wilson Woolsey Wynn Young (AK)

NOT VOTING-11

Berman Brown (CA) Costello Gilchrest Kasich Largent Lazio McInnis Mollohan Packard Wise

Ms. JACKSON-LEE of Texas, Ms. MCKINNEY, and Messrs. LAFALCE, NEY, ROGAN, KINGSTON, BURTON of Indiana, FORBES, HUNTER, and BARTLETT of Maryland changed their vote from "aye" to "no."

Ms. SLAUGHTER and Messrs. VITTER, BARCIA, BONIOR, EHLERS, WELDON of Pennsylvania, and MORAN of Kansas changed their vote from "no" to "aye."

So the amendment in the nature of a substitute was rejected.

The result of the vote was announced as above recorded.

Mr. HYDE.

Mr. Chairman, I ask unanimous consent that the remainder of the bill be printed in the RECORD and open to amendment at any point.

The CHAIRMAN.

Is there objection to the request of the gentleman from Illinois?

There was no objection.

The text of the remainder of the committee amendment in the nature of a substitute is as follows:

**SEC. 2. CREATION OF GENERAL RULES RELATING TO CIVIL FORFEITURE PROCEEDINGS.**

Section 981 of title 18, United States Code, is amended-

(1) by inserting after subsection (i) the following:

"(j)(1)(A) In any nonjudicial civil forfeiture proceeding under a civil forfeiture statute, with respect to which the agency conducting a seizure of property must give written notice to interested parties, such notice shall be given as soon as practicable and in no case more than 60 days after the later of the date of the seizure or the date the identity of the interested party is first known or discovered by the agency, except that the court may extend the period for filing a notice for good cause shown.

"(B) A person entitled to written notice in such proceeding to whom written notice is not given may on motion void the forfeiture with respect to that person's interest in the property, unless the agency shows-

"(i) good cause for the failure to give notice to that person; or

"(ii) that the person otherwise had actual notice of the seizure.

"(C) If the government does not provide notice of a seizure of property in accordance with subparagraph (A), it shall return the property and may not take any further action to effect the forfeiture of such property.

"(2)(A) Any person claiming property seized in a nonjudicial forfeiture proceeding may file a claim with the appropriate official after the seizure.

"(B) A claim under subparagraph (A) may not be filed later than 30 days after-

"(i) the date of final publication of notice of seizure; or

"(ii) in the case of a person entitled to written notice, the date that notice is received.

"(C) The claim shall state the claimant's interest in the property.

"(D) Not later than 90 days after a claim has been filed, the Attorney General shall **\*H4877** file a complaint for forfeiture in the appropriate court or return the property, except that a court in the district in which the complaint will be filed may extend the period for filing a complaint for good cause shown or upon agreement of the parties.

"(E) If the government does not file a complaint for forfeiture of property in accordance with subparagraph (D), it shall return the property and may not take any further action to effect the forfeiture of such property.

"(F) Any person may bring a claim under subparagraph (A) without posting bond with respect to the property which is the subject of the claim.

"(3)(A) In any case where the Government files in the appropriate United States district court a complaint for forfeiture of property, any person claiming an interest in the seized property may file a claim asserting such person's interest in the property within 30 days of service of the Government's complaint or, where applicable, within 30 days of alternative publication notice.

"(B) A person asserting an interest in seized property in accordance with subparagraph (A) shall file an answer to the Government's complaint for forfeiture within 20 days of the filing of the claim.

"(4)(A) If the person filing a claim is financially unable to obtain representation by counsel, the court may appoint counsel to represent that person with respect to the claim.

"(B) In determining whether to appoint counsel to represent the person filing the claim, the court shall take into account such factors as-

"(i) the claimant's standing to contest the forfeiture; and

"(ii) whether the claim appears to be made in good faith or to be frivolous.

"(C) The court shall set the compensation for that representation, which shall be equivalent to that provided for court-appointed representation under section 3006A of this title, and to pay such cost there are authorized to be appropriated such sums as are necessary as an addition to the funds otherwise appropriated for the appointment of counsel under such section.

"(5) In all suits or actions brought under any civil forfeiture statute for the civil forfeiture of any property, the burden of proof is on the United States Government to establish, by clear and convincing evidence, that the property is subject to forfeiture.

"(6)(A) An innocent owner's interest in property shall not be forfeited under any civil forfeiture statute.

"(B) With respect to a property interest in existence at the time the illegal conduct giving rise to forfeiture took place, the term 'innocent owner' means an owner who-

"(i) did not know of the conduct giving rise to forfeiture; or

"(ii) upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property.

"(C) With respect to a property interest acquired after the conduct giving rise to the forfeiture has taken place, the term 'innocent owner' means a person who, at the time that person acquired the interest in the property, was-

"(i)(I) a bona fide purchaser or seller for value (including a purchaser or seller of goods or services for value); or

"(II) a person who acquired an interest in property through probate or inheritance; and

"(ii) at the time of the purchase or acquisition reasonably without cause to believe that the property was subject to forfeiture.

"(D) Where the property subject to forfeiture is real property, and the claimant uses the property as the claimant's primary residence and is the spouse or minor child of the person who committed the offense giving rise to the forfeiture, an otherwise valid innocent owner claim shall not be denied on the ground that the claimant acquired the interest in the property-

"(i) in the case of a spouse, through dissolution of marriage or by operation of law, or

"(ii) in the case of a minor child, as an inheritance upon the death of a parent, and not through a purchase. However, the claimant must establish, in accordance with subparagraph (C), that at the time of the acquisition of the property interest, the claimant was reasonably without cause to believe that the property was subject to forfeiture.

"(7) For the purposes of paragraph (6)-

"(A) ways in which a person may show that such person did all that reasonably can be expected may include demonstrating that such person, to the extent permitted by law-

"(i) gave timely notice to an appropriate law enforcement agency of information that led the person to know the conduct giving rise to a forfeiture would occur or has occurred; and

"(ii) in a timely fashion revoked or attempted to revoke permission for those engaging in such conduct to use the property or took reasonable actions in consultation with a law enforcement agency to discourage or prevent the illegal use of the property; and

"(B) in order to do all that can reasonably be expected, a person is not required to take steps that the person reasonably believes would be likely to subject any person (other than the person whose conduct gave rise to the forfeiture) to physical danger.

"(8) As used in this subsection:

"(1) The term 'civil forfeiture statute' means any provision of Federal law (other than the Tariff Act of 1930 or the Internal Revenue Code of 1986) providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense.

"(2) The term 'owner' means a person with an ownership interest in the specific property sought to be forfeited, including a leasehold, lien, mortgage, recorded security device, or valid assignment of an ownership interest. Such term does not include-

"(i) a person with only a general unsecured interest in, or claim against, the property or estate of another;

"(ii) a bailee unless the bailor is identified and the bailee shows a colorable legitimate interest in the property seized; or

"(iii) a nominee who exercises no dominion or control over the property.

"(k)(1) A claimant under subsection (j) is entitled to immediate release of seized property if-

"(A) the claimant has a possessory interest in the property;

"(B) the continued possession by the United States Government pending the final disposition of forfeiture proceedings will cause substantial hardship to the claimant, such as preventing the functioning of a business, preventing an individual from working, or leaving an individual homeless; and

"(C) the claimant's likely hardship from the continued possession by the United States Government of the seized property outweighs the risk that the property will be destroyed, damaged, lost, concealed, or transferred if it is returned to the claimant during the pendency of the proceeding.

"(2) A claimant seeking release of property under this subsection must request possession of the property from the appropriate official, and the request must set forth the basis on which the requirements of paragraph (1) are met.

"(3) If within 10 days after the date of the request the property has not been released, the claimant may file a motion or complaint in any district court that would have jurisdiction of forfeiture proceedings relating to the property setting forth-

"(A) the basis on which the requirements of paragraph (1) are met; and

"(B) the steps the claimant has taken to secure release of the property from the appropriate official.

"(4) If a motion or complaint is filed under paragraph (3), the district court shall order that the property be returned to the claimant, pending completion of proceedings by the United States Government to obtain forfeiture of the property, if the claimant shows that the requirements of paragraph (1) have been met. The court may place such conditions on release of the property as it finds are appropriate to preserve the availability of the property or its equivalent for forfeiture.

"(5) The district court shall render a decision on a motion or complaint filed under paragraph (3) no later than 30 days after the date of the filing, unless such 30-day limitation is extended by consent of the parties or by the court for good cause shown."; and

(2) by redesignating existing subsection (j) as subsection (l).

### **SEC. 3. AMENDMENT TO THE CONTROLLED SUBSTANCES ACT.**

Section 518 of the Controlled Substances Act (21 U.S.C. 888) is repealed.

**SEC. 4. COMPENSATION FOR DAMAGE TO SEIZED PROPERTY.**

(a) TORT CLAIMS ACT .-Section 2680(c) of title 28, United States Code, is amended-

(1) by striking "law-enforcement" and inserting "law enforcement"; and

(2) by inserting before the period the following: ", except that the provisions of this chapter and section 1346(b) of this title do apply to any claim based on the destruction, injury, or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if the property was seized for the purpose of forfeiture but the interest of the claimant is not forfeited".

(b) DEPARTMENT OF JUSTICE.-

(1) IN GENERAL.-With respect to a claim that cannot be settled under chapter 171 of title 28, United States Code, the Attorney General may settle, for not more than \$50,000 in any case, a claim for damage to, or loss of, privately owned property caused by an investigative or law enforcement officer (as defined in section 2680(h) of title 28, United States Code) who is employed by the Department of Justice acting within the scope of his or her employment.

(2) LIMITATIONS.-The Attorney General may not pay a claim under paragraph (1) that-**\*H4878**

(A) is presented to the Attorney General more than 1 year after it occurs; or

(B) is presented by an officer or employee of the United States Government and arose within the scope of employment.

**SEC. 5. PREJUDGMENT AND POSTJUDGMENT INTEREST.**

Section 2465 of title 28, United States Code, is amended-

(1) by inserting "(a)" before "Upon"; and

(2) adding at the end the following:

"(b) INTEREST.-

"(1) POST-JUDGMENT.-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.

"(2) PRE-JUDGMENT.-The United States shall not be liable for prejudgment interest, except that in cases involving currency, other negotiable instruments, or the proceeds of an interlocutory sale, the United States shall disgorge to the claimant any funds representing-

"(A) 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; and

"(B) for any period during which no interest is actually paid, an imputed amount of interest that such currency, instruments, or proceeds would have earned at the rate described in section 1961.

"(3) LIMITATION ON OTHER PAYMENTS.-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.".

**SEC. 6. APPLICABILITY.**

(a) IN GENERAL.-Unless otherwise specified in this Act, the amendments made by this Act apply with respect to claims, suits, and actions filed on or after the date of the enactment of this Act.

(b) EXCEPTIONS.-

(1) The standard for the required burden of proof set forth in section 981 of title 18, United States Code, as amended by section 2, shall apply in cases pending on the date of the enactment of this Act.

(2) The amendment made by section 5 shall apply to any judgment entered after the date of enactment of this Act.

The CHAIRMAN.

The question is on the committee amendment in the nature of a substitute, as amended.

The committee amendment in the nature of a substitute, as amended, was agreed to.

The CHAIRMAN.

Under the rule, the Committee rises.

Accordingly, the Committee rose; and the Speaker pro tempore (Mr. HEFLEY) having assumed the chair, Mr. LAHOOD, Chairman of the Committee of the Whole House on the State of the Union, reported that that Committee, having had under consideration the bill (H.R. 1658) to provide a more just and uniform procedure for Federal civil forfeitures, and for other purposes, pursuant to House Resolution 216, he reported the bill back to the House with an amendment adopted by the Committee of the Whole.

The SPEAKER pro tempore.

Under the rule, the previous question is ordered.

Is a separate vote demanded on the amendment to the committee amendment in the nature of a substitute adopted by the Committee of the Whole? If not, the question is on the committee amendment in the nature of a substitute.

The committee amendment in the nature of a substitute was agreed to.

The SPEAKER pro tempore.

The question is on the engrossment and third reading of the bill.

The bill was ordered to be engrossed and read a third time, and was read the third time.

The SPEAKER pro tempore.

The question is on the passage of the bill.

The question was taken; and the Speaker pro tempore announced that the ayes appeared to have it.

RECORDED VOTE

Mr. HYDE.

Mr. Speaker, I demand a recorded vote.

A recorded vote was ordered.

The vote was taken by electronic device, and there were ayes 375, noes 48, not voting 11, as follows:

<Roll No. 255>

AYES-375

Abercrombie Ackerman Aderholt Allen Archer Armea Baird Baker Baldacci Baldwin Ballenger Barcia Barr Barrett (NE) Bartlett Barton Bass Bateman Becerra Bentsen Bereuter Berkley Berry Biggert Bilirakis Bishop Blagojevich Bliley Blunt Boehlert Boehner Bonilla Bonior Bono Borski Boucher Brady (PA) Brady (TX) Brown (FL) Brown (OH) Burr Burton Buyer Callahan Calvert Camp Campbell Canady Cannon Capps Capuano Cardin Carson Castle Chabot Chenoweth Clay Clayton Clement Clyburn Coburn Combest Conyers Cook Cooksey Cox Coyne Cramer Crane Cummings Cunningham Danner Davis (FL) Davis (IL) Davis (VA) Deal DeFazio DeGette Delahunt DeLauro DeLay DeMint Diaz-Balart Dickey Dicks Dingell Dixon Doggett Dooley Doolittle Doyle Dreier Duncan Dunn Edwards Ehlers Ehrlich Emerson Engel English Eshoo Etheridge Evans Everett Ewing Farr Fattah Filner Fletcher Foley Forbes Ford Fossella Fowler Frank (MA) Franks (NJ) Frelinghuysen Frost Gallegly Ganske Gejdenson Gephardt Gibbons Gillmor Gonzalez Goode Goodlatte Goodling Gordon Goss Graham Granger Green (TX) Green (WI) Greenwood Gutierrez Gutknecht Hall (OH) Hall (TX) Hansen Hastings (FL) Hastings (WA) Hayworth Hefley Herger Hill (MT) Hilleary Hilliard Hinckley Hinojosa Hobson Hoeffel Hoekstra Holden Holt Hooley Horn Hostettler Hoyer Hulshof Hunter Hyde Inslee Isakson Istook Jackson (IL) Jackson-Lee (TX) Jefferson Jenkins Johnson, E. B. Johnson, Sam Jones (OH) Kanjorski Kaptur Kelly Kennedy Kildey Kilpatrick King (NY) Kingston Kleczka Klink Knollenberg Kolbe Kucinich Kuykendall LaFalce LaHood Lampson Lantos Largent Larson LaTourette Leach Lee Levin Lewis (CA) Lewis (GA) Lewis (KY) Linder Lipinski LoBiondo Lofgren Lowey Lucas (KY) Lucas (OK) Luther Maloney (NY) Manzullo Markey Martinez Mascara Matsui McCarthy (MO) McCarthy (NY) McCollum McDermott McGovern McHugh McIntosh McIntyre McKeon McKinney McNulty Meehan Meek (FL) Meeks (NY) Menendez Metcalf Millender-McDonald Miller (FL) Miller, Gary Miller, George Minge Mink Moakley Moran (KS) Moran (VA) Morella Murtha Nadler Napolitano Neal Nethercutt Ney Northup Norwood Nussle Oberstar Obey Olver Ortiz Ose Owens Oxley Pallone Pastor Paul Payne Pease Pelosi Peterson (PA) Petri Phelps Pickett Pitts Pombo Pomeroy Porter Price (NC) Pryce (OH) Quinn Radanovich Rahall Rangel Regula Riley Rivers Rodriguez Roemer

Rogan Rogers Rohrabacher Ros-Lehtinen Rothman Roybal-Allard Royce Rush Ryan (WI) Ryun (KS) Sabo Salmon Sanchez Sanders Sandlin Sanford Sawyer Saxon Scarborough Schaffer Schakowsky Scott Sensenbrenner Serriano Sessions Shadegg Shaw Sherman Sherwood Shimkus Shuster Simpson Sisisky Skeen Skelton Slaughter Smith (MI) Smith (NJ) Smith (TX) Smith (WA) Snyder Spence Spratt Stabenow Stark Stearns Stenholm Strickland Stump Stupak Sununu Talent Tancredo Tanner Tauscher Tauzin Taylor (NC) Terry Thomas Thompson (MS) Thornberry Thune Thurman Tiahrt Tierney Toomey Towns Traficant Udall (CO) Udall (NM) Upton Velazquez Vento Vitter Walden Walsh Wamp Watkins Watt (NC) Watts (OK) Waxman Weldon (PA) Weller Wexler Weygand Whitfield Wicker Wilson Wolf Woolsey Wu Wynn Young (AK) Young (FL)

## NOES-48

Andrews Bachus Barrett (WI) Bilbray Blumenauer Boswell Boyd Bryant Chambliss Collins Condit Crowley Cubin Deutsch Gekas Gilman Hayes Hill (IN) Houghton Hutchinson John Johnson (CT) Jones (NC) Kind (WI) Latham Maloney (CT) McCrery Mica Moore Myrick Pascrell Peterson (MN) Pickering Portman Ramstad Reyes Reynolds Roukema Shays Shows Souder Sweeney Taylor (MS) Thompson (CA) Turner Visclosky Weiner Weldon (FL)

## NOT VOTING-11

Berman Brown (CA) Costello Gilcrest Kasich Lazio McInnis Mollohan Packard Waters Wise

Mr. HOUGHTON changed his vote from "aye" to "no."

Mr. ADERHOLT and Mr. HOLT changed their vote from "no" to "aye."

So the bill was passed.

The result of the vote was announced as above recorded. **\*H4879**

A motion to reconsider was laid on the table.

Stated for:

Mr. PACKARD.

Mr. Speaker, I was unavoidably detained for Rollcall 255, which was final passage of H.R. 1658, the Civil Asset Forfeiture Reform Act. I am a cosponsor of this legislation. Had I been present, I would have voted "aye."

Mr. BERMAN.

Mr. Speaker, I was unable to cast a vote on final passage of H.R. 1658, the Civil Asset Forfeiture Reform Act. Had I been present, I would have voted "aye."

**145 Cong. Rec. H4858-02, 1999 WL 419758**

## Part 6

# Extract of Hearing Before Senate Subcommittee on Criminal Justice Oversight

July 21, 1999

### 1. Statement of Deputy Attorney General Eric Holder, 1999 WL 20010421

Congressional Testimony by Federal Document Clearing House  
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Wednesday, July 21, 1999

#### Asset Forfeiture Eric H. Holder, Jr.

STATEMENT OF ERIC H. HOLDER,JR. DEPUTY ATTORNEY GENERAL BEFORE THE SUBCOMMITTEE ON CRIMINAL JUSTICE OVERSIGHT COMMITTEE ON THE JUDICIARY UNITED STATES SENATE CONCERNING THE NEED FOR REFORM OF THE ASSET FORFEITURE LAWS PRESENTED ON JULY 21, 1999

Mr. Chairman and Members of the Subcommittee, I want to congratulate you, the Ranking Minority Member, Senator Schumer, and all Members of the Subcommittee for helping lead the way toward improving the asset forfeiture laws. The Department of Justice is pleased to be in a position to work cooperatively with you toward important and needed reforms to civil asset forfeiture law.

The time to reform the forfeiture laws has surely come. Laws designed decades, even centuries, ago to deal with the seizure of pirate ships on the high seas need to be updated to apply to the ways we should be most constructively using the forfeiture laws today - to seize houses, cars, businesses and bank accounts which are the instrumentalities and proceeds of criminal activity, in a manner which ensures fairness and due process. For that reason, the Department of Justice has long supported revisions to the asset forfeiture laws, and we have sent a proposal to Congress putting those revisions into effect. In addition to reforming the basic civil asset forfeiture law, we also think that the current laws can be augmented to provide law enforcement with a more effective crime-fighting tool. A comprehensive forfeiture bill can do both.

#### The asset forfeiture program

Before commenting on the specific provisions of that proposal and the bill recently passed by the House of Representatives, let me provide the Subcommittee with some background on the asset forfeiture program.

Asset forfeiture has become one of the most powerful and important tools that federal law enforcement can employ against criminals -- from drug dealers, to terrorists, to white collar criminals -- who prey on the vulnerable for financial gain. Derived from the ancient practice of forfeiting vessels and contraband in Customs and Admiralty cases, forfeiture statutes are now found throughout the federal code. We are convinced that the large drop in crime this Nation has witnessed is related to effective use of the asset forfeiture laws, along with other important anti-crime measures.

#### Why do forfeiture?

Federal law enforcement agencies use the forfeiture laws for a variety of reasons. Like the statutes the First Congress enacted in 1789, the modern laws allow the government to seize contraband -- property that it is simply unlawful to possess, like illegal drugs, unregistered machine guns, smuggled goods and counterfeit money.

Forfeiture is also used to take the instrumentalities of crime out of circulation. If drug dealers are using a "crack house" to sell drugs to children as they pass by on the way to school, the building is a danger to the health and safety of the neighborhood. Under the forfeiture laws, we can rid the community of the crack house. Utilizing the Department's Weed and Seed program we can often ensure that the property goes to a community organization, which will then use it to better the lives of those in the neighborhood. If a boat or truck is being used to smuggle illegal aliens across the border, we can

forfeit the vessel or vehicle to prevent its being used time and again for the same purpose. The same is true for an airplane used to fly cocaine from Colombia or Mexico to the United States, or a printing press used to mint phony \$1 00 bills.

The government also uses forfeiture to take the profit out of crime and to return property to victims. No one has any right to retain the money gained from bribery, extortion, illegal gambling, or drug dealing. With the forfeiture laws, we can separate the criminal from his profits -- and any property traceable to it -- thus removing the incentive others may have to commit similar crimes tomorrow. And if the crime is one that has victims -- like carjacking or fraud -- we can use the forfeiture laws to recover the property and restore it to the owners.

We have included with this testimony a summary of just a sampling of our recent cases involving both civil and criminal forfeiture.

### **Why do civil forfeiture?**

There are several reasons why we do forfeitures. There are, however, two kinds of forfeiture: criminal and civil. The former is part of a criminal case against a defendant. The other is an entirely separate civil action. If most of our cases involve an arrest or prosecution - which they do - then why do we need civil forfeiture? Why can't we do most of our forfeitures as part of the criminal prosecution?

Everyone should understand that there is parallel criminal arrest and prosecution in the overwhelming majority of civil forfeiture cases. (In 1996, the rate was 81 percent in IDEA cases.) But there are important reasons why the government must have civil forfeiture in addition to criminal.

First, criminal forfeiture is unavailable if the defendant is dead or is a fugitive. There is simply no criminal case in which to pursue forfeiture. Second, a substantial majority of the DEA and FBI's forfeiture cases are uncontested, often because the defendant in jail sees no point in claiming property that most likely connects him to the crime. Civil forfeiture allows us to dispose of these uncontested cases administratively.

Third, criminal forfeiture statutes are not comprehensive. Forfeiture in gambling, counterfeiting, and alien smuggling cases must be done civilly, as must almost all forfeitures of firearms, simply because there is no criminal forfeiture statute.

Fourth, criminal forfeiture in a federal case requires a federal conviction. If the defendant was convicted in a state case, the federal forfeiture must be a civil forfeiture.

Fifth, criminal forfeiture is limited to the property of the defendant. If the IDEA seizes an airplane loaded with drugs and arrests the pilot, it cannot forfeit the airplane in the criminal case against the pilot unless he owns the airplane. But that is rarely the case; the title is almost always in the name of a corporation abroad.

### **Fiscal impact**

The result of this law enforcement activity is that last year the agencies of the Department of Justice took nearly \$450 million out of the hands of criminals and deposited it into the Justice Department Assets Forfeiture Fund. That's \$450 million that otherwise would have been available to drug dealers, pornographers, loan sharks and terrorists to use to ply their crimes against innocent citizens and their children.

The forfeitures are put to good use. The funds are provided to law enforcement programs, including nearly half that is shared with state and local law enforcement agencies through the equitable sharing program, some of which may be passed on to community-based organizations through that program.[1]

#### **Response to criticisms of the forfeiture laws**

The proliferation of forfeiture into new areas has been controversial. When laws that were designed to seize pirate ships from privateers are applied to the seizure of homes, cars, businesses and bank accounts, there are a lot of concerns to address and answers to sort out. How do we protect innocent property owners? What procedures afford due process? When does forfeiture go too far in violation of the Excessive Fines Clause of the Eighth Amendment?

[1] In the last fiscal year, \$177 million was shared with state and local law enforcement from the Justice Assets Forfeiture Fund, of which up to 15 per cent was eligible for pass-through to community-based organizations.

The Executive and Judicial Branches of government have been very active in this sorting out this process. First, the Department of Justice has issued detailed policy guidelines governing the use of the administrative, civil judicial, and criminal forfeiture laws by all agencies of the Department. See Department of Justice Asset Forfeiture Policy Manual (1

996). The Treasury Department has issued similar guidelines. Together, these guidelines help ensure that the forfeiture laws are administered fairly and effectively, with all appropriate consideration given to the rights of property owners. Moreover, we have conducted an intensive series of training sessions for law enforcement agents and federal prosecutors, including detailed instruction on how to incorporate forfeiture into criminal cases instead of relying exclusively on the civil forfeiture laws.

The courts have been extraordinarily active in this area, as well. The Supreme Court has decided eleven forfeiture cases since 1992, and hundreds of cases dealing with all aspects of forfeiture procedure have been decided by the lower courts. These cases have given much needed clarity and definition to the forfeiture laws and the rights of property owners, but they have also left loopholes and ambiguities that only Congress can resolve through legislation.

The cumulative effect of these efforts is evident. New examples of problems in the forfeiture program have been decidedly difficult for our opponents to find. We run a better program because our procedures are better defined, and our guidelines are rigorously enforced. As I said previously, the overwhelming majority of all forfeitures take place in conjunction with a related arrest and prosecution. And as a result of the emphasis on criminal forfeiture since 1994, approximately half of all contested forfeiture actions are now undertaken as part of criminal cases.

### **Guaranteeing due process**

But we can do more. The asset forfeiture program is a vital law enforcement tool, but we recognize that 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. It is for that reason that we have supported efforts to make further revisions to the forfeiture laws -- not just by policy, not just by case law, but by statute -- to ensure fairness and procedural due process.

We said before and we say again that the burden of proof in civil forfeiture cases should be on the government. If the government seeks to forfeit a person's house, the government should have to prove that a crime was committed and that the property was involved in that crime; the burden should not be on property owner (e.g., to prove that he did not know that his property was being used illegally). We said before and we say again that there should be a uniform innocent owner defense available to claimants in all civil forfeiture cases. While the Supreme Court held in *Bennis v. Michigan* that an innocent owner defense is not mandated by the Due Process Clause of the Fifth Amendment, that does not mean Congress cannot enact such protection by statute. We think it should.

We said before, and we say again, that the time limits for filing claims should be extended to ensure that everyone has an adequate opportunity to obtain his day in court; that there should be relief for citizens whose property is damaged while in government custody; and that the government should pay interest on money that it seizes and later has to return.

All of these protections for citizens and property owners are included in the bill that we submitted to Congress. These proposals are derived substantially from the bill that Sen. Schumer introduced in the House of Representatives in 1997, H.R. 1745, and we congratulate him for the leadership he has shown on this issue over the past several years.

The following is a short summary of the 13 major reforms to the civil forfeiture laws that are codified in our proposal:

- Burden of proof. The burden is on the government to prove the connection between the property and the offense by a preponderance of the evidence.
- Innocent owners. There is a uniform innocent owner defense.
- Return of seized property. The government must file its forfeiture action within 90 days or give the property owner a hearing on his motion for the return of seized property.
- Suppression of evidence. Property seized without probable cause may not be admitted into evidence in the forfeiture case.
- Stay. Civil forfeiture cases may be stayed, at the property owner's request, while criminal cases are pending to avoid conflicts with the right against self-incrimination.
- Proportionality. The Supreme Court's rule that forfeitures may not be "grossly disproportional to the gravity of the offense" is codified.
- Interest. Successful claimants recover the seized property with interest.

- Adoptive forfeitures. Federal agencies may only adopt state seizures if the state authorities comply with state rules requiring a state judge to authorize the adoption.
- Judicial approval of seizures. Arrest warrants for property subject to forfeiture must be approved by a judge or magistrate.
- Time for filing a claim. The time for filing a claim is extended from 20 to 30 days from the publication of notice of the forfeiture.
- Cost bond. The present policy of waiving the cost bond in cases where the claim is filed in forma pauperis is codified.
- Deadlines on government action. The seizing agency must send notice of the forfeiture action within 60 days of the seizure.
- Damage to seized property. The Federal Tort Claims Act is amended to give property owners the right to recover damages to property that is seized but never forfeited.

We have prepared a detailed section-by-section analysis of our proposal, and ask that it be included in the Record.

### **Problems with H.R. 1658**

Many of these proposals are included in the House bill, H.R.1658. We are pleased that there is much common ground. But H.R.1658 crosses the line between providing due process and giving unintended relief to drug dealers, money launderers, and other criminals who victimize the elderly and the vulnerable in our society. Let me give a few examples.

#### **H.R. 1658 is overbroad**

First, H. R. 1658 is seriously overbroad. It applies not just to drug and money laundering cases, but to virtually every one of the more than 200 civil forfeiture statutes in federal law. These are statutes used to protect the environment and endangered species, to recover artifacts stolen from Indian land, to combat terrorism, foil counterfeiters and break up gambling and pornography rings. If there are problems with forfeitures, those must be addressed but without the needless weakening of a tool that has been used for decades in so many different contexts without incident or complaint.

#### **Leaving property to the criminal's heirs**

We support the enactment of a uniform innocent owner defense. A person who does not know that his/her property is being used illegally, or who becomes aware of the illegal use but takes all reasonable steps to try to stop it, should not suffer the loss of the property through forfeiture. But H.R. 1658 goes beyond that. It mistakenly bars the government from seizing criminal proceeds if the heirs of a criminal have acquired the property through inheritance.

Under the House bill, if a criminal dies, his fortune passes directly to his heirs without fear of forfeiture, even if the money consists entirely of criminal proceeds. A major drug dealer or pornographer could amass a fortune over a lifetime of crime, and pass it on to his heirs without the government's being able to step in and confiscate the money. The same is true if even the criminal proceeds were taken by fraud from innocent victims, thereby granting the fraud artist's heirs priority over the victims of his crimes. The heirs of a drug lord killed in a shoot out with the police or with a rival drug gang should not be free to inherit his drug fortune.

Over the past decade, we have recovered over \$70 million from the estate of the notorious drug lord Jose Gonzalo Rodriguez Gacha after he was killed by the Colombian police. Under H.R.1658, Gacha's heirs would have been entitled to all his drug money.

#### **Returning property to criminals**

H.R. 1658 also contains a provision that would require the government to return seized property to criminals pending trial in the forfeiture case in order to avoid a "hardship." We understand that there may be instances where an innocent person's property is seized from a wrongdoer and held pending trial --undoubtedly to the inconvenience of the innocent claimant. But in thousands of cases every year, property -- like cars, airplanes, cash and other easily disposable items -- is seized from drug dealers, gamblers, pornographers and money launderers. It makes no sense to write into law a provision that allows such people to retain possession of the seized property pending trial. Giving a dufflebag-full of cash back to a drug courier, just because he claims some "hardship" will befall him, defies reason and guarantees the property will simply disappear regardless of what guidelines might be engrafted on the statute.

Seizure of a flashy car from a notorious drug dealer sends a strong message to the community that crime will not pay. If that same car is back on the street a week later because the owner claimed some hardship, sends the opposite message -- that law enforcement is a paper tiger, and criminals can flaunt the spoils of their trade without fear of consequences. The same is true if the car, boat, or plane was used as the instrumentality of crime.

The release-of-property provision will cause enormous problems for the Immigration and Naturalization Service, which seized 27,000 automobiles a year, mostly along the Southwest Border, as part of its enforcement program against the transportation and smuggling of illegal aliens. If the cars, trucks, vessels and other conveyances seized by the INS have to be returned to the smugglers to avoid a "hardship," there will be little left of the anti-smuggling program.

Yet, in any case in which INS refused to release the vehicle, H.R. 1658 would permit the claimant to apply immediately to federal court for an order forcing the agency to do so, and the court would have to rule on the request within 30 days. The courts along the Southwest Border are already overburdened with civil and criminal cases related to border interdiction. To add more cases, each of which would have to be resolved within 30 days, to the dockets of those courts could potentially overwhelm the judiciary and threaten to bring justice to a standstill.

Any legislation that contains a provision that requires the government to give a seized airplane back to a drug dealer, or seized photocopy equipment back to a counterfeiter -- supposedly to avoid a "hardship" pending trial -- crosses the line from a measure designed to ensure fairness to become simply a windfall for criminals.

### **Remedy for failure to give notice of administrative forfeiture**

The vast majority of forfeiture cases are uncontested. These are cases in which the government seizes property and sends notice of the forfeiture to the property owner, but no one files a claim. Such administrative forfeitures account for an overwhelming majority of all DEA and FBI forfeitures.

Pursuant to current Justice Department internal guidelines, the seizing agency must send notice of the forfeiture action to potential claimants within 60 days of the seizure, unless the time limit is waived for good cause by a supervising official. Also under current law, if the government fails to make a reasonable effort to give notice of the forfeiture to potential claimants, and a person who did not receive notice later claims an interest in the property, a federal judge may order that the forfeiture action be started over again. *United States v. Woodall*, 12 F.3d 791, 793 (8th Cir. 1993). Such claims are almost invariably filed by federal prisoners who assert that they did not receive the forfeiture notice because the seizing agency sent it to the wrong place of incarceration as the prisoner was moved throughout the corrections system. See e.g. *United States v. Clark*, 84 F.3d 378 (10th Cir. 1996); *United States v. Franklin*, 897 F. Supp. 1301, 1303 (D. Or. 1995); *Hong v. United States*, 920 F. Supp. 311 (E.D.N.Y. 1996); *Concepcion v. United States*, 938 F. Supp. 134 (E.D.N.Y. 1996); *Scott v. United States*, 1996 WL 748428 (D.D.C. 1996).

H.R. 1658 would change this process in two significant ways. First, it would codify the 60-day guideline and require the seizing agency to petition a court for a waiver instead of getting it from a supervising official within the Department or agency -- another process certain to burden the judiciary unnecessarily, given the 45,000 seizures per year made by Justice Department agencies. Second, it would change the remedy for the failure to provide notice by allowing the claimant simply to "void the forfeiture," and bar the government ever from re-initiating the forfeiture action.

Again, this issue is one that arises almost always in the context of a federal prisoner who did not receive notice through the prison system. It makes no sense to give prisoners a windfall by allowing them to "void a forfeiture" anytime the Bureau of Prisons is unable to deliver notice of administrative forfeiture of property to the current prison address. If H.R. 1658 were enacted, instead of having judges order that forfeiture proceedings start again by returning to the status quo ante in such cases, prisoners serving long terms of incarceration for drug dealing, money laundering and like crimes would receive reimbursement checks for seized proceeds.

### **Appointment of counsel**

I now turn to the two most objectionable provisions of H.R. 1658 - those dealing with the appointment of counsel and with the standard of proof:

The bill creates incentives for abuse by allowing anyone interested in contesting the forfeiture to file a free claim and to request a free lawyer. Suppose three people are stopped in a car carrying \$50,000 in drug money wrapped in rubber bands and hidden under the seat. And suppose they say they got the money from a guy in New York and are delivering it to a friend in Florida. Who gets the free lawyer? The driver? The passengers? The guy in New York? The girlfriend in Florida? Under H.R. 1658, they all would be entitled. The potential for abuse in the context of 45,000 cases a year is staggering.

The principle that no person should be denied the means to seek redress in the courts against unreasonable government action is recognized in the Equal Access to Justice Act ("EAJA"). That statute provides that any person who prevails against the government in a case in which the government action was not "substantially justified" is entitled to recover attorney's fees.

The availability of EAJA fees provides the needed protection and there is no need to authorize the court to appoint counsel in civil forfeiture cases. Indeed, with tens of thousands of forfeiture seizures taking place every year, the burden on the courts just to hear the motions for appointment of counsel is likely to be enormous, and to be enormously expensive.

### **Clear and convincing evidence**

Most troubling, H.R. 1658 would elevate the burden of proof standard to clear and convincing evidence - a standard virtually unheard of in civil cases, even when the case is based on a criminal violation. If the government chooses to seek civil sanctions separately, the standard is preponderance of the evidence. (Sanctions for knowingly overbilling government programs are generally sought under the False Claims Act, 31 U.S.C. 3729. The same is true when banks are accused of money laundering, or bankers are accused of bank fraud. See 18 U.S.C. 1956(b) (civil money laundering enforcement); 12 U.S.C. 1833a (bank fraud).) There is no sound or reasoned basis for imposing the higher standard when we seek to take printing presses from counterfeiters, or profits from drug peddlers.

It is important to understand that there are essentially three issues in a civil forfeiture case.

- Forfeitability: was a crime committed by someone, and was this property derived from, involved in, or used to commit that crime?
- Innocent owner: even if the property is subject to forfeiture, was the owner of the property an innocent owner?
- Proportionality: even if the owner was not innocent, would the forfeiture of this property be "grossly disproportional to the gravity of the offense," and thus be unconstitutional under the Excessive Fines Clause of the Eighth Amendment?

The standard of proof in H. R. 1658 applies only to the first issue: the showing that the property was derived from, or used to commit, a crime. In cases involving a field used for growing marijuana or a crack house where drugs are sold to kids on their way to school, the "nexus" of the property to the crime can be confidently demonstrated in most cases. The common questions in those cases concern applications of the innocent owner defense and the proportionality of the forfeiture under the Eighth Amendment. Raising the standard of proof is not likely to affect the government's ability to prevail in those civil forfeiture cases.

Elevation of the standard of proof to "clear and convincing evidence" would have a devastating effect on the government's ability to establish the forfeitability of the property in complex money laundering and drug cases. In these offenses the criminal and his money launderers work long and hard to hide the connection between the crime and its proceeds. We are concerned that too high a burden of proof will result in inappropriate losses of cases by the government, leading to a windfall for undeserving criminals.

Managing the cash proceeds is one of the drug dealer's greatest problems. If it is "street money," the drug proceeds weigh 31/2 times the equivalent amount of cocaine. But the drug dealer is not a supermarket owner or amusement park operator who can simply deposit his cash proceeds in a bank. To avoid creating a paper trail, he has to move the money via couriers through airports, down highways, and in containers, in his effort to get it back to South America. Or he has to run it through otherwise legitimate businesses, off-shore banks and shell corporations, money remitters, and accounts held by nominees, and ultimately sell it on the Colombian Black Market Peso Exchange, all to conceal or disguise the connection between the criminal proceeds and the underlying crime. That's the very definition of money laundering. See 18 U.S.C. 1956(a)(1)(13)(i). For a sophisticated money launderer - whether he keeps the money as cash, moves it via couriers, smuggles it out of the country, or sells it on the black market - the trail between the crime and the money is very murky indeed.

Significantly, even in the criminal forfeiture context, Congress recognized that the nexus between the property and the crime need only be shown by a preponderance of the evidence. In certain drug cases there is even a statutory presumption that the money is drug proceeds.

Statutes requiring the government to meet a "clear and convincing" standard are extremely rare. See e.g. 18 U.S.C. 3524(e)(1) (stripping non-custodial parent of visitation rights with child when custodial parent is relocated as a protected witness). In civil cases, such as those filed under the False Claims Act, 31 U.S.C. 3729, and the bank fraud statutes, 12 U.S.C. 1833a, to give just two examples, the "preponderance" standard is routinely applied. Our view is that preponderance of the evidence is an appropriate standard.

## Improvements to the forfeiture laws

Importantly, we are eager to see civil asset forfeiture reform that includes provisions needed to make the asset forfeiture laws more effective as law enforcement tools.

For example, it is right to put the burden of proof on the government in civil forfeiture cases, but it is wrong to omit provisions that allow the government to gather the evidence needed to meet its evidentiary burden. Congress should enact provisions allowing attorneys for the government to issue subpoenas for evidence in civil forfeiture cases in the same way that they are issued in federal health care cases, anti-trust cases, bank fraud cases and civil RICO cases. Similarly, Congress should permit the government's civil attorneys to have access to the grand jury material already in the possession of its criminal prosecutors.

Also, in the course of revising the civil forfeiture laws, we should address the problem that arises when claims are filed by fugitives. Before 1996, the federal courts employed a rule, known as the fugitive disentitlement doctrine, that barred a fugitive from justice from attempting to hide behind his fugitive status while contesting a civil forfeiture action against his property. See *United States v. Eng*, 951 F.2d 461, 464 (2d Cir. 1991) ("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").

But in 1996, the Supreme Court held in *Degen v. United States*, 116 S. Ct. 1777 (1996), that as a judge-made rule, the sanction of absolute disentitlement goes too far. Instead, it is left to Congress to enact a statute that, as the Court described it, avoids "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." *Degen*, 116 S. Ct. at 1778. Codification of the fugitive disentitlement doctrine is an essential part of any civil forfeiture reform.

A serious need is legislation which enhances the criminal forfeiture laws. The recent shift to criminal forfeiture in the federal courts has revealed numerous deficiencies in the criminal laws that have hampered the government's ability to make full use of those statutes.

In particular, the law should allow the government to, pursue criminal forfeiture any time a statute authorizes civil forfeiture, and it should allow the government to restrain property subject to forfeiture pre-trial, so that the property does not disappear or dissipate while the criminal case is pending. Title V of the Administration's proposal contains these and a comprehensive set of other proposals that would make the criminal forfeiture statutes the equal of their civil counterparts as effective crime-fighting tools.

Finally, once the needed reforms of the civil forfeiture laws are made, I urge Congress to expand forfeiture into new areas where it can be used to combat sophisticated, serious domestic and international criminal activity. From telemarketing to terrorism to counterfeiting to violations of the food and drug laws, the remedy of asset forfeiture should be applied. Title II of our proposal contains numerous provisions designed to achieve this goal.

## Conclusion

As I said at the outset, we firmly believe that the time has come to reform the forfeiture laws. We have said this repeatedly since 1993, when forfeiture reform legislation was first introduced. We have said that Congress should enact legislation to ensure that "the forfeiture laws of the U.S. will be tough but fair -- tough but fair -- which is exactly what the American people have a right to expect." I still very much believe that. Working together, we can craft a balanced set of forfeiture laws that combine fairness with effective law enforcement. We look forward to working with the Subcommittee to do exactly that.

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## A BILL

*[Editor's Note: Please note that only those portions of the DOJ proposal that were ultimately included, in some form, in the final bill are included in the excerpt of the legislative history.]*

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 1999.

### SEC. 2. TABLE OF CONTENTS

**TITLE I — CIVIL FORFEITURE PROCEDURE**

- Sec. 102. Uniform innocent owner defense.
- Sec. 103. Stay of civil forfeiture case
- Sec. 104. Limitations period for challenges to cash seizures by prisoners
- Sec. 105. Application of procedures for drug cases
- Sec. 106. Pre-judgment interest.
- Sec. 107. Seizure warrant requirement.
- Sec. 108. Civil restraining orders.
- Sec. 109. Excessive fines.
- Sec. 111. Access to records in bank secrecy jurisdictions
- Sec. 114. Disclosure of grand jury information to federal prosecutors.
- Sec. 115. Statute of limitations for civil forfeiture actions
- Sec. 116. Destruction or removal of property to prevent seizure
- Sec. 117. Fungible property in bank accounts.

**TITLE II — EXTENDING FORFEITURE AUTHORITY TO OTHER CRIMES**

- Sec. 204. Forfeiture for alien smuggling.
- Sec. 215. Other criminal proceeds

**TITLE III - MISCELLANEOUS FORFEITURE AMENDMENTS**

- Sec. 302. Use of forfeited funds to pay restitution to crime victims
- Sec. 307. Certificate of reasonable cause

**TITLE IV — INTERNATIONAL LAW ENFORCEMENT COOPERATION**

- Sec. 402. Fugitive disentitlement
- Sec. 404. Proceeds of foreign crimes

**TITLE V - CRIMINAL FORFEITURE**

- Sec. 502. Use of criminal forfeiture as an alternative to civil forfeiture.

**TITLE I -- CIVIL FORFEITURE PROCEDURE****SEC. 102. 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 forfeiture 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 the person establishes, by a preponderance of the evidence, --

"(A) that the person did not know that the property was being used or was likely to be used in the commission of such illegal act, or

"(B) that upon learning that the property was being used or was likely to be used in the commission of such illegal act, the person promptly did all that reasonably could be expected to terminate or to prevent such use of the property.

"(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 the person establishes, by a preponderance of the evidence, that the person 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, unless the bailor is identified, and the bailor has authorized the bailee to claim in the forfeiture proceeding, pursuant to the Supplemental Rules for Admiralty and Maritime Claims; (C) a nominee who exercises no dominion or control over the property; or (D) a beneficiary of a constructive trust; and

"(2) a person shall be considered to have known that his or her property was being used or was likely to be used in the commission of an illegal act 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.

"(d) If the court determines, in accordance with this section, that an innocent owner has 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 if neither (1) nor (2) is reasonably practical under all of the circumstances, (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."

(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. 103. STAY OF CIVIL FORFEITURE CASE**

(a) 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 is 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 by the government to the court under this subsection that involves an on-going criminal investigation or prosecution shall be made 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 by dispositive motion or at the time of trial."

(b) DRUG FORFEITURES.-- Section 511(i) of the Controlled Substances Act (21 U.S.C. § 881(i)) is amended to read as follows:

"(i) The provisions of title 18, United States Code, Section 981(g) regarding the stay of a civil forfeiture proceeding shall apply to forfeitures under this section."

## **SEC. 104. LIMITATIONS PERIOD FOR CHALLENGES TO CASH SEIZURES BY PRISONERS**

Section 981 of title 18, United States Code, is amended by adding at the end the following subsection:

"Challenges to administrative forfeitures

"(l)(1) Any motion to set aside a declaration of forfeiture entered pursuant to section 609 of the Tariff Act of 1930 (19 U.S.C. § 1609), as incorporated by subsection (d), must be filed not later than 2 years after the entry of the declaration of forfeiture. Such motion shall be granted if --

"(A) the moving party had an ownership or possessory interest in the forfeited property, and the Government failed to take reasonable steps to provide such party with notice of the forfeiture; and

"(B) the moving party did not have actual notice of the seizure within sufficient time to file a claim within the time period provided by law.

"(2) If the court grants a motion made under paragraph (1), it shall set aside the declaration of forfeiture as to the moving party's interest pending forfeiture proceedings in accordance with section 602 et seq. of the Tariff Act of 1930 (19 U.S.C. § 1602 et seq.), which proceedings shall be instituted within 60 days of the entry of the order granting the motion.

"(3) If, at the time a motion made under this paragraph (1) is granted, the forfeited property has been disposed of by the Government in accordance with law, the Government shall institute forfeiture proceedings under paragraph (2) against a substitute sum of money equal to the value of the forfeited property at the time it was disposed of, plus interest.

"(4) The institution of forfeiture proceedings under paragraph (2) shall not be barred by the expiration of the statute of limitations under section 621 of the Tariff Act of 1930 (19 U.S.C. § 1621) if the original publication of notice was initiated before the expiration of such limitations period.

"(5) A motion made under this subsection shall be the exclusive means of obtaining judicial review of a declaration of forfeiture entered by a seizing agency.

"(6) This subsection shall apply to any administrative forfeiture under this section, and to any administrative forfeiture under the Controlled Substances Act, or under any other provision of law that incorporates the provisions of the customs laws."

## **SEC. 105. APPLICATION OF PROCEDURES FOR DRUG CASES**

Section 511(d) of the Controlled Substances Act (21 U.S.C. § 881(d)) is amended by adding the following at the end: "The provisions of Chapter 46, title 18, United States Code, shall also apply to seizures and forfeitures under this section, insofar as applicable and not inconsistent with the provisions hereof."

## **SEC. 106. 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 provision of title 18, United States Code, the Controlled Substances Act, or the Immigration and Naturalization Act of 1952, 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, where such interest 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 to make any other payments of interest or other compensation 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.

## **SEC. 107. 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, which may be issued by a magistrate judge 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 --

(A) a complaint for forfeiture has been filed in the district court and the court has issued an arrest warrant in rem pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims, based upon a showing of probable cause;

(B) there is probable cause to believe that the property is subject to forfeiture and (i) the seizure is made pursuant to a lawful arrest or search, or (ii) another exception to the Fourth Amendment warrant requirement would apply; or

(C) the property was lawfully seized by a state or local law enforcement agency and has been transferred to a federal agency in accordance with State law."

"(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 in the district where the property is located 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 at a hearing conducted in the manner provided in rule 43(e) of the Federal Rules of Civil Procedure. 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."

(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."

**SEC. 108. CIVIL RESTRAINING ORDERS**

Section 981 of title 18, United States Code, is amended by adding the following at the end:  
"Restraining orders.

"(m) 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(e) 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.

**SEC. 109. EXCESSIVE FINES**

Section 981 of title 18, United States Code, is amended by adding the following at the end:  
"Excessive Fines

"(n) 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 the forfeiture is grossly disproportional to the gravity of the offense. The claimant shall have the burden of establishing that the forfeiture is grossly disproportional 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 grossly disproportional to the gravity of the offense, it shall adjust the forfeiture to the extent necessary to avoid the Constitutional violation.

**SEC. 111. 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 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. 114. DISCLOSURE OF GRAND JURY INFORMATION TO FEDERAL PROSECUTORS**

Section 3322(a) of title 18, United States Code, is amended --

(1) by striking "civil forfeiture under section 981 of title 18, United States Code, of property described in section 981(a)(1)(C) of such title" and inserting "any civil forfeiture provision of federal law"; and

(2) by striking "concerning a banking law violation".

**SEC. 115. STATUTE OF LIMITATIONS FOR CIVIL FORFEITURE ACTIONS**

Section 621 of the Tariff Act of 1930 (19 U.S.C. § 1621) is amended --

- (1) by inserting ", or in the case of forfeiture, within five years after the time when the existence of the property and the involvement of the property in the alleged offense were discovered" after "within five years after the time when the alleged offense was discovered";
- (2) by striking "and" at the end of paragraph (1);
- (3) by striking the period and inserting ", and" at the end of paragraph (2); and
- (4) by adding, at the end, the following new paragraph:

"(3) the provisions of section 2415(e) of title 28, United States Code, shall apply to this section."

**SEC. 116. DESTRUCTION OR REMOVAL OF PROPERTY TO PREVENT SEIZURE**

- (a) Section 2232(a) of title 18, United States Code, is amended by--
  - (1) inserting "or seizure" after "Physical interference with search";
  - (2) inserting ", including seizure for forfeiture," after "after seizure";
  - (3) striking "searches and seizures" after "authorized to make" and inserting "searches or seizures";
  - (4) striking "or" after "wares,"; and
  - (5) inserting ", or other property, real or personal," after "merchandise."
- (b) Section 2232(b) of title 18, United States Code, is amended by--
  - (1) inserting "or seizure" after "Notice of search";
  - (2) striking "searches and seizures" after "authorized to make" and inserting "searches or seizures";
  - (3) inserting ", including seizure for forfeiture," after "likely to make a search or seizure"; and
  - (4) inserting "real or personal," after "merchandise or other property,".

**SEC. 117. FUNGIBLE PROPERTY IN BANK ACCOUNTS**

- (a) IN GENERAL-- 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 striking subsection (b), as redesignated, and inserting the following:

"(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 2 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) does 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) in subsection (c), as redesignated, by adding at the end the following:

"(3) In this subsection, the term 'financial institution' includes a foreign bank, as defined in paragraph (7) of section 1(b) of the International Banking Act of 1978.";

(5) by adding at the end the following:

“(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.”.

(b) RETROACTIVE APPLICATION.-- The amendments made by this section shall apply retroactively to any transaction occurring on or after October 28, 1992.

## **SEC. 204. FORFEITURE FOR ALIEN SMUGGLING**

(a) CRIMINAL FORFEITURE AUTHORITY.-- Section 982(a)(7) of title 18, United States Code, is amended --

(1) by striking "(A)," by striking all of sub-paragraph (B), and by redesignating parts (i) and (ii)(I) and (II) as sub-paragraphs (A) and (B)(i) and (ii), respectively;

(2) by inserting "sections 274(a), 274A(a)(1) or 274A(a)(2) of the Immigration and Nationality Act of 1952 (8 U.S.C. §§ 1324(a), 1324A(a)(1) and 1324A(a)(2)),” before "section 1425" the first time it appears;

(2) in sub-paragraph (A), as redesignated by this section, by striking "a violation of, or a conspiracy to violate, subsection (a)" and inserting "the offense of which the person is convicted"; and

(3) in sub-paragraph (B)(i) and (ii), as redesignated by this section, by striking "a violation of, or a conspiracy to violate, subsection (a)" through "of this title" and inserting "the offense of which the person is convicted".

(b) CIVIL FORFEITURE.-- Section 981(a)(1) of title 18, United States Code, is amended by adding the following at the end:

"(I)(i) any conveyance, including any vessel, vehicle, or aircraft, which has been or is being used in the commission of a violation of 8 U.S.C. § 1324(a); and

"(ii) 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 8 U.S.C. § 1324(a), or (II) 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)."

## **SEC. 215. OTHER CRIMINAL PROCEEDS**

(a) CRIMINAL FORFEITURE.-- Section 982(a)(2) of title 18, United States Code, is amended by –

(1) adding “, or” at the end of sub-paragraph (B), and

(2) inserting the following after sub-paragraph (B):

“(C) any offense constituting ‘specified unlawful activity’ as that term is defined in section 1956(c)(7) of this title”

(b) CIVIL FORFEITURE.-- Section 981(a)(1)(C) of title 18, United States Code, is amended by striking “or a violation of section 1341” and all that follows, and inserting “or any offense constituting ‘specified unlawful activity’ as that term is defined in section 1956(c)(7) of this title, or a conspiracy to commit such offense.”.

## **SEC. 302. USE OF FORFEITED FUNDS TO PAY RESTITUTION TO CRIME VICTIMS**

Section 981(e) of title 18, United States Code, is amended 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”.

## **SEC. 307. 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. 402. FUGITIVE DISENTITLEMENT**

(a) IN GENERAL.-- Chapter 163 of title 28, United States Code, is amended by inserting the following new section: § 2467. 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 against the person, 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:

"2467. Fugitive disentitlement"

(c) APPLICATION. --The amendments made by this section shall apply to any case pending on the effective date of this Act.

**SEC. 404. ENFORCEMENT OF FOREIGN FORFEITURE JUDGMENT**

(a) IN GENERAL.-- Chapter 163 of Title 28, United States Code, is amended by inserting the following new section: "Section 2468. Enforcement of foreign 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 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, or any foreign offense described in Section 1956(c)(7)(B) of title 18, 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 and 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:

"2468. Enforcement of foreign forfeiture judgment"

## **SEC. 502. USE OF CRIMINAL FORFEITURE AS AN ALTERNATIVE TO CIVIL 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 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 413 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. § 853)."

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### **SECTION-B Y-SECTION ANALYSIS FORFEITURE ACT OF 1999 Title I - Civil Forfeiture Procedure**

#### **Section 102. Uniform Innocent Owner Defense**

The Constitution does not require any protection for innocent owners in civil forfeiture statutes. *Bennis v. Michigan*, 516 U.S. 442 (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 forfeit 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, 79 F.3d 918 (9th Cir. 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, 820 (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>1</sup> It applies to all civil forfeitures in titles 8 and 18 and the Controlled Substances Act, and it may be incorporated into other forfeiture statutes as Congress may see fit.

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 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 be considered to have had knowledge of the illegal activity, and would have to show, pursuant to subparagraph (B), 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

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<sup>1</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).

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).

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.

### **Section 103. 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 the 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 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.

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.

*See United States v. All Right, Title and Interest in Real Property* (228 Blair Ave.), 821 F. Supp. 893 (S.D.N.Y. 1993).

#### **Section 104. Limitations period for challenges to cash seizures by prisoners**

In money laundering cases, cash or other property involved in the money laundering offense is generally seized by a federal agency and forfeited in accordance with the customs laws, which are incorporated by reference into the money laundering forfeiture statute. 18 U.S.C. § 981(d).

Under the customs laws, the seizing agency may forfeit certain property administratively — that is, without referring the case to the United States Attorney — if the forfeiture is uncontested, and if certain criteria regarding the nature and value of the property are met. 19 U.S.C. § 1607. *See Yskamp v. DEA*, \_\_\_\_ F.3d \_\_\_, No. 98-6148, 1998 WL 887697 (3rd Cir. Dec. 21, 1998). The seizing agency, however, must take steps that are "reasonably calculated" to ensure that persons with an ownership or possessory interest in the property are aware of the forfeiture action and the procedure for contesting it. *See United States v. Randall*, 976 F. Supp. 1442 (M.D. Ala. 1997); *United States v. Schiavo*, 897 F. Supp. 644, 648-49 (D. Mass. 1995).

Generally, a property owner who fails to challenge an administrative forfeiture may not later seek judicial review of the agency's action. *See 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."). But the district courts do have equitable jurisdiction to review administrative forfeitures to ensure that the government took adequate steps to provide proper notice. *United States v. Schinnell*, 80 F.3d 1064 (5th Cir. 1996) ("once the administrative forfeiture was completed, the district court lacked jurisdiction to review the forfeiture except for failure to comply with procedural requirements or to comport with due process"); *see Polanco v. U.S. Drug Enforcement Administration*, 158 F.3d 647 (2d Cir. 1998); *United States v. Giraldo*, 45 F.3d 509, 511 (1st Cir. 1995).

Challenges to administrative forfeitures are routinely and almost exclusively filed by federal prisoners who were arrested and incarcerated in connection with the criminal offense that gave rise to the forfeiture action. In such cases, the

prisoner was aware that his property was seized at the time of the arrest, but for whatever reason determined that it was not in his interest to challenge the forfeiture. Later, however, the prisoner claims that he did not challenge the forfeiture because the government failed to provide him with adequate notice that the forfeiture was taking place. The usual claims are that the government sent the notice to a home address instead of to the place of incarceration, or sent the notice to a place of incarceration from which the prisoner had been moved, or sent the notice to the correct place of incarceration but failed to ensure that the jailer delivered the notice to the prisoner. In recent years, the number of such cases has been legion. *See e.g. Small v. United States*, 136 F.3d 1334 (D.C. Cir. 1998); *United States v. Clark*, 84 F.3d 378 (10th Cir. 1996); *United States v. Real Property . . . Lido Motel*, 135 F.3d 1312 (9th Cir. 1998); *United States v. Real Property (Tree Top)*, 129 F.3d 1266 (6th Cir. 1997) (Table Case); *Weng v. United States*, 137 F.3d 709 (2nd Cir. 1998); *United States v. Giraldo*, 45 F.3d 509, 511 (1st Cir. 1995); *United States v. One Parcel . . . 13 Maplewood Dr.*, 1997 WL 567945 (D. Mass. 1997); *Whiting v. United States*, \_\_\_ F. Supp. 2d \_\_\_, 1998 WL 847933 (D. Mass. Nov. 30, 1998); *Aguilar v. United States*, 8 F. Supp. 2d 175 (D. Conn. 1998); *Scott v. United States*, 950 F. Supp. 381 (D.D.C. 1996).

This amendment is intended to resolve two issues that have split the courts regarding such prisoner challenges to administrative forfeitures. First, the courts disagree on the statute of limitations on such claims. *Compare Williams v. Drug Enforcement Administration*, 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") with *Polanco v. U.S. Drug Enforcement Administration*, 158 F.3d 647 (2d Cir. 1998) (claimant has 6 years from date he discovered, or had reason to discover, his property was forfeited, not from date it was seized; if claimant never received notice, 6 years runs from end of the 5-year period in which gov't could have filed a forfeiture action). As the Second Circuit acknowledged, its rule means that a prisoner actually has 11 years from the time his property was seized to file his challenge. Thus, in a recent case in New York, a prisoner whose property was seized at the time he was arrested for drug trafficking in 1990, and who did nothing to contest the forfeiture action at that time, was allowed to file a challenge to the administrative forfeiture in 1997, more than seven years after the seizure took place. *Valencia-Romero v. United States*, 1998 WL 938949 (E.D.N.Y. 1998).

The courts are also divided as to the appropriate remedy when it turns out that the government's efforts to send notice to a prisoner were inadequate. In most cases, the court will simply vacate the declaration of forfeiture and direct the seizing agency to institute a new forfeiture action. *See United States v. Volanty*, 79 F.3d 86, 88 (8th Cir. 1996) (district court did not abuse discretion in permitting gov't to correct due process violation by vacating administrative forfeiture and instituting new judicial forfeiture proceeding). But the courts recognize that this may not be possible if, as is frequently the case, the prisoner has waited so long to file his challenge to the administrative forfeiture that the statute of limitations bars the government from filing a new claim. In such cases, some courts will address the forfeiture action on the merits without requiring a new complaint to be filed, thus ensuring that the prisoner does not receive a windfall as a result of his delay in challenging the forfeiture. *See United States v. Boero*, 111 F.3d 856 (2d Cir. 1997); *United States v. Marolf*, 973 F. Supp. 1139 (C.D. Cal. 1997); *Kadonsky v. United States*, 1998 WL 119531 (N.D. Tex. 1998). But other courts hold that the property must be returned to the prisoner. *See Clymore v. United States*, \_\_\_ F.3d \_\_\_, 1999 WL 3366 (10th Cir. Jan. 7, 1999).

The amendment addresses both of these problems by providing that challenges to uncontested administrative forfeitures must be filed within 2 years of the entry of the declaration of forfeiture pursuant to 19 U.S.C. § 1609, and by providing that the remedy in cases where a court finds that the notice was inadequate is to refile the forfeiture complaint without regard to the expiration of the statute of limitations on the forfeiture action. Both provisions, and most of the legislative language, is taken from a proposal introduced in 1997 by Reps. Hyde and Conyers and approved by the House Judiciary Committee. *See H. Rep. 105-358*, 105<sup>th</sup> Cong., 1<sup>st</sup> Sess., at p.3. The amendment does not change the current rule that the lack of procedural due process in the administrative forfeiture proceeding is the only ground on which a person may seek judicial review of an uncontested administrative forfeiture. *See United States v. Deninno*, 103 F.3d 82 (10th Cir. 1996) (jurisdiction is limited to adequacy of due process in the administrative forfeiture proceeding); *United States v. Schiavo*, 897 F. Supp. 644, 647 (D. Mass. 1995) (court could review adequacy of notice but not Fourth Amendment objection to seizure that claimant could have raised if he had filed a claim); *Concepcion v. United States*, 938 F. Supp. 134 (E.D.N.Y. 1996) (court lacks jurisdiction to review 8th Amendment challenge to administrative forfeiture).

## Section 105. Application of Procedures for Drug Cases

This section makes the amendments to Section 981 applicable to civil forfeitures in drug cases *brought under the Controlled Substances Act (not in in rem forfeiture cases of drugs brought under 21 U.S.C. § 334 of the FFDCA)*.

## Section 106. 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*, 69 F.3d 1491 (9th Cir. 1995); *U.S. v. \$133,735.30 Seized from U.S. Bancorp Brokerage Account*, 139 F.3d 729 (9<sup>th</sup> Cir. 1998); and *U.S. v. \$515,060.42 in U.S. Currency*, 152 F.3d 491 (6<sup>th</sup> Cir. 1998); also see *Phillips v. Washington Legal Foundation*, 118 S. Ct. 1925 (1998). (upholding the interest-follows-the-principal rationale underlying these decisions).

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.

## Section 107. 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 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) preserves the current rule that property may be seized for civil forfeiture either pursuant to the Admiralty Rules once a civil judicial complaint is filed, or pursuant to a seizure warrant. The statute is revised, however, 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.

Finally, subsection (b)(2) is revised to make clear that federal authorities do not have to obtain a federal warrant to re-seize property already lawfully in the possession of state law enforcement authorities when the State elects, in accordance with state law, to turn the property over to the federal government for forfeiture under federal law.

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.

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 108. Civil Restraining Orders**

The section 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).

## **Section 109. Excessive Fines**

This section 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*, 113 S. Ct. 2801 (1993) and *Alexander v. United States*, 113 S. Ct. 2766 (1993) (holding that Excessive Fines Clause of the Eighth Amendments may apply to civil and criminal forfeitures respectively). Neither of those decisions addresses the question of whether judge or jury decides if a civil forfeiture is excessive, but most courts have held that the Eighth Amendment determination is to be made by the court *after* return of the verdict of forfeiture. *See United States v. Funds in the Amount of \$170,926.00*, 985 F. Supp. 810 (N.D. Ill. 1997) (motion to dismiss civil complaint on 8<sup>th</sup> Amendment grounds denied; court should not address excessive fines challenge until government has established forfeitability at trial); *United States v. \$633,021.67 in U.S. Currency*, 842 F. Supp. 528 (N.D. Ga. 1993) (pre-trial determination of yet-to-occur forfeiture would be premature); *United States v. One Parcel of Real Estate Located at 13143 S.W. 15th Lane*, 872 F. Supp. 968 (S.D. Fla. 1994) (excessive fines issues is not ripe for review until after judgment of forfeiture has been entered).

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 amendment makes this procedure part of the forfeiture statute.

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.

## **Section 111. 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 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 114. Disclosure of Grand Jury Material to Federal Prosecutors**

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. Thus, the provision recognizes that civil forfeiture actions under § 981 are part of any law enforcement action arising out of a criminal investigation.

The limitation to forfeiture under "§981(a)(1)(C)" for "banking law" violations, however, is obsolete. Because all civil forfeiture actions are now recognized as law enforcement functions, grand jury information should be available to government attorneys for their use in all civil forfeiture cases. The amendment therefore strikes the references to paragraph (C) and to banking law so that disclosure under 18 U.S.C. § 3322(a) will be permitted in regard to any forfeiture under federal law. 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 115. Statute of Limitations for Civil Forfeiture Actions**

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 1993 but not discover that the proceeds of the robbery were used to buy a motorboat until 1996. Under current law the forfeiture of the motorboat would be barred by the statute of limitations. *See United States v. \$515,060.42 in U.S. Currency*, 152 F.3d 491 (6<sup>th</sup> Cir. 1998) (if the government is aware of an on-going scheme, the statute of limitations runs from the time the government first became aware of the scheme, not from the date of the particular violation that generated the seized property). 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.

Section 1621 is also amended to make the provisions of 28 U.S.C. § 2415(e) applicable to forfeiture actions filed by the government. Section 2415(e) provides that in all suits for money damages filed by the government, if the suit is timely filed but is later dismissed without prejudice, the government may re-file the action within one year, notwithstanding the expiration of statute of limitations. The amendment makes this rule applicable to forfeiture actions brought by the government as well as actions for money damages.

#### **Section 116. Destruction or Removal of Property to Prevent Seizure**

This amendment is intended to remove any possible ambiguity as to whether 18 U.S.C. § 2232 (Destruction or removal of property to prevent seizure) applies to seizures for forfeiture. In particular, it is intended to alleviate any concern that

Section 2232 is limited to investigative "searches and seizures" only and thus excludes forfeiture seizures executed by law enforcement agencies pursuant to seizure warrants issued against forfeitable property (*see, e.g.*, 21 U.S.C. § 881(b)) and forfeiture seizures executed by the U.S. Marshals Service pursuant to warrants of arrest *in rem* or orders of criminal forfeiture. The amendment also adds language to clarify that interference with seizures of real property is included within the statute's prohibitions.

### **Section 117. Fungible Property in Bank Accounts**

This section makes several clarifying changes to 18 U.S.C. § 984, the statute authorizing forfeiture of fungible property in civil cases when no property traceable to the underlying offense is available. By striking subsection (a) of the present section 984, 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 Congress's 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 (b) of this section applies these changes retroactively to any transaction occurring on or after October 28, 1992, the date of the enactment of section 984.

### **Section 204. Forfeiture for Alien Smuggling**

There are technical errors in the drafting of Section 217 of the Immigration Reform Act of 1996 that nullify the intended effect of the criminal forfeiture provisions.

It is evident from the text of the provision that Congress intended to authorize criminal forfeiture for violations of 8 U.S.C. §§ 1324(a), 1324A(a)(1) and 1324A(a)(2). References to those statutes, however, appear only in one sub-paragraph of the provision, and not in the introductory paragraph that lists the offenses for which forfeiture may be imposed as a penalty. The statutes must be referenced in the introductory language to give the provision its intended effect. Subsequent surplus references are deleted.

Moreover, the 1996 Act failed to make a corresponding amendment to the civil forfeiture statute in the Immigration and Naturalization Act, 8 U.S.C. § 1324(b) to allow the proceeds of alien smuggling cases to be forfeited civilly in the event the smuggler is not apprehended or for some other reason cannot be prosecuted. The amendment corrects this omission.

### **Section 215. Other Criminal Proceeds**

This amendment makes the proceeds of most serious crimes 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). The crimes to which the provision will apply are those defined as "specified unlawful activity" for purposes of the money laundering statutes, 18 U.S.C. § 1956(c)(7), and conspiracies to commit such offenses.

By providing for forfeiture of the proceeds of these 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.

### **Section 302. Use of Forfeited Funds to Pay Restitution to Crime Victims**

This section amends the civil 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 statute dealing with restitution to victims, 18 U.S.C. § 981(e), 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>2</sup> In contrast, 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.<sup>3</sup> These amendments negate that implication by making it clear that the Attorney General may make use of the forfeiture laws to restore property to victims in all cases.

### **Section 307. 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 402. 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*, 116 S. Ct. 1777 (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. *See United States v. Funds Held in the Name of Wetterer*, 17 F. Supp.2d 161 (E.D.N.Y. 1998) (because of *Degen*, claimant that is *alter ego* of fugitive may file claim challenging forfeiture of bank account held by perpetrator of mail fraud/child sex abuse scheme who is resisting extradition in Guatemala). 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*, 116 S. Ct. at 1778. 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

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<sup>2</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.

<sup>3</sup> Section 981(d) incorporates the Customs laws, which in turn contain remission and mitigation authority. *See* 19 U.S.C. § 1618. But that authority has been interpreted only to permit remission to the owner of the seized property, a category that does not include most victims.

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.

This amendment will apply to cases pending at the time of enactment.

#### **Section 404. Enforcement of Foreign Forfeiture Judgments**

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). Indeed, 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 any offense in a foreign country that is a "specified unlawful activity" for money laundering purposes, 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 502. Use of Criminal Forfeiture as an Alternative to Civil Forfeiture

Under current law, 28 U.S.C. § 2461(a), if a statute provides for forfeiture without prescribing whether the forfeiture is civil or criminal, it is assumed that only civil forfeiture is authorized. In such cases, the government may not pursue forfeiture as part of the criminal prosecution, but must file a parallel civil forfeiture case in order to prosecute an individual and forfeit the proceeds of the offense. *See e.g.* 18 U.S.C. § 1955 (gambling); § 545 smuggling.

The vast majority of federal forfeiture statutes fall into this category. That is, the vast majority of forfeitures must be done civilly even if there is a related criminal prosecution. To encourage greater use of criminal forfeiture, this amendment revises § 2461(a) to authorize criminal forfeiture whenever any form of forfeiture is otherwise authorized by statute.

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### 2. Statement of Gilbert G. Gallegos, 1999 WL 20010425

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Wednesday, July 21, 1999

#### **Asset Forfeiture Gilbert G. Gallegos**

TESTIMONY of Gilbert G. Gallegos National President, Fraternal Order of Police On "Oversight of Federal Asset Forfeiture: Its Role in Fighting Crime" Before the Senate Committee on the Judiciary Subcommittee on Criminal Justice Oversight presented on 21 July 1999.

Good afternoon Mr. Chairman and distinguished Members of the Criminal Justice Oversight Subcommittee, it is an honor to appear before you once again. My name is Gilbert Gallegos and I am the National President of the Grand Lodge, Fraternal Order of Police. With over 283,000 members, the F.O.P. is the largest organization of rank-and- file law enforcement officers in the nation. I am here today to testify on the future of civil asset forfeiture and attempts to reform existing law, an issue of the utmost concern to law enforcement officers at every level of government. While reform of current forfeiture law is appropriate, it is of equal importance that any such reform does not hamper the ability of law enforcement to separate the proceeds of illegal activity from criminals and drug traffickers.

The impetus for this hearing is no doubt the recent attempts to reform forfeiture procedures through enactment of H.R. 1658, which passed the House of Representatives last month. During floor debate on this important measure, the Fraternal Order of Police, the Department of Justice, and various other law enforcement groups stood together to oppose the intent and perhaps unintended consequences of that legislation. Proponents of the bill attacked law enforcement's use of civil forfeiture and made several veiled references to police officers serving as the government's bounty hunters. Several lawmakers came to the floor to describe the "horror stories" of law enforcement's supposedly unjust attempts to take property away from innocent citizens. We were described as opposed to "constructive" reform of any type and our position was described as the defenders of the status quo. Nothing could be further from the truth.

We worked with Members of both parties not out of a desire to thwart any type of civil forfeiture reform, but rather out of a dedication to a common-sense reform effort that would increase the protections available to innocent property owners while preserving law enforcement's ability to ensure that criminals and drug dealers do not profit from their illegal activity.

A part of the reason that I am appearing before you today, Mr. Chairman, is to debunk these salacious assertions and give you the perspective of the "cop on the beat." It is true that law enforcement believes in the effectiveness of civil asset forfeiture. It provides State and local police agencies with much needed resources that can be used to provide officer safety equipment or to supplement the funds available to fight crime. But perhaps most importantly, it comprises the second of a two pronged approach to winning the war on drugs. As former US Attorney General Richard Thornburgh once said, "it is truly satisfying to think that it is now possible for a drug dealer to serve time in a forfeiture-financed prison, after being arrested by agents driving a forfeiture-provided automobile, while working in a forfeiture-funded sting operation." Not only can we put criminals and drug dealers behind bars, but civil asset forfeiture allows us to ensure that neither they, nor their families, will be allowed to live a life of luxury off of a criminal's ill-gotten gains.

There are several problems with the House-passed version of the bill that I believe must be addressed. First, in the event of an administrative error, H.R. 1658 would give prisoners and criminals a windfall by forcing the government to return

forfeited property to the prisoner with no opportunity to file a new forfeiture action against it. For example, if the government sends notice to an incarcerated felon that his property will be forfeited to the wrong prison, the government has no alternative but to return that property.

Second, while H.R. 1658 appropriately places the burden of proof on the government, it does so at the unacceptably high level of "clear and convincing" evidence. This means that drug dealers would have more protection from civil sanctions than are currently available to doctors, bankers, and defense contractors.

Third, the legislation gives judges the authority to appoint counsel to any and all persons who believe that they have standing to contest a forfeiture. No safeguards are in place to prevent the abuse of this provision by individuals filing frivolous claims and it will no doubt cause an enormously unnecessary drain on government funds.

Fourth, this legislation establishes an "innocent owner" defense that allows criminals and drug dealers to pass on their fortunes through sham transactions. Under the provisions of this bill, criminals will be allowed to amass sizable illegal fortunes and then pass it on legitimately to their children, spouses, and associates through probate.

Finally, there is the issue of the return of seized property pending completion of the forfeiture proceedings if the person can successfully claim that continued government possession of their property would impose a "substantial hardship." H.R. 1658 would force law enforcement to return seized property despite the fact that there may be overwhelming evidence that it was used to commit a crime. If property that is currency, contraband, evidence, or an item likely to be used to commit additional criminal acts is returned, it is highly likely that it will be disposed of and will not be available for forfeiture.

These are just some of the problems that law enforcement has with the current provisions of H.R. 1658. Having said that, I want to make it clear that I am not here today to argue that some reform is not necessary to maintain the public's confidence in the use of civil asset forfeiture as an effective crime-fighting tool. Since 1993, the Supreme Court has decided no fewer than eleven cases dealing with the procedural safeguards that must be provided to individuals who have their property seized and forfeited. For example, forfeitures are now subject to the Eighth Amendment's prohibition against excessive fines; and if it would be "grossly disproportional to the gravity of the offense," it is unconstitutional. In addition, the Supreme Court has said that residences and other real property cannot be seized without prior notice and a hearing. In response, Federal law enforcement agencies who conduct forfeitures have been revising and refining their procedures to be in compliance with the Supreme Court's decisions. Therefore, the fact that proponents of H.R. 1658 in its existing form can only cite "horror stories" which occurred before the Court's rulings indicate that the administrative reforms have been effective.

We can, however, take these efforts one step further. It is possible to codify into law the efforts of the Department of Justice, the Treasury Department, and the Supreme Court to reform civil forfeiture procedures, protect the interest of innocent property owners, and preserve law enforcement's ability to use civil forfeiture to win the war on drugs. Despite conventional wisdom, these three goals are not at odds with one another.

To that end, I believe that there are two important provisions that must be incorporated into any reform legislation not included in H.R. 1658 as engrossed by the House. The first is shifting the burden of proof in civil asset forfeiture cases from the property owner to the government to show by a "preponderance of the evidence" that the property is subject to forfeiture. It is not fair for a property owner who believes that his or her property has been incorrectly seized to have to prove that their property was not used in the commission of a crime in order to avoid forfeiture. We believe that a "preponderance of the evidence," the standard used in most civil cases, is the appropriate level of proof in civil forfeiture cases. A showing of "probable cause" does not merit the forfeiting of a person's property to the government. Likewise, a standard of "clear and convincing" evidence is not appropriate for use in civil forfeiture cases. To my knowledge, such a standard of evidence is used only for the most serious civil actions brought by the government, such as the involuntary separation of a child from its parent.

The second important provision that must be included in any final civil asset forfeiture reform legislation is the construction of an "innocent owner defense" so that property owners who take certain reasonable steps can defend against the government's claims. While protecting innocent property owners, however, we must be careful not to create a loophole whereby criminals can pass on the profits of their crimes through sham transactions. First, property owners must have the opportunity to defeat a forfeiture action if, at the time of the criminal offense, they had no knowledge of the illegal use of their property or upon learning of the illegal use, took all reasonable steps to revoke permission for the use of their property.

Second, with respect to property acquired after the illegal offense giving rise to the forfeiture, a person would be an "innocent owner" if they were a bona fide purchaser for value and was, at the time of purchase, reasonably without cause to believe that the property had been used for criminal purposes. If the property is jointly owned, there should also be a recourse for one party to receive either the property or a portion of the proceeds from the sale of such property. This would enable the spouse of a criminal, who was unaware of the illegal use of their jointly owned property to not have to forfeit

their right to it simply because of the actions of another. Here again there is a balance that can be struck between protecting property rights and taking property used to commit crimes out of commission.

Law enforcement officials at every level of government believe that forfeiture is extremely effective in taking the profit out of crime and reducing the incentive that others would have to commit similar illegal offenses. And if it is a crime that has victims, law enforcement can use civil asset forfeiture to recover and restore the property to its rightful owners or at the very least, ensure a just measure of compensation to the victim. In addition, forfeiture provides much needed resources to state and local governments that supplement the funds available to keep our streets safe. As I have said before, civil asset forfeiture is one of the most effective tools we have to rid our communities of the scourge of crime and drugs. For when law enforcement can use a criminal's money or property to rid our communities of this problem once and for all, then we as a nation, and as a society, can claim a final victory in the war on drugs.

As the Senate begins its consideration of the future of civil asset forfeiture, I would urge that you seek out that balance which I have spoken of between defending the rights of law abiding property owners and defending law enforcement's use of this effective crime fighting tool. As you have heard, and will continue to hear, this is something that we in the law enforcement community believe is sorely lacking from H.R.1658.

Thank you Mr. Chairman. At this time, I would be pleased to answer any questions you may have.

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### **3. Statement of Johnny Mack Brown, 1999 WL 20010426**

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Wednesday, July 21, 1999

#### **Asset Forfeiture Johnny Mack Brown**

July 21, 1999

Good Afternoon Mr. Chairman, Members of the Committee.

Thank you for inviting me to testify before you this afternoon on this crucial issue, Asset Forfeiture. My name is Johnny Mack Brown and I am the Sheriff of Greenville County, South Carolina. I was first elected in 1976 and am a Past President of the National Sheriffs Association (NSA). I remain active in the NSA and currently serve as the Association's Treasurer.

Before I go on, let me say I concur it is a fundamental right for all Americans to feel secure from unlawful searches and seizure, I have spent most of my adult life defending these rights, Americans need to feel secure that their government will not unjustly seize their property. However, these same Americans not only expect but demand action be taken against the illegal proceeds and property of criminal enterprises. The public expects we will make certain that criminals do not profit from their crimes, but without strong asset forfeiture laws crime does pay, and it pays very well.

The primary aim of asset forfeiture is to cripple criminal organizations by removing their ill-gotten assets which are utilized in their continuing criminal enterprises. A secondary benefit of asset forfeiture is the assets seized by law enforcement can then be used to continue our efforts to fight the war on crime while lessening the financial burden on our law-abiding citizens. Let me give you an example of how federal forfeiture laws have assisted the citizens of Greenville County. In 1989, we identified an individual, Dawain Israel Faust, Jr., as operating a large scale cocaine and heroin enterprise in our area. After months of investigation we were able to make arrests of Faust and several associates. We were also able to identify a significant amount of real estate and other personal property which was used in the furtherance of this enterprise. Using the Federal Forfeiture Statute we, working in conjunction with the FBI, were able to seize these assets. After conviction on the narcotics charges in the Federal system Faust's property was forfeited. As the result of this forfeiture and equitable sharing the Greenville County Sheriff's Office received approximately sixty (60) acres of land with a two thousand square foot home, which was transformed into a state-of-the-art law enforcement training facility. Our Center for Advanced Training provides advanced training for Sheriff's Office personnel along with other local, state and

federal law enforcement agencies. This is just one example of how the Federal Forfeiture Statute serves as a valuable weapon in the war against drugs, while having a positive effect on law enforcement. Without strong asset forfeiture laws we would not have been as effective in dealing such a complex multi-state criminal enterprise as the one headed by Faust.

Mr. Chairman, the changes being proposed to the Federal Asset Forfeiture law will handcuff our efforts to eliminate these complex criminal organizations. While we may be able to cut off the head of the organization by criminal enforcement, the current asset forfeiture laws help us make certain the organization is thoroughly disabled and handicapped in its ability to engage in future criminal activity. While we tried to work with the House, the managers of this legislation were uninterested in negotiating to make this bill acceptable to law enforcement. We applaud your diligence and appreciate the opportunity to work with the Committee to craft an acceptable bill.

As you know, the House passed bill will force law enforcement and prosecutors to prove their case by "clear and convincing evidence." At first glance this may seem reasonable, but on closer examination it is an unreasonably high standard. The clear and convincing standard is a higher standard than the probable cause needed to effect an arrest of an individual. The House passed bill makes the government's burden of proof in forfeiture actions against drug dealers higher than required to take their freedom in arrest situations. Does it really make sense that the burden of proof to take property is higher than that required to take freedom?

Instead of this overly restrictive standard, the NSA would support the more reasonable burden of proof which calls for a "preponderance of the evidence." As most of you know, the preponderance of the evidence is the accepted standard in civil property actions.

Secondly, the House bill creates an entitlement program for lawyers. Under the House bill anyone can challenge a forfeiture action and they are entitled to a free lawyer to do so. This places an unwarranted burden on the government in that we will have to address any claim regardless of merit, but we will also have to fund all claims regardless of the ability to retain counsel. Why should our law-abiding citizens be forced to pay for legal services for wealthy drug dealers and criminal syndicates to defend their criminal activities? These criminals can afford their own counsel and it would be obscene for them to receive an appointed attorney.

The House bill further makes a mockery of law enforcement efforts to interdict drug trafficking by forcing the courts to release seized property back to the criminal pending trial if the individual claims a "hardship," even in cases where overwhelming evidence indicates the property was used in furtherance of the crime. It is difficult for me to believe a seized boat, airplane, or luxury car should be returned to a drug dealer because the dealer claims a hardship. The only hardship encountered by the trafficker would be more difficulty in continuing his illegal activity without that property. It is my job to make the lives of these traffickers as difficult as possible, and I ask you to provide us with the tools to ensure they continue to suffer this type of hardship.

Finally, the House bill creates a huge loophole through its innocent owner defense. This loophole allows drug traffickers to transfer their property to their friends and associates who become so-called innocent owners. These innocent owners hold the property for the dealers until they get out of jail or in most cases continue to support and grow the business accumulating more property. It is not difficult to imagine a drug trafficker claiming it is his mother's new Jaguar and he is just using it, while his mother has little or no legitimate source of income. The NSA would like to see this loophole slammed shut in the face of these drug traffickers, so only truly innocent owners would be allowed to recover property.

Mr. Chairman, Members of the Committee, the NSA strongly opposes H. R. 1658, the Civil Asset Forfeiture Reform Act. We feel this legislation changes the intent of asset forfeiture, and turns the tide in favor of drug traffickers and trial lawyers at the expense of the men and women in law enforcement. That is not only wrong, it is reprehensible. This Nation's Sheriffs use asset forfeiture to disrupt criminal activity and the NSA is concerned if H. R. 1658 is enacted, law enforcement at all levels will be adversely affected.

We encourage you to support your nation's law enforcement and ask that you strongly oppose H. R. 1658. Asset forfeiture has allowed law enforcement to disrupt illegal activity by seizing real property and assets from criminals. It has made a difference in the fight against crime and we should not erode this valuable law enforcement tool.

Thank you, Mr. Chairman. I would be happy to answer any questions you may have.

Johnny Mack Brown, Sheriff Greenville County Sheriffs Office 4 McGee Street Greenville, South Carolina 29601 (864) 467-5280

**4. Statement of Samuel J. Buffone, 1999 WL 20010428**

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Wednesday, July 21, 1999

**Asset Forfeiture**  
**Samuel J. Buffone**

UNITED STATES SENATE JUDICIARY COMMITTEE SUBCOMMITTEE ON CRIMINAL JUSTICE OVERSIGHT

Hearing on "Oversight of Federal Asset Forfeiture: Its Rule in Fighting Crime"

Prepared Statement of Samuel J. Buffone On Behalf of the National Association of Criminal Defense Lawyers.

Distinguished members of the Committee. I appear today on behalf of the National Association of Criminal Defense Lawyers (NACDL). On behalf of the NACDL I thank you for inviting us to participate in this hearing. I currently serve as co-chair of the NACDL's Forfeiture Abuse Task Force.

NACDL is the preeminent organization in the United States advancing the mission of the Nation's criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. A professional bar association founded in 1958, NACDL's 10,000 direct members - and 80 state and local affiliate organizations with another 28,000 members - include private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors and judges committed to preserving fairness within America's criminal justice system.

The committee has captioned today's hearing as "Oversight of Federal Asset Forfeiture: Its Role in Fighting Crime." The issue before this Committee should not be the importance of asset forfeiture as an effective weapon to combat crime. All parties to the debate agree on this point. Rather, the issue before this Committee should be whether current forfeiture law and practice adequately protects the rights of all Americans. Since the rebirth of forfeiture law in the 1970's, and its subsequent dramatic growth, I have been involved as an author, litigator and spokesperson on behalf of organized bar associations on forfeiture issues. Throughout this entire debate there has never been a serious contention that both civil asset forfeiture and criminal forfeiture are indeed effective law enforcement tools and play a valuable role in fighting crime. It is appropriate for this committee to consider how this important weapon in the arsenal of law enforcement can be most effectively employed consistent with our constitutional system of government and historic concern as a nation for the personal and property rights of our citizens.

During hearings before the Committee On the Judiciary of the House of Representatives on civil asset forfeiture reform Stefan D. Cassella, Assistant Chief, Asset Forfeiture, Money Laundering Section, Criminal Division, United States Department of Justice, testified regarding the Department of Justice's position on asset forfeiture reform. Mr. Casella stated:

I said last year that no matter how effective asset forfeiture may be as a law enforcement tool - and this is a very effective law enforcement tool - that no program, no tool of law enforcement, however effective at fighting crime, can survive 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.[1]

The NACDL agrees with Mr. Cassella's premise that respect for the rule of law is ultimately based on the respect for understanding of the basis for societal regulation and the overall fairness of how that regulation is administered. When law becomes an abstraction, as it has in the forfeiture area, the government risks losing societal consensus on the very need for these law enforcement tools - Such archaic notions as the "personification fiction," under which inanimate property can be found guilty of a crime despite the innocence of its owner, is a level of abstraction that evades all but the most attentive scholars to the nuances of forfeiture law. The average citizen finds it difficult to comprehend the fairness of a system under which property may be seized on an ex parte showing of probable cause, and the property owner must post a bond simply for the right to shoulder a higher burden of proof to demonstrate the innocence of his property.

[1] Statement of Stefan D. Casella, Hearings Before the Committee on the Judiciary, House of Representatives, 105th Congress (June 11, 1997).

The NACDL strongly supports the enactment into law of HR 1658, the "Civil Asset Forfeiture Reform Act." The Bill as passed by the House, addresses the most important areas of forfeiture abuse law and rationalizes the civil asset forfeiture system in a way that will move closer to ensuring public support for appropriate uses of civil forfeiture. In a series of hearings before the House, a broad coalition of organizations presented testimony regarding ongoing abuses of civil asset

forfeiture and the need for comprehensive reform. Chairman Henry Hyde's book "Forfeiting our Property Rights, Is Your Property Safe From Seizure presented striking evidence of the pervasiveness of civil asset forfeiture abuse.

The recent passage of HR 1658 was made possible in part by an unprecedented bipartisan coalition that both recognized and supported the pressing need for civil asset forfeiture reform. The NACDL joined the Americans for Tax Reform, Chamber of Commerce of the United States of America, Small Business Survival Committee, Republicans for Choice, Institute for Justice, The Madison Project, Free Congress Foundation, American Conservative Union, National Rifle Association, Association of Concerned Tax Payers, Conservative Leadership Pact, Law Enforcement Alliance of America, Eagle Forum, Seniors Coalition, Frontiers of Freedom, American Civil Liberties Union in supporting this legislation. HR 1658 passed the House with 375 votes including 191 Republicans, 183 Democrats and 1 Independent.

## **The Need for Reform**

The NACDL has continued to collect instances of abuse of civil asset forfeiture reform. The following case studies illustrate how innocent Americans can suffer substantial financial detriment based on the application of the current civil asset forfeiture system.

- The Legislation places the burden of proof on the government, and sets an appropriate standard, clear and convincing evidence;
- The Legislation provides for the appointment of counsel for indigent claimants who have bona fide claims but lack the resources to protect their property;
- It establishes a uniform innocent owners defense applicable to all civil forfeitures;
- It establishes uniform time limits for providing notice of a seizure and for filing a civil forfeiture complaint in court.

## **Burden of Proof**

Under current civil forfeiture practice, the burden of proof is placed upon the claimant. A party whose property has been seized on a mere showing of probable cause must come to court and prove by preponderance of the evidence, that probable cause for forfeiture does not exist. In the alternative the claimant can show lack of knowledge or consent to legal activities. This defense is not uniformly applied.

Normally, the burden and standard of proof is based upon the risk of erroneous decision making. It is remarkable that the burden is placed upon the claimant when it is the government that has instituted the lawsuit and the greatest risk of erroneous fact finding is in unbridled application of this governmental authority. The burden is a constitutional anomaly in view of the quasi-criminal nature of forfeiture and the important privacy interest at stake in forfeiture proceedings. The House bill would reestablish a constitutional balance by requiring that in all civil forfeiture actions the burden of proof is on the United States to establish by clear and convincing evidence that the property is subject to forfeiture. This provision recognizes both the appropriateness of the United States shouldering this burden and the necessity for a clear and convincing evidence standard in light of the risk of erroneous fact finding and the importance of the rights at issue. The clear and convincing evidence standard has been used successfully by law enforcement in some of the major state jurisdictions including California, New York and Florida.

## **Appointed Counsel**

The House Bill provides that if a person filing a claim is financially unable to obtain counsel, the court may appoint counsel to represent the person with respect to the claim. The bill does not provide counsel for all claimants, and not even all indigent claimants, but rather requires courts to consider the claimant's standing to contest the forfeiture and whether the claim appears to be made in good faith and to be non-frivolous. The bill would do no more than provide discretion to District Court judges to appoint counsel for indigent claimants and does not constitute a radical departure from current law. Fundamental due process considerations dictate that indigents be provided with counsel in order to contest the seizure of their property. The bill would provide an important safeguard for indigents who face civil forfeiture actions but who do not face related criminal charges. Under current practice, those facing criminal charges have more ready access to counsel than claimants who do not. Whatever other reforms are passed, an indigent claimant facing the loss of a significant portion of their property will still not face a fair process if he must face it unrepresented.

## **Innocent Owner**

The House bill provides a uniform innocent owner defense. Under current law a variety of standards, or none at all, govern claims by innocent owners regarding their property that is subject to forfeiture. The statute carefully defines the interest of an innocent owner and provides relief only where the owner did not know of the conduct giving rise to the forfeiture or upon learning of the conduct did all that reasonably could be expected under the circumstances to terminate

illegal use of the property. For property interests acquired after the conduct giving rise to forfeiture, an innocent owner must show that he is either a BFP for value or that the interest was acquired through probate or inheritance or at the time of the acquisition he was reasonably without cause to believe that the property was subject to forfeiture. Special rules apply to real property in order to ensure that spouses or minor children of a person who committed an offense are not unnecessarily deprived of their homestead.

This provision codifies an important standard of fairness and centers forfeiture law in a critical area that the public can support. The notion that even an innocent owner can lose his property because of its involvement in a crime garners little public support.

### **Uniform Time Limits for Notice of Seizure and Filing a Civil Forfeiture Complaint**

The bill establishes uniform and enforceable time limits for the government to provide notice and commence a forfeiture action. First, the bill establishes a much needed sixty day time limit for the government to provide notice of the seizure and its intent to forfeit the property. Second, it establishes a ninety day time limit in which the United States Attorney must file a civil forfeiture complaint following a receipt of a notice of claim.

### **Conclusion**

As I stated at the beginning of my testimony, ultimately an understanding of and respect for the rationale and fairness of forfeiture laws are the best way to ensure their continued vitality. The provisions of HR 1658 take critical steps towards ensuring the necessary balance between the necessities of law enforcement and the fairness of the processes. Additionally, the process, untethered by any easily understood rationale, will not garner public confidence. Forfeiture has grown on the back of arcane notions of medieval law and complex rules relating to custom seizures that bear little relationship to the reality of an average citizen's life. The Bill positions forfeiture closer to the central concept that a wrongdoer should not profit from his illegal activity. The NACDL supports Senate passage of the Bill as passed by the House.

*Note:* Neither Mr. Buffone nor NACDL has received any federal grant, contract or subcontract in the current and preceding two fiscal years.

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### **5. Statement of Roger Pilon, 1999 WL 20010429**

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Wednesday, July 21, 1999

#### **Asset Forfeiture Roger Pilon, Ph.D., J.D.**

STATEMENT of Roger Pilon, Ph. D, J.D. Vice President for Legal Affairs B. Kenneth Simon Chair in Constitutional Studies Director, Center for Constitutional Studies Cato Institute Washington, D.C. before the Senate Judiciary Committee Criminal Justice Oversight Subcommittee United States Senate presented on July 21, 1999

### **Oversight of Federal Asset Forfeiture: Its Role in Fighting Crime**

Mr. Chairman, distinguished members of the subcommittee:

My name is Roger Pilon. I am vice president for legal affairs at the Cato Institute and the director of Cato's Center for Constitutional Studies.

I want to thank you, Mr. Chairman, and thank Mr. Schumer as well, for inviting me to testify before the subcommittee today on federal asset forfeiture law and practice.

Late last month, as we all know, the House of Representatives passed H.R. 1658, the Civil Asset Forfeiture Reform Act. The vote was by an overwhelming margin of 375 to 48. The bill that passed had been refined over several years by its author, Henry Hyde, chairman of the House Judiciary Committee, whose book on American forfeiture law I edited and the Cato Institute published in 1995. Sponsorship of the House bill was broad and bipartisan. For some time now an equally

broad and diverse range of citizens and organizations has urged its passage. (I am attaching copies of several letters indicating the broad support the bill enjoys.) That alone suggests that there is something fundamentally wrong with our forfeiture law and practice, which is why these hearings in the Senate are important.

## Preliminary Matters

Before discussing the substance and procedure of the matter, however, I want to make four preliminary points. First, it should be clear that most of those who support the House bill see a role-- and an important role--for forfeiture in law enforcement. That is why the bill was written to reform the law, not to abolish it. I say that because some who oppose any changes, or who advocate only minor changes, sometimes charge that opponents of our present law want to abolish that law entirely. That is not true.

Second, it is sometimes said, in a related way, that opponents of our present law are really opponents of the so-called war on drugs, and that the forfeiture reform movement is a stalking horse, the ultimate target being the drug war. Here, too, that is not true. To be sure, many of us are of the view, shared by a growing number of Americans, that the war on drugs, like Prohibition before it, is an extremely costly failure, and that drug use should be treated not as a criminal but as a medical matter. But there is no necessary connection whatever between that view and the view that our forfeiture law needs reform. Indeed, in the House, many of the most ardent supporters of the war on drugs are ardent supporters of forfeiture reform.

Third, although the law enforcement community does not speak with a single voice in opposition to forfeiture reform--indeed, some in that community strongly support reform--it is fair to say that the majority there oppose the House bill. And in support of that opposition, they will cite success after success--the use of forfeiture to deprive drug kingpins of their ill-gotten gains and the tools of their trade, for example. No one can deny those successes, whatever their larger effect. But that is not the point. The point, rather, is that this body of law--because its foundations and practices are so foreign to our system of justice, as I will demonstrate in a moment--leads too often to flagrant miscarriages of justice, to the seizure and forfeiture of property from ordinary, innocent citizens. Given that stark reality, the law needs to be reformed. Just as a man charged with a crime cannot put up as his defense all the good deeds he has done in his life, so too our forfeiture law cannot escape reform simply because it produces many good results. Those results are to its credit. But it is the wrongs that result from our forfeiture law that should concern us--and prompt us to ask just why those wrongs are occurring. After all, it was not for nothing that the House vote was as overwhelming as it was.

Finally, and closely related to my third preliminary point, law enforcement often argues that forfeiture is an important tool in the war on crime. They are right. Forfeiture is an important tool in that effort. And under the House bill it will continue to be an important tool, for most forfeitures will occur in the future exactly as they have in the past. But in a free society, not any forfeiture law or practice will do. To state the point most generally, in our society, law enforcement officials may not use any means they wish in their efforts to reduce or remedy crime. After all, a police state would doubtless reduce crime. But we cannot have a police state in this nation because we have a Constitution and a body of law promulgated under it that limits what police, prosecutors, courts, and Congress may do--both substantively and procedurally.

In fact, it is precisely on that fundamental point--that first principle, the rule of law--that those of us who urge reform ultimately rest our case.<sup>[1]</sup> Modern American asset forfeiture law, especially civil forfeiture, rests on animistic and authoritarian principles, leading to practices that are utterly foreign to our first principles as a nation. Something is terribly wrong when a body of "law" enables officials to stop motorists and other travelers and seize their cash on the spot, returning it, if they do, often years later, only after the person proves his innocence-- where such a defense is possible; when that "law" enables officials to seize and sometimes destroy boats, cars, homes, airplanes, and whole businesses because they suspect the property has somehow been "involved" in a crime; or when it encourages officials to maim and even kill in their efforts to seize property for forfeiture to the government.<sup>[2]</sup> Lawyers who come upon this body of law for the first time are often taken aback by the injustice and irrationality of it all. Imagine what the ordinary citizen must think.

## Forfeiture in a Nutshell

The very styling of the relatively few cases that make it to court tells much of the story: United States v. \$405,089.23 U.S. Currency<sup>[3]</sup>; United States -i. 92 Buen a Vista Avenue <sup>[4]</sup>; United States v. One Mercedes 560 SEL.<sup>[5]</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.

[1] I have discussed the issues that follow more fully in Roger Pilon, "Can American Asset Forfeiture Law Be Justified?" 39 New York Law School Law Review 311 (1994).

[2] For those and many more examples of abuses perpetrated under our forfeiture law, see Henry Hyde, *Forfeiting Our Property Rights*(1995).

[3] 518 U.S. 267 (1996).

[4] 507 U.S. 111 (1993).

[5] 919 F.2d 327 (5th Cir. 1990).

Thus, officials today can seize a person's property, real or chattel, without notice or hearing,[6] 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.[7] In defending the innocence of his accused property, the owner must prove a negative, of course. 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 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 much of our modern civil asset forfeiture law, despite periodic efforts in the House to reform some areas, and despite court challenges in recent years that have succeeded, when they have, only in chipping away at the doctrine. It is a body of law that enables prosecutors to go directly against property--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.

[ 6] In the case of real property, that changed after 1993 when the Supreme Court ruled that owners had to be given notice and an opportunity to be heard before their real property could be seized. *United States v. James Daniel Good Property*, 510 U.S. 43 (1993).

[ 7] Thus, in *Bennis v. Michigan*, 516 U.S. 442 (1996), a case the Supreme Court decided under state law, Mrs. Bennis lost her half-interest in the family car when officials seized the car after her husband used it for an assignation with a prostitute. Although Mrs. Bennis was given "due process, 11 nothing she could have said in any proceeding would have made a difference since the law provided no innocent-owner defense. Wronged by her husband, she was wronged again by the Michigan law.

## The Procedure of the Matter

To illustrate more fully how this law works in practice, however, it may be useful to distinguish three procedures--administrative, civil, and criminal--through which the government moves to complete a forfeiture after seizing a person's property.[8] Administrative forfeiture is essentially a default proceeding: if no one files a claim to the seized property, it forfeits by default to the government. The Justice Department's principal spokesman for forfeiture has claimed that 80 percent of forfeitures "are uncontested because in most cases the evidence is so overwhelming that contesting the forfeiture would be pointless."[9] That may be true in many cases. But there are also many other cases that involve amounts too small to make it worth the owner's contesting the forfeiture, especially in light of the legal fees and the extraordinary burden of proving one's innocence.

But if an owner does contest the seizure, he has to file a claim and post a "cost bond" amounting to ten percent of the value of the property or \$5,000, whichever is less. That does not release the property to the owner, however; incredibly, it is designed to defray the government's litigation and storage costs. Once the owner files a claim and posts a cost bond, the government has to file a complaint in federal district court. But it can wait up to five years--the statute of limitations--before doing so, whereas the owner has a mere ten days to answer the complaint, failing which the property forfeits to the government. Except in a criminal proceeding, there is no right of counsel, which means, again, that many small seizures end by default to the government.

Worse still, when the owner contests the seizure and posts a cost bond, his situation is perilous; for under many statutes the government has a choice. It can file a civil complaint, initiating a civil forfeiture action; or it can include a forfeiture count in a criminal indictment. Think about the dilemma that puts the owner in. If the government initiates a civil action in response to his contesting the seizure, not only can it wear him down through long and costly discovery but, through that very process, it can try to generate evidence for a subsequent criminal prosecution. Thus, the effort to get his property back

exposes the owner to the risk of self-incrimination--even when the actions that led to the seizure in the first place prove ultimately to be trivial or innocent. And even if he is not indicted, the procedural hurdle the owner faces is daunting: whereas the government has to show the court simply that there is probable cause to believe that the property is subject to forfeiture--which it can do using rank hearsay evidence, inadmissible in a normal trial--the owner, once the burden shifts, has to prove the property's "innocence" by a preponderance of the evidence, with no hearsay allowed.

[8] For a detailed discussion of forfeiture law, see David B. Smith, *Prosecution and Defense of Forfeiture Cases* (1998).

[9] Stefan D. Cassella, "Forfeiture Is Reasonable, and It Works," 11 *Criminal Law and Procedure News* (The Federalist Society) vol. 1, no. 2 (Spring 1997), at 8.

But on the other hand, once the owner contests the seizure the government can respond with an outright indictment. In some ways, of course, the owner would be better off under those circumstances: the burden of proof would be on the government; the standard of proof would be beyond a reasonable doubt; and forfeiture, where it is included as a count in the indictment, would follow only upon conviction. But who wants to face a criminal indictment and trial just to get his property back? At the same time, who wants to go through a civil action either, against the government, just to get his property back, especially at the risk of ultimately being indicted? Faced with that dilemma, is it any wonder that owners often simply walk away from their loss when the government seizes their property? Is that the kind of dilemma we want to put off ten innocent citizens in? As Chairman Hyde put it, "the system is stacked against innocent citizens and in favor of government"? [10] After all, prosecutors are not empowered simply to score victories and enrich government coffers. They have an obligation to do justice as well. Regrettably, the conflict of interest is so stark under our forfeiture laws that it is all too easy to shirk that obligation.

From this much, then, it should be clear just why the House bill puts the burden of proof on the government--where it should have been all along--and why it requires the government to discharge that burden by clear and convincing evidence. In a free society, if government takes a person's property, it had better have good reason for doing so, not simply probable cause, not even a mere preponderance of the evidence, but clear and convincing evidence. These are, after all, quasi-criminal proceedings: the allegation is that the property is ill-gotten, or contraband, or that it facilitated a crime. Even though they may be styled "civil," these are much closer to criminal proceedings than to any ordinary civil action involving a private dispute or even a dispute with the government. If the government is going to allege criminal activity as the ground for its taking private property, it should at least have clear and convincing evidence to support that allegation.

[10] Hyde, *supra* note 2, at 8.

## Returning to Substance

We return, finally, to the substance of the matter and to a point made at the outset, namely, that under the House bill, most forfeitures will continue exactly as they have until now. For if Justice is right about most forfeitures not being contested due to the overwhelming evidence that supports them, that will not change even if the government does carry the burden of proof and carries it by a higher standard of evidence. Drug dealers will still not contest a seizure if it means running the risk of an indictment: it's simply too easy to recoup that loss through another deal. And where there are parallel criminal proceedings, there too the process will continue as it does today; for if there is enough evidence to prosecute a criminal action, there is probably more than enough evidence to effect a civil forfeiture.

What will change is that innocent owners will finally get a break. Here, we are not talking about contraband but about the other two most common substantive rationales for forfeiture--ill-gotten gain (or the proceeds of crime) and "facilitation." Taking first the proceeds rationale, with the burden on the government to prove, by clear and convincing evidence, that the money or property it seized was derived from crime, it will be more difficult to turn a seizure into a forfeiture, especially if the owner is in fact innocent--which is exactly as it should be. Does that mean that some innocent owners may still lose their property--and that some guilty owners may keep theirs. Of course it does. Justice can never be perfect, but it can be better than it is today. Again, we cannot fight crime by any means. In a free society, we err on the side of the innocent, not against them.

In the case of facilitation forfeiture, the issues are not as easy because the rationale is not as rational. The idea that property that "facilitates" a crime is thereby forfeitable to the government takes us to the darkest roots of forfeiture and to the greatest abuses in our own time. For the "instruments" of crime can be read so broadly as to include anything even "involved" in a crime. Indeed, for the crime of failing to fill out a customs form saying that he was taking more than \$10,000 in U.S. currency out of the country, Mr. Hosep Bajakajian and his family, fearful of making such a declaration, would have forfeited the legally-acquired \$357,144 they had in their possession as they waited to board an airplane in Los Angeles in 1994--but for the five-to-four decision of the Supreme Court last year saying that the statute allowing the forfeiture of anything "involved" in the crime violated the Excessive Fines Clause of the Eighth Amendment. [11] Whole bank accounts have been lost due to a single questionable deposit: the account "facilitated" the laundering of money. And stories of a home lost when one member of a family made an illegal phone call from it are too numerous to recount. [12]

[11] *United States v. Bajakajian*, 524 U.S. 321 (1998). See Roger Pilon, "High Court Reins In Overweening Government," *The Wall Street Journal*, June 23, 1998, at A20.

No one has ever offered a satisfactory justification for facilitation forfeiture, although a Justice Department spokesman, attempting recently to explain why the Department did not limit itself to criminal forfeitures, inadvertently exposed the irrationality of the doctrine. The "most important" reason for doing civil forfeitures, he said, is because "criminal forfeiture is limited to the property of the defendant. If the defendant uses someone else's property to commit a crime, criminal forfeiture accomplishes nothing [for the government]. Only civil forfeiture will reach the property" (original emphasis) .[13]

That is a striking admission. Proceeding "normally," against the accused, we can't reach the property of someone else. Thus, when Billy Munnerlyn, who ran a charter jet service, accepted a fare from a man who turned out, unknown to Mr. Munnerlyn, to be carrying drug money, the government could not have seized his plane unless it had brought a civil action--not against the drug dealer, nor even against Mr. Munnerlyn, who did no wrong, of course, but against the plane.[14] For the plane, you see, was "guilty" for having "facilitated" the crime. Yet the same Justice official who tells us how to reach property of people who haven't committed a crime says also that "property doesn't commit crimes; people do. [15] Just so. Then why charge the plane? Why? Because that's the only way the government can get the property of someone who is not guilty--by personifying the property and charging it with "facilitating" a crime. We're right back with the "goring ox" of antiquity and with a rationale that no one any longer believes, if anyone ever did.

Unfortunately, the House bill does not do away, once and for all, with facilitation forfeiture. Nevertheless, it does mitigate the effects of the doctrine by incorporating in all federal forfeiture statutes a fairly robust innocent-owner defense. Here again, the bill may not be perfect--and that defense may need to be strengthened--but the breadth of coverage is much greater than under current law.

[12] See, e.g., *United States v. Real Estate Known as 916 Douglas Ave.*, 903 F.2d 490 (7th Cir. 1990), cert. denied, 111 S. Ct. 1090 (1991).

[13] Cassella, *supra* note 9, at 4. For a critique, see Roger Pilon, "Forfeiting Reason," 11 *Criminal Law and Procedure News*, *supra* note 9, at 1ff.

[14] For a discussion of this case, see Hyde, *supra* note 2, at 12.

[15] Cassella, *supra* note 9, at 4.

## Conclusion

In sum, the House has presented the Senate with an opportunity to help correct the considerable injustices that have been taking place for too long in this nation under the banner of forfeiture law. As I noted earlier, under the House bill, most forfeitures will go on as they have in the past. The illegitimate forfeitures, the ones that should never have taken place to begin with, will mostly fail--as they should--assuming they are even undertaken. Those, however, are a small fraction of all forfeitures, yet they have given the law enforcement community--to say nothing of the victims--the greatest problems; for they have given all of forfeiture a bad name, which is why this bill should be welcomed even--indeed, especially--by law enforcement. But above all, it should be welcomed by every American who wants to see our law and legal institutions grounded on our first principles as a nation. Forfeiture has a place in law enforcement, but like every tool in that effort, it must spring from principles of justice if it is to serve justice.

Thank you, Mr. Chairman and Mr. Schumer, for the opportunity to testify before the subcommittee today.

## Part 7

### S.1701 (Sessions-Schumer Bill), Introductory Statements

(Note: Text of S.1701 appears at the end.)

S. 1701. A bill to reform civil asset forfeiture, and for other purposes; to the Committee on the Judiciary.

#### Civil Asset Forfeiture Reform

Mr. SESSIONS.

Mr. President, today I am proud to introduce the Sessions/Schumer Civil Asset Forfeiture Reform Act of 1999. This bill is the product of many months of work by a bipartisan group of Judiciary Committee Senators. It will make many needed reforms to the law of civil asset forfeiture. At the same time, our measures preserve forfeiture as a crucial tool for law enforcement.

The Sessions/Schumer bill was drafted in close consultation and with the support of the Justice and Treasury Departments. It has the support of the FBI, the DEA, the INS, and the U.S. Marshall's Service.

There are five major reforms in the Sessions/Schumer bill. First, we have raised the burden of proof on the government in forfeiture claims from probable cause to preponderance of the evidence, the same as other civil cases.

Second, Sessions/Schumer requires that real property can only be seized through the court. It will be illegal for federal agents to physically seize real property until the property has been forfeited in court.

For those who cannot afford the cost bond, our bill also adds a property bond alternative for contesting forfeiture. This provides potential claimants with more flexibility in choosing how to proceed with a claim against seized assets. It will no longer be necessary to provide cash up front to file a claim. Instead, a claimant can simply pledge an asset to cover the anticipated costs or, if the claimant cannot afford this, proceed without posting any bond.

Sessions/Schumer also creates a uniform innocent owner defense; an innocent owner's interest in property cannot be forfeited by the government. An innocent owner includes one who had no knowledge that the property may have been used to commit a crime. And \*S12109 in cases where the property was acquired after the crime, the uniform innocent owner defense includes bona fide purchases who have no reason to know that the asset they have purchased may be tainted.

The fifth major reform provides payment of attorney's fees. If a claimant receives a judgment in his favor, the Government will pay the claimant's reasonable attorney's fees.

I am pleased to note that this bill has the support of a broad coalition of law enforcement groups. It has been endorsed by the Fraternal Order of Police, the Federal Law Enforcement Officer's Association, the International Association of Chiefs of Police, the International Brotherhood of Police Officers, the National Association of Police Organizations, the National District Attorney's Association, the National Sheriff's Association, and the National Troopers' Coalition.

As one who believes in justice and who spent many years as a federal prosecutor, I know how important asset forfeiture is in the war on drugs. We cannot allow exaggerated rhetoric and outdated examples to destroy asset forfeiture as a law enforcement tool. I believe that this bill will strike an appropriate balance between those on the front lines of the war on drugs and advocates for reform.

Mr. THURMOND.

Mr. President, I rise today as an original cosponsor of the Civil Asset Forfeiture Reform Act of 1999. This important legislation makes needed reforms to Federal civil asset forfeiture while preserving Federal civil asset forfeiture and its important role in fighting crime.

The government has had the authority to seize property connected to illegal activity since the founding days of the Republic. Forfeiture may involve seizing contraband, like drugs, or the tools of the trade that facilitate the crime.

Further, forfeiture is critical to taking the profits out of the illegal activity. Profit is the motivation for many crimes like drug trafficking and racketeering, and it is from these enormous profits that the criminal activity thrives and sustains. The use of traditional criminal sanctions of fines and imprisonment are inadequate to fight the enormously profitable trade in illegal drugs, organized crime, and other such activity, because even if one offender is imprisoned the criminal activity continues.

Asset forfeiture deters crime. It has been a major weapon in the war on drugs since the mid-1980s, when we expanded civil forfeiture to give it a more meaningful role.

The Judiciary Subcommittee on Criminal Justice Oversight which I chair, held a hearing recently on this important issue. We heard from the Department of Justice, the Department of Treasury, the law enforcement community and others involved in this issue. The Departments and law enforcement expressed support for reform but concerns about going too far.

As I stated at that time, many believe the government should have the burden of proving that it is more likely than not that the property was involved in the criminal activity, rather than the owner having to prove that the property was not involved. There is wide support for developing a more uniform innocent owner defense. Further, some are concerned that under current law the government is not liable when it negligently damages property in its possession, even when the property is later returned to its innocent owner.

I believe we have addressed these concerns in this bill. We have raised the burden on the government to the preponderance of the evidence standard, which is the general burden of proof used in civil cases.

We have developed a uniform innocent owner defense to protect an owner's interest in property when he did not have knowledge of the criminal activity or took reasonable steps to stop or prevent the illegal use of the property. The bill also protects the bona fide purchaser who purchased the property after the fact without knowledge of the criminal activity.

As an additional reform provision, this legislation holds the government liable for the negligent damage to property as the result of unreasonable law enforcement actions while the property is in the government's possession.

This bill requires the government to make seizures pursuant to a warrant, based on probable cause, and requires a timely notice to interested parties of the seizure. When a claim has been filed for the return of property, the government must conduct a judicial hearing within 90 days, and if the court enters a judgment for the claimant, the government must pay reasonable attorney fees to the claimant. This is a reasonable way to award attorney fees to the claimant after the court has determined that the claim was justified. This provision also protects the government from frivolous claims because it maintains the possibility of awarding cost to the government if the claim is determined to be frivolous.

In this legislation, we encourage the government to use criminal forfeiture as an alternative to civil forfeiture. We also allow for the use of forfeited funds to pay restitution to crime victims by expanding the ability of the Attorney General to use property forfeited in a Federal civil case to pay restitution to victims of the underlying crime.

This bill represents a compromise between the many interests involved in this issue. I would like to commend my colleagues Senators SESSIONS, BIDEN, SCHUMER, and FEINSTEIN for their work on this complex issue. After the hearing in my Subcommittee, we worked hard to create comprehensive, bipartisan legislation, and I believe we have succeeded.

This bill has been endorsed by law enforcement organizations including the Fraternal Order of Police, the National Association of Police Organizations, the National District Attorneys Association, the National Troopers Coalition, the National Sheriffs Association, and the International Association of Chiefs of Police.

This is a balanced reform of Federal civil asset forfeiture laws. It does not tie the hands of law enforcement and does not give criminals the upper hand. It makes needed reforms of civil asset forfeiture while preserving civil asset forfeiture as an essential law enforcement tool.

I hope our colleagues will join with us in supporting this important bipartisan legislation.

1999 CONG US S 1701  
106th CONGRESS, 1st Session

United States Library of Congress

**S 1701**  
Introduced in Senate  
October 6, 1999

S. 1701  
To reform civil asset forfeiture, and for other purposes.

## IN THE SENATE OF THE UNITED STATES

October 6, 1999

Mr. SESSIONS (for himself, Mr. SCHUMER, Mr. THURMOND, Mr. BIDEN, Mrs. FEINSTEIN, Mr. HELMS, and Mr. CLELAND) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

## A BILL

To reform civil asset forfeiture, and for other purposes.

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

### SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

**(a) SHORT TITLE-** This Act may be cited as the 'Civil Asset Forfeiture Reform Act of 1999'.

**(b) TABLE OF CONTENTS-** The table of contents for this Act is as follows:

- Sec. 1. Short title; table of contents.
- Sec. 2. Burden of proof.
- Sec. 3. Notice of administrative forfeiture; limitations period for challenges.
- Sec. 4. Time for filing claim; waiver of cost bond.
- Sec. 5. Time for filing a complaint.
- Sec. 6. Probable cause hearing.
- Sec. 7. Award of attorneys' fees to successful claimants.
- Sec. 8. Special provisions for real property.
- Sec. 9. Compensation for damage to seized property.
- Sec. 10. Uniform innocent owner defense.
- Sec. 11. Release of property in hardship cases.
- Sec. 12. Stay of civil forfeiture case.
- Sec. 13. Prejudgment interest.
- Sec. 14. Seizure warrant requirement.
- Sec. 15. Civil restraining orders.
- Sec. 16. Excessive fines.
- Sec. 17. Civil investigative demands.
- Sec. 18. Access to records in bank secrecy jurisdictions.
- Sec. 19. Cooperation among Federal prosecutors.
- Sec. 20. Access to other records.
- Sec. 21. Statute of limitations for civil forfeiture actions.
- Sec. 22. Destruction or removal of property to prevent seizure.
- Sec. 23. Fungible property in bank accounts.
- Sec. 24. Currency seized from drug couriers.
- Sec. 25. Use of forfeited funds to pay restitution to crime victims.
- Sec. 26. Fugitive disentitlement.
- Sec. 27. Enforcement of foreign forfeiture judgment.
- Sec. 28. Encouraging use of criminal forfeiture as an alternative to civil forfeiture.
- Sec. 29. Application of procedures for drug cases.
- Sec. 30. Application of procedures to other civil forfeitures.
- Sec. 31. Application to alien smuggling offenses.
- Sec. 32. Effective dates.

**SEC. 2. BURDEN OF PROOF.**

Section 981 of title 18, United States Code, is amended by adding at the end the following:

## '(k) BURDEN OF PROOF AT TRIAL-

## '(1) IN GENERAL- At trial--

'(A) the Government shall have the burden of proving that the property is subject to forfeiture by a preponderance of the evidence; and

'(B) the claimant shall have the burden of proving any affirmative defense by a preponderance of the evidence.

'(2) TIMING- No party shall be required to establish that it is able to meet its burden of proof under paragraph (1) until the time of trial, except that any party may file a motion for summary judgment pursuant to rule 56 of the Federal Rules of Civil Procedure at any time.'

**SEC. 3. NOTICE OF ADMINISTRATIVE FORFEITURE; LIMITATIONS PERIOD FOR CHALLENGES.**

Section 981 of title 18, United States Code, is amended by adding at the end the following:

## '(l) ADMINISTRATIVE FORFEITURES-

## '(1) NOTICE-

'(A) IN GENERAL- Whenever property, other than real property, is seized by a Federal law enforcement agency pursuant to subsection (b), or is turned over to a Federal law enforcement agency by a State or local law enforcement agency pursuant to subsection (b)(2)(C) for the purpose of forfeiture under Federal law, the Government shall commence administrative forfeiture proceedings against the property pursuant to the customs laws (19 U.S.C. 1602 et seq.) not later than 60 days after the seizure or turnover, unless the Attorney General has filed a civil forfeiture complaint, or included the property in a criminal indictment, before such 60-day period has expired. Upon commencing administrative forfeiture proceedings, the seizing agency shall send notice of the proceedings, together with information on the applicable procedures for contesting the forfeiture, to each party known to the seizing agency at the time of the seizure to have an ownership or possessory interest, including a lienholder's interest in the seized property. If the identity or interest of a party is not determined until after the seizure but is determined before a declaration of forfeiture is entered, such written notice and information shall be sent to such interested party not later than 60 days after the determination of the seizing agency of the identity of the party or the party's interest.

'(B) RETURN OF PROPERTY- If the Government does not send notice of a seizure of property to the person from whom it was received in accordance with subparagraph (A), and no extension of time is granted, the Government shall return the property to that person without prejudice to the right of the Government to commence a forfeiture proceeding at a later time. If the property is returned under this paragraph, neither the seizing agency nor any individual agent shall be held liable for the failure to provide notice. The Government shall not be required to return contraband or other property that the person from whom the property was seized may not legally possess.

## '(2) EXTENSION-

'(A) IN GENERAL- The Attorney General, the Secretary of the Treasury, or the United States Postal Service, as applicable, may waive the requirements of paragraph (1)(A) for good cause.

'(B) DELEGATION OF AUTHORITY- The power to grant a waiver may be delegated to a person of supervisory rank (as defined in section 7103(a)(10) of title 5 ((5 USCA 7103))) in the headquarters office of the seizing agency.

## '(3) MOTION TO SET ASIDE DECLARATION OF FORFEITURE-

'(A) IN GENERAL- Any person entitled to notice under paragraph (1)(A) who does not receive such notice may file, not later than 2 years after the date of final publication of notice of seizure of the property, a motion to set aside a declaration of forfeiture entered pursuant to section 609 of the Tariff Act of 1930 (19 U.S.C. 1609), which motion shall be granted if-

'(i) the moving party had an ownership or possessory interest in the forfeited property, and the Government knew, or reasonably should have known, of that party's interest and failed to take reasonable steps to provide such party with notice of the forfeiture; and

'(ii) the moving party did not have actual notice of the seizure within sufficient time to file a claim within the time period provided by law.'

'(B) SETTING ASIDE DECLARATION OF FORFEITURE- If the court grants a motion made under subparagraph (A), the court shall set aside the declaration of forfeiture as to the interest of the moving party pending forfeiture proceedings in accordance with the Tariff Act of 1930 (19 U.S.C. 1602 et seq.), which proceedings shall be instituted within 60 days of the entry of the order granting the motion.'

'(C) DISPOSED PROPERTY- If, at the time a motion made under this subparagraph (A) is granted, the forfeited property has been disposed of by the Government in accordance with law, the Government shall institute forfeiture proceedings under subparagraph (B) against a substitute sum of money equal to the value of the forfeited property at the time the property was disposed of, plus interest.'

'(D) JUDICIAL REVIEW- A motion made under this subsection shall be the exclusive means of obtaining judicial review of a declaration of forfeiture entered by a seizing agency.'

#### **SEC. 4. 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) IN GENERAL- Any person claiming such seized vessel, vehicle, aircraft, merchandise, or baggage may file a claim with the Customs Service at any time after the seizure, provided that the claim is filed not later than 30 days after the first publication of notice of seizure, or the deadline set forth in a personal notice letter received by such person, whichever is later. The claim shall be signed by the claimant under penalty of perjury and shall contain a brief statement of the nature and extent of the claimant's ownership interest in the property.'

'(b) BOND- Any person filing a claim pursuant to subsection (a) shall post the bond to the United States in the sum of \$5,000 or 10 percent of the value of the claimed property, whichever is less, but not less than \$250, with sureties approved by the Customs Service. No bond shall be required if the Secretary approves a claim filed in forma pauperis. A claim filed in forma pauperis shall include the information required to complete form 4 in the appendix of forms following rule 48 of the Federal Rules of Appellate Procedure.'

'(c) TRANSMITTAL TO UNITED STATES ATTORNEY- Upon the filing of a claim pursuant to this section, the Customs Service shall transmit the claim, with a duplicate list and description of the articles seized, to the United States attorney for the district in which the property was seized, or any other district in which a forfeiture action may be filed pursuant to section 1355(b) of title 28, United States Code. The United States attorney, after reviewing the matter, may decide, in his or her discretion, to return the property to the claimant or to reach an appropriate compromise agreement with the claimant with respect to the property. Otherwise, the United States attorney shall proceed to a condemnation of the merchandise or other property in the manner prescribed in the Federal Rules of Civil Procedure, Supplemental Rules for Certain Admiralty and Maritime Claims, or shall proceed to include the merchandise or other property in an appropriate criminal indictment.'

(b) CONFORMING AMENDMENT- Section 609 of the Tariff Act of 1930 (19 U.S.C. 1609) is amended by striking 'twenty' and inserting '30'.

(c) EXEMPTION FROM COST BOND REQUIREMENT- Section 981(d) of title 18, United States Code, is amended-

(1) by inserting '(1)' after '(d)'; and

(2) by adding at the end the following:

'(2)(A) A cost bond otherwise required by section 608 of the Tariff Act of 1930 (19 U.S.C. 1608) shall not be required if the claimant-

'(i) pledges real or personal property having a value greater than or equal to the value of the bond that would otherwise be required under section 608(b) ((19 USCA 1608)) as security against the costs of the Government;

'(ii) provides, in any case in which the pledged real or personal property is subject to a Federal or State recording, certificate of title, or registration statute, documentary proof evidencing the ownership of the property by the claimant or pledgor; and

'(iii) files an affidavit under penalty of perjury setting forth the value of the property and stating that the claimant is the owner of the property.

'(B) Once the claim is referred to the United States attorney in accordance with section 608(c) of the Tariff Act of 1930 (19 U.S.C. 1608), the United States attorney may ask the court to review the facts set forth in the affidavit filed under subparagraph (A)(ii).

'(C) At the conclusion of the case, the claimant may move for return of the cost bond, or to rescind the property pledge, and the court shall grant such motion if the court finds that the claim was substantially justified. If the court denies such motion, or if no such motion is made, the Government shall retain the bond to the extent necessary to recover its costs and return the balance to the claimant. In the case of a property pledge, the Government may—

'(i) serve upon the claimant an assessment of its costs, which assessment shall be collectible as a debt owed to the Government under chapter 176 of title 28; or

'(ii) foreclose on the pledged property to recover its costs.'

## **SEC. 5. TIME FOR FILING A COMPLAINT.**

Section 981 of title 18, United States Code, is amended by adding at the end the following:

### **'(m) FILING A COMPLAINT-**

'(1) IN GENERAL- In any case in which property has been seized or restrained by the Government and a claim has been filed, the Attorney General shall—

'(A) not later than 90 days after the date on which the claim is filed (unless such requirement is waived by mutual agreement between the Government and the claimants), file a complaint for forfeiture in the manner set forth in the Federal Rules of Civil Procedure, Supplemental Rules for Certain Admiralty and Maritime Claims, or include a forfeiture count in a criminal indictment or information, or both; or

'(B) return the property pending the filing of a complaint or indictment.

### **'(2) EXTENSION OF TIME-**

'(A) IN GENERAL- The Government may apply to a Federal magistrate judge (as defined in the Federal Rules of Criminal Procedure) in any district in which venue for a forfeiture action would lie under section 1355(b) of title 28 ((28 USCA 1355)) for an extension of time in which to comply with paragraph (1), which extension shall be granted based on a showing of good cause.

'(B) EX PARTE APPLICATIONS- If an extension is sought under this paragraph on the basis that the filing required by paragraph (1) would jeopardize an ongoing criminal investigation or prosecution or court- authorized electronic surveillance, the application under subparagraph (A) may be made ex parte.

### **'(3) FILING OF CLAIM AND ANSWER-**

'(A) IN GENERAL- Subject to subparagraph (B), upon the filing of a civil complaint, the claimant shall file a claim and answer in accordance with the Federal Rules of Civil Procedure, Supplemental Rules for Certain Admiralty and Maritime Claims.

'(B) MOTION TO DISMISS- After filing a timely claim under subparagraph (A), a party with standing to challenge the forfeiture may, within the time period provided for filing of an answer under rule C(6) of the Federal Rules of Civil Procedure, Supplemental Rules for Certain Admiralty and Maritime Claims, file, in lieu of an answer, a motion to dismiss the complaint for failure to comply with rule E(2)(a) of the Federal Rules of Civil Procedure, Supplemental Rules for Certain Admiralty and Maritime Claims, or on any other ground set forth in rule 12(b) of the Federal Rules of Civil Procedure. If such motion is denied, the claimant shall file an answer within the period provided by rule 12(a)(4) of the Federal Rules of Civil Procedure, or such other period as the court may determine.

### **'(4) MOTION TO DISMISS COMPLAINT FOR FORFEITURE-**

'(A) IN GENERAL- If a complaint for forfeiture is filed, a party with standing to challenge the forfeiture may move to dismiss the complaint for failure to comply with rule E(2) of the Federal Rules of Civil Procedure, Supplemental Rules for

Certain Admiralty and Maritime Claims, or on any other ground set forth in rule 12(b) of the Federal Rules of Civil Procedure.

**'(B) INSUFFICIENCY OF EVIDENCE-** Notwithstanding section 615 of the Tariff Act of 1930 (19 U.S.C. 1615), a party may not move to dismiss the complaint on the ground that the evidence in the possession of the Government at the time the Government filed its complaint was insufficient to establish the forfeitability of the property.'

## **SEC. 6. PROBABLE CAUSE HEARING.**

Section 981 of title 18, United States Code, is amended by adding at the end the following:

**'(n) PROBABLE CAUSE HEARING-** A person with standing to challenge the forfeiture of property seized under this section may file a motion for the return of the property in the manner described in rule 41(e) of the Federal Rules of Criminal Procedure. If such motion is filed, the court shall conduct a hearing within 90 days and shall order the release of the property, pending trial on the forfeiture and the entry of judgment, unless—

'(1) the Government establishes probable cause to believe that the property is subject to forfeiture, based on all information available to the Government at the time of the hearing;

'(2) the Government has filed a civil forfeiture complaint against the property, and a magistrate judge has determined there is probable cause for the issuance of a warrant of arrest in rem pursuant to the Federal Rules of Civil Procedure, Supplemental Rules for Certain Admiralty and Maritime Claims;

'(3) a grand jury has returned an indictment that includes an allegation that the property is subject to criminal forfeiture;

'(4) the party filing the motion had notice of the intent of the Government to forfeit the property administratively pursuant to section 607(c) of the Tariff Act of 1930 (19 U.S.C. 1607(c)), and failed to file a claim to the property within the specified time period;

'(5) the property is contraband or other property that the moving party may not legally possess; or

'(6) the property is needed as evidence in a criminal investigation or prosecution.

## **SEC. 7. AWARD OF ATTORNEYS' FEES TO SUCCESSFUL CLAIMANTS.**

Section 981 of title 18, United States Code, is amended by adding at the end the following:

### **'(o) ATTORNEY FEES, COSTS, SANCTIONS-**

**'(1) IN GENERAL-** Except as provided in paragraph (3), if the party filing a claim in a civil forfeiture case is not charged with any criminal offense in a related criminal case, and the court enters judgment for that party on any ground other than a ground set forth in subsection (r), the court shall order the Government to pay costs and reasonable attorneys' fees to the claimant. If the court enters judgment in part for the claimant and in part for the Government, the court shall reduce the award of costs and attorneys' fees accordingly.

**'(2) SANCTIONS-** If the court enters judgment for the Government, and the court determines that the claim was frivolous, counsel representing the claimant may be subject to sanctions pursuant to rule 11 of the Federal Rules of Civil Procedure, and the claimant may be ordered to reimburse the Government for costs.

**'(3) EXCEPTION-** If the claimant is a lienholder with a secured interest in the property subject to forfeiture, and the Government agrees to accept the claim and pay off the lienholder at the conclusion of the case if the Government prevails as to other claims, no costs or attorneys fees shall be paid to the lienholder.'

## **SEC. 8. SPECIAL PROVISIONS FOR REAL PROPERTY.**

Section 981 of title 18, United States Code, is amended by adding at the end the following:

### **'(p) CIVIL FORFEITURE OF REAL PROPERTY-**

**'(1) IN GENERAL-** Notwithstanding any other provision of law, all civil forfeitures of real property and interests in real property shall proceed as judicial forfeitures. The administrative forfeiture provisions of the Tariff Act of 1930 (19 U.S.C. 1602 et seq.) do not apply to the forfeiture of real property.

**'(2) PROCEDURES-**

**'(A) IN GENERAL-** Except as otherwise provided in this subsection, real property that is the subject of a civil forfeiture action shall not be seized before entry of an order of forfeiture nor shall the owners or occupants of the real property be evicted from, or otherwise deprived of the use and enjoyment of, real property that is the subject of a pending forfeiture action. In lieu of issuing an arrest warrant in rem as prescribed by the Federal Rules of Civil Procedure, Supplemental Rules for Certain Admiralty and Maritime Claims, the court in which a civil forfeiture action against real property is pending shall issue a notice of complaint for forfeiture, which notice shall be served on the property owner and posted on the property. The posting of such notice shall be sufficient to give the court in rem jurisdiction over the property.

**'(B) CONSTRUCTIVE SERVICE OF PROCESS-** If the property owner cannot be served with the notice of complaint for forfeiture because such owner is a fugitive or resides outside of the United States, and efforts at service pursuant to rule 4 of the Federal Rules of Civil Procedure, are unavailing, or cannot be located despite the exercise of due diligence, constructive service may be made in accordance with the laws of the State in which the property is located.

**'(3) SEIZURE PRIOR TO ENTRY OF ORDER OF FORFEITURE-** Real property may be seized prior to the entry of an order of forfeiture if the Government notifies the court that the Government intends to seize the property before trial, and the court, before issuing any seizure warrant or arrest warrant in rem—

**'(A)** issues a Notice of Application for Warrant, causes the notice to be served on the property owner and posted on the property, and conducts a hearing to determine if there is probable cause for the forfeiture; or

**'(B)** makes an ex parte determination that there is probable cause for the forfeiture and that there are exigent circumstances that permit the Government to seize the property.

**'(4) POST-SEIZURE HEARING-** If the court issues a seizure warrant or arrest warrant in rem pursuant to paragraph (3)(B), the court shall conduct a prompt post-seizure hearing during which the property owner shall have an opportunity to contest the basis for the seizure. If the real property is seized before a complaint is filed, the Government shall file a complaint, or institute criminal forfeiture proceedings, within 90 days of the seizure in accordance with subsection (m).

**'(5) ACTIONS NOT CONSIDERED SEIZURES-** For purposes of this section, the filing of a lis pendens and the execution of a writ of entry for the purpose of conducting an inspection and inventory of the property shall not be considered a seizure.

**'(6) APPLICABILITY-** This subsection applies only to civil forfeitures of real property and interests in real property and does not apply to forfeitures of the proceeds of the sale of such property or interests, or of money or other assets intended to be used to acquire such property or interests. Nothing in this section may be construed to affect the authority of the court to issue a restraining order affecting real property.'

**SEC. 9. COMPENSATION FOR DAMAGE TO SEIZED PROPERTY.**

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

(1) by striking 'law-enforcement' and inserting 'law enforcement'; and

(2) by inserting before the period at the end the following: ', except that—

**'(1)** this chapter and section 1346(b) ((28 USCA 1346)) do apply to any claim based on negligence involving the destruction, injury, or loss of goods or merchandise while in the possession of any officer of customs or excise or any other Federal law enforcement officer, if—

**'(A)** the property was seized solely for the purpose of forfeiture;

**'(B)** the interest of the claimant is not forfeited; and

**'(C)** the claimant is not convicted of a crime for which the interest of the claimant in the property would be subject to forfeiture under Federal or State law; and

**'(2)** damage to property occurring in the course of carrying out a lawful law enforcement function, such as the disassembly of goods and merchandise, may not be construed to be the result of negligence, unless the law enforcement function was carried out in an unreasonable manner'.

**SEC. 10. UNIFORM INNOCENT OWNER DEFENSE.**

(a) IN GENERAL- Chapter 46 of title 18, United States Code, [FN1] is amended by inserting after section 982 ((18 USCA 982)) the following:

Sec. 983. Innocent owners

'(a) The interest of an innocent owner in property shall not be forfeited in any judicial action under any civil forfeiture provision of this title, the Controlled Substance Act, or the Immigration and Nationality Act.

'(b)(1) In this section, the term 'innocent owner' means, with respect to a property interest in existence at the time the illegal act giving rise to forfeiture took place, an owner who—

'(A) did not know that the property was being used or was likely to be used in the commission of such illegal act, or

'(B) upon learning that the property was being used or was likely to be used in the commission of such illegal act, did all that reasonably could be expected to terminate or to prevent such use of the property.

'(2)(A) In this section, the term 'innocent owner' means, with respect to a property interest acquired after the act giving rise to the forfeiture took place, a person who establishes, by a preponderance of the evidence, that the person 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.

'(B) In this paragraph—

'(i) the term 'purchaser' means a person who becomes an owner of property or an interest in specific property by giving money, goods, or services in exchange for such property;

'(ii) 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.

'(C) An otherwise valid claim under subparagraph (A) shall not be denied on the ground that the claimant gave nothing of value in exchange for the property if—

'(i) the property is the principal residence of the claimant;

'(ii) depriving the claimant of the property would deprive the claimant of the claimant's only means of maintaining adequate shelter in the community for the claimant and all dependents residing with the claimant;

'(iii) the property is not, and is not traceable to, the proceeds of any criminal offense; and

'(iv) the claimant acquired his or her interest in the property through marriage, divorce, or legal separation, or the claimant was the spouse or legal dependent of a person whose death resulted in the transfer of the property to the claimant through inheritance or probate;

except that the court shall limit the value of any real property interest for which innocent ownership is recognized under this subparagraph to the value necessary to maintain adequate shelter in the community for such claimant and all dependents residing with the claimant.

'(3) Notwithstanding any provision of this section, no person may assert an ownership interest under this section in contraband or other property that is illegal to possess. Except as provided in paragraph (2)(A), no person may assert an ownership interest under this section in property that is the proceeds of any criminal offense, or is traceable to the proceeds of any criminal offense, irrespective of State property law.

'(4) An innocent owner defense under this section is an affirmative defense.

'(c) In this section—

'(1) the term 'owner'—

'(A) means a person with an ownership interest in the specific property sought to be forfeited, including a lien, mortgage, recorded security device, or valid assignment of an ownership interest; and

'(B) does not include—

'(i) a person with only a general unsecured interest in, or claim against, the property or estate of another person;  
'(ii) a bailee, unless the bailor is identified, and the bailor has authorized the bailee to claim in the forfeiture proceeding, pursuant to the Federal Rules of Civil Procedure, Supplemental Rules for Certain Admiralty and Maritime Claims;

'(iii) a nominee who exercises no dominion or control over the property; or  
'(iv) a beneficiary of a constructive trust; and

'(2) a person shall be considered to have known that his or her property was being used or was likely to be used in the commission of an illegal act, 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.

'(d)(1) If the court determines, in accordance with this section, that an innocent owner has 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—

'(A) severing the property;

'(B) 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

'(C) if neither subparagraph (A) nor (B) is reasonably practical under all of the circumstances, 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.

'(2) 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.'

**(b) STRIKING SUPERSEDED PROVISIONS-**

(1) **CIVIL FORFEITURE**- Section 981(a) of title 18, United States Code, is amended—

(A) in paragraph (1), by striking 'Except as provided in paragraph (2), the' and inserting 'The'; and

(B) by striking paragraph (2) and inserting the following:

'(2) [Reserved].'

(2) **DRUG FORFEITURES**- Paragraphs (4), (6), and (7) of section 511(a) of the Controlled Substances Act (21 U.S.C. 881(a) (4), (6), and (7)) are each amended by striking ', except that' and all that follows before the period at the end.

(3) **FORFEITURES IN CONNECTION WITH SEXUAL EXPLOITATION OF CHILDREN**- Paragraphs (2) and (3) of section 2254(a) of title 18, United States Code, are each amended by striking ', except that' and all that follows before the period at the end.

(c) **CONFORMING A MENDMENT**- The analysis for chapter 46 of title 18, United States Code, is amended by inserting after the item relating to section 982 the following:

983. Innocent owners.

**SEC. 11. RELEASE OF PROPERTY IN HARDSHIP CASES.**

(a) **IN GENERAL**- Chapter 46 of title 18, United States Code, [FN2] is amended by inserting after section 984 ((18 USCA 984)) the following:

Sec. 985. Release of property to avoid hardship

'(a) IN GENERAL- A person who has filed a claim in a civil for forfeiture action governed by the procedures set forth in this chapter is entitled to release pursuant to subsection (b) of seized property pending trial if-

'(1) the claimant has a possessory interest in the property sufficient to establish standing to contest forfeiture and has filed a nonfrivolous claim on the merits of the forfeiture action;

'(2) the claimant has sufficient ties to the community to provide assurance that the property will be available at the time of the trial;

'(3) the continued possession by the United States pending the final disposition of forfeiture proceedings will cause substantial hardship to the claimant, such as preventing the claimant from working, leaving the claimant homeless, or preventing the functioning of a business;

'(4) the hardship to the claimant outweighs the risk that the property will be destroyed, damaged, lost, concealed, diminished in value or transferred if the property is returned to the claimant during the pendency of the proceeding; and

'(5) none of the conditions set forth in subsection (c) applies.

'(b) PROCEDURES-

'(1) IN GENERAL- The claimant may make a request for the release of property under this subsection at any time after the claim is filed. If, at the time the request is made, the seizing agency has not yet referred the claim to a United States attorney pursuant to section 608 of the Tariff Act of 1930 (19 U.S.C. 1608), the request may only be filed with the seizing agency or the United States attorney to whom the claim was referred. In either case, the request shall set forth the basis on which the requirements of subsection (a)(1) are met.

'(2) MOTION FOR RETURN OF SEIZED PROPERTY- If the seizing agency, or the United States attorney, as the case may be, denies the request or fails to act on the request by the deadline for filing a complaint for forfeiture in response to the claim, as required under this chapter, the claimant may file the request as a motion for the return of seized property in the district court for the district represented by the United States attorney to whom the claim was referred, or if the claim has not yet been referred, in the district court that issued the seizure warrant for the property, or if no warrant was issued, in any district court that would have jurisdiction to consider a motion for the return of seized property under rule 41(e) of the Federal Rules of Criminal Procedure. The motion shall set forth the basis on which the requirements of subsection (a) have been met and the steps the claimant has taken to secure the release of the property from the appropriate official.

'(3) ACTION BY DISTRICT COURT- The district court shall act on a motion made pursuant to this subsection within 30 days or as soon thereafter as practicable, and shall grant the motion if the claimant establishes that the requirements of subsection (a) have been met. All factual evidence shall be submitted through affidavit. The Government, in responding to a motion under this subsection, may in appropriate cases, submit evidence ex parte in order to avoid disclosing any matter relating to an ongoing criminal investigation or pending trial.

'(4) COURT ORDER TO MAINTAIN VALUE OF PROPERTY- If the court grants the motion, the court shall enter any order necessary to ensure that the value of the property is maintained while the forfeiture action is pending, including permitting the inspection, photographing, and inventory of the property, and the court may take action in accordance with rule E of the Federal Rules of Civil Procedure, Supplemental Rules for Certain Admiralty and Maritime Claims. If the property to be returned is an airplane, a vessel, or a motor vehicle with a value of greater than \$25,000, the claimant shall post a bond equal to the value of the property, unless the court waives the bond for good cause. The Government may place a lien against the property or file a lis pendens to ensure that the property is not transferred to another person. The Government, in responding to a motion under this subsection, may, in appropriate cases, submit evidence ex parte in order to avoid disclosing any matter relating to an ongoing criminal investigation or pending trial.

'(5) REINSTATEMENT OF INSURANCE- Any insurance on the subject property at the time of seizure shall be kept in force, or shall be reinstated if it has been discontinued since the time of seizure, prior to return of the property pursuant to this subsection, and the court, in appropriate cases, may also order that such insurance be obtained by the claimant as a condition of release of the property. If property returned to the claimant under this section is lost, stolen, or diminished in value, any insurance proceeds shall be paid to the United States and such proceeds shall be subject to forfeiture in place of the property originally seized.

'(c) INAPPLICABILITY- This section does not apply if the seized property--

'(1) is contraband, currency, or other monetary instrument, or electronic funds;

- '(2) is evidence of a violation of the law;
- '(3) by reason of design or other characteristic, is particularly suited for use in illegal activities; or
- '(4) is likely to be used to commit additional criminal acts if returned to the claimant.

'(d) CHANGE OF VENUE- Once a motion for the release of property under this section is filed, the party filing the motion or the Government may request that the motion be transferred to another district in which venue for the forfeiture action would lie under section 1355(b) of title 28 ((28 USCA 1355)) pursuant to the change of venue provisions in section 1404 of title 28 ((28 USCA 1404)).'

(b) CONFORMING AMENDMENT- The analysis for chapter 46 of title 18, United States Code, is amended by inserting after the item relating to section 984 the following:

985. Release of property to avoid hardship.

## **SEC. 12. STAY OF CIVIL FORFEITURE CASE.**

(a) IN GENERAL- Section 981(g) of title 18, United States Code, is amended to read as follows:

### **'(g) STAY OF CIVIL FORFEITURE CASE-**

'(1) IN GENERAL- Upon the motion of the United States, the court shall stay the civil forfeiture proceeding if the court determines that civil discovery or trial could adversely affect the ability of the Government to conduct a related criminal investigation or the prosecution of a related criminal case.

'(2) STAY OF PROCEEDINGS- Up on the motion of a claimant, the court shall stay the civil forfeiture proceeding with respect to that claimant if the court determines that--

'(A) the claimant is the subject of a related criminal investigation or case;

'(B) the claimant has standing to assert a claim in the civil forfeiture proceeding; and

'(C) continuation of the forfeiture proceeding may infringe upon the right of the claimant against self-incrimination in the related investigation or case.

'(3) PROTECTIVE ORDER LIMITING DISCOVERY- 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 1 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 1 party to pursue discovery while the other party is substantially unable to do so.

'(4) DEFINITIONS- In this subsection, the terms 'related criminal case' and 'related criminal investigation' mean an actual prosecution or investigation in progress at the time the request for the stay, or any subsequent motion to lift 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 2 proceedings without requiring an identity with respect to any 1 or more factors.

'(5) PRESENTATIONS EX PARTE AND UNDER SEAL- Any presentation by the Government to the court under this subsection that involves an ongoing criminal investigation or prosecution shall be made ex parte and under seal.

'(6) COURT ORDER TO PRESERVE VALUE OF PROPERTY- 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) APPLICABILITY OF STANDING DETERMINATION- A determination by the court that the claimant has standing to request a stay pursuant to paragraph (2) shall apply only to this subsection and shall not preclude the Government from objecting to the standing of the claimant by dispositive motion or at the time of trial.'

(b) DRUG FORFEITURES- Section 511(i) of the Controlled Substances Act (21 U.S.C. 881(i)) is amended to read as follows:

'(i) The provisions of section 981(g) of title 18, United States Code, regarding the stay of a civil forfeiture proceeding shall apply to forfeitures under this section.'

## **SEC. 13. PREJUDGMENT INTEREST.**

(a) IN GENERAL- Section 2465 of title 28, United States Code, is amended--

(1) by striking 'Upon' and inserting the following:

'(a) IN GENERAL- Upon'; and

(2) by adding at the end the following:

'(b) INTEREST- Upon entry of judgment for the claimant in any proceeding to condemn or forfeit property seized or arrested under provision of title 18, the Controlled Substances Act, or the Immigration and Nationality Act, the United States--

'(1) shall be liable for post-judgment interest as set forth in section 1961 ((28 USCA 1961));

'(2) shall not be liable for prejudgment 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, if such interest resulted from the investment of the property in an interest-bearing account or instrument; and

'(3) shall not be required to disgorge the value of any intangible benefits nor to make any other payments of interest or other compensation 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.

## **SEC. 14. SEIZURE WARRANT REQUIREMENT.**

(a) IN GENERAL- Section 981(b) of title 18, United States Code, is amended to read as follows:

'(b) SEIZURE WARRANT REQUIREMENT-

'(1) IN GENERAL- 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 United States Postal Service, respectively.

'(2) WARRANT REQUIREMENT- Any seizure pursuant to this section shall be made pursuant to a warrant, which may be issued by a magistrate judge 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--

'(A) a complaint for forfeiture has been filed in the district court and the court has issued an arrest warrant in rem pursuant to the Federal Rules of Civil Procedure, Supplemental Rules for Certain Admiralty and Maritime Claims, based upon a showing of probable cause;

'(B) there is probable cause to believe that the property is subject to forfeiture and--

'(i) the seizure is made pursuant to a lawful arrest or search; or

'(ii) another exception to the fourth amendment warrant requirement would apply; or

'(C) the property was lawfully seized by a State or local law enforcement agency and has been transferred to a Federal agency.

'(3) OUT-OF-DISTRICT WARRANTS- Notwithstanding rule 41(a) of the 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 ((28 USCA 1355)), and executed in any district in which the property is found, or transmitted to the central authority of any foreign state for service in accordance with any treaty or other international agreement. The judicial officer shall command the officer to seize, within a specified period of time not

to exceed 20 days, the property specified in the warrant. 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) SUPPRESSION OF EVIDENCE-** A party with standing to challenge a seizure and forfeiture under this section may move to suppress the use of the property as evidence on the ground that the Government lacked probable cause at the time of the seizure. Suppression of the property as evidence shall not affect the right of the Government to proceed with a forfeiture action based on independently derived evidence.

**'(5) PERSONS ARRESTED ABROAD-**

**'(A)** 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 in the district in which the property is located 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 at a hearing conducted in the manner provided in rule 43(e) of the Federal Rules of Civil Procedure.

**'(B)** 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.'

**(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.'

**SEC. 15. CIVIL RESTRAINING ORDERS.**

Section 981 of title 18, United States Code, is amended by adding at the end the following:

**'(q) RESTRAINING ORDERS-** 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(e) 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.'

**SEC. 16. EXCESSIVE FINES.**

Section 981 of title 18, United States Code, is amended by adding at the end the following:

**'(r) EXCESSIVE FINES-** At the conclusion of the trial and following the entry of a verdict of forfeiture--

**'(1)** the claimant may petition the court to determine whether the excessive fines clause of the eighth amendment to the Constitution of the United States applies, and if so, whether the forfeiture is grossly disproportional to the gravity of the offense;

**'(2)** the claimant shall have the burden of establishing that the forfeiture is grossly disproportional by a preponderance of the evidence at a hearing conducted in the manner provided in rule 43(e) of the Federal Rules of Civil Procedure, by the court without a jury; and

**'(3)** if the court determines that the forfeiture is grossly disproportional to the gravity of the offense, the court shall adjust the forfeiture to the extent necessary to avoid the constitutional violation.'

**SEC. 17. CIVIL INVESTIGATIVE DEMANDS.**

(a) IN GENERAL- Section 981 of title 18, United States Code, is amended by adding at the end the following:

'(s) CIVIL INVESTIGATIVE DEMAND- In any investigation relating to the seizure or forfeiture of property under this section, the Attorney General, the Secretary of the Treasury, or their designee, may issue in writing, and cause to be served, a subpoena for evidence of the nature, and in the manner, described in section 3486 ((18 USCA 3486)).'.

(b) OBSTRUCTION OF CIVIL INVESTIGATIVE DEMAND- Section 1505 of title 18, United States Code, is amended by inserting 'section 981(s) of this title or' before 'the Anti-Trust Civil Process Act'.

(c) RIGHT TO FINANCIAL PRIVACY ACT AMENDMENT- Section 1120(b)(1) of the Right to Financial Privacy Act (12 U.S.C. 3420(b)(1)) is amended by inserting 'or civil investigative demand' after 'a grand jury subpoena'.

(d) FAIR CREDIT REPORTING ACT AMENDMENT- Section 604(a)(1) of the Fair Credit Reporting Act (15 U.S.C. 1681b(a)(1)) is amended by inserting 'or a civil investigative demand proceeding' before the period at the end.

**SEC. 18. ACCESS TO RECORDS IN BANK SECRECY JURISDICTIONS.**

Section 986 of title 18, United States Code, is amended by adding at the end the following:

'(d) ACCESS TO RECORDS LOCATED ABROAD-

'(1) IN GENERAL- In any civil forfeiture case, or in any ancillary proceeding in any criminal forfeiture case governed by section 413(n) of the Controlled Substances Act (21 U.S.C. 853(n)), in which--

'(A) financial records located in a foreign country may be material--

'(i) to any claim or to the ability of the Government to respond to such claim; or

'(ii) in a civil forfeiture case, to the ability of the Government to establish the forfeitability of the property; and

'(B) it is within the capacity of the claimant to waive his or her rights under applicable financial secrecy laws, or to obtain the records himself 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.

'(2) PRIVILEGE- This subsection shall not affect the right of the claimant to refuse production on the basis of any privilege guaranteed by the Constitution of the United States or any other provision of Federal law.'

**SEC. 19. COOPERATION AMONG FEDERAL PROSECUTORS.**

Section 3322(a) of title 18, United States Code, is amended--

(1) by striking 'civil forfeiture under section 981 of title 18, United States Code, of property described in section 981(a)(1)(C) of such title' and inserting 'any civil forfeiture provision of Federal law'; and

(2) by striking 'concerning a banking law violation'.

**SEC. 20. ACCESS TO OTHER RECORDS.**

Section 6103(i)(1) of the Internal Revenue Code of 1986 (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. 21. STATUTE OF LIMITATIONS FOR CIVIL FORFEITURE ACTIONS.**

Section 621 of the Tariff Act of 1930 (19 U.S.C. 1621) is amended--

(1) by inserting ', or in the case of forfeiture, within five years after the time when the existence of the property and the involvement of the property in the alleged offense were discovered' after 'within five years after the time when the alleged offense was discovered';

- (2) in paragraph (1), by striking 'and' at the end;
- (3) in paragraph (2), by striking the period at the end and inserting ';' and'; and
- (4) by adding at the end the following:

'(3) the provisions of section 2415(e) of title 28, United States Code, shall apply to this section.'.

## **SEC. 22. DESTRUCTION OR REMOVAL OF PROPERTY TO PREVENT SEIZURE.**

Section 2232 of title 18, United States Code, is amended--

- (1) in subsection (a)--
  - (A) by inserting 'or seizure' after 'Physical interference with search';
  - (B) by inserting ', including seizure for forfeiture,' after 'after seizure';
  - (C) by striking 'searches and seizures' after 'authorized to make' and inserting 'searches or seizures';
  - (D) by striking 'or' after 'wares,'; and
  - (E) by inserting ', or other property, real or personal,' after ' merchandise'; and
- (2) in subsection (b)--
  - (A) by inserting 'or seizure' after 'Notice of search';
  - (B) by striking 'searches and seizures' after 'authorized to make' and inserting 'searches or seizures';
  - (C) by inserting ', including seizure for forfeiture,' after 'likely to make a search or seizure'; and
  - (D) by inserting 'real or personal,' after 'merchandise or other property,'.

## **SEC. 23. FUNGIBLE PROPERTY IN BANK ACCOUNTS.**

(a) IN GENERAL- Section 984 of title 18, United States Code, is amended--

(1) by striking subsection (a) and redesignating subsections (b), (c), and (d) as subsections (a), (b), and (c), respectively; and

(2) by striking subsection (b), as redesignated, and inserting the following:

'(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 2 years of the offense that is the basis for the forfeiture.';

(3) in subsection (c), as redesignated--

(A) by striking paragraph (1) and inserting the following:

'(1) Subsection (a) does 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.'; and

(B) by adding at the end the following:

'(3) In this subsection, the term 'financial institution' includes a foreign bank, as defined in section 1(b)(7) of the International Banking Act of 1978 (12 U.S.C. 3101).'; and

(4) by adding at the end the following:

'(d) Nothing in this section may be construed to limit the ability of the Government to forfeit property under any provision of law if the property involved in the offense giving rise to the forfeiture or property traceable thereto is available for forfeiture.'

(b) EFFECTIVE DATE- The amendments made by this section shall apply to any transaction occurring on or after October 28, 1992.

## **SEC. 24. CURRENCY SEIZED FROM DRUG COURIERS.**

Section 511 of the Controlled Substances Act (21 U.S.C. 881) is amended by inserting after subsection (j) the following:

'(k)(1) In any action with respect to the forfeiture of seized currency pursuant to subsection (a)(6) of this section, or subparagraph (A) or (B) of section 981(a)(1) of title 18, United States Code, the finder of fact shall determine the nexus between the currency and the drug trafficking offense based on the totality of the circumstances. The presence or absence of any 1 factor shall not be dispositive.

'(2) In making a determination under paragraph (1), the finder of fact may rely on any of the following factors as probative of a connection between large quantities of currency and drug trafficking:

'(A) The currency was in excess of the amount normally carried by legitimate leisure and business travelers, and was, at the time of seizure, being transported through an airport, on a highway, or at a port-of-entry.

'(B) The currency was packaged in bundles, concealed in paper bags, wrapped in cellophane or other plastic wrap, concealed under clothing, or otherwise being transported in a highly unusual manner.

'(C) The currency was packaged with, or found in proximity to, products or chemicals intended to conceal odors from a drug detection dog, or had recently been washed or cleaned with water or chemicals designed to remove such odors.

'(D) The person transporting the property (or any portion thereof) provided false information to any law enforcement officer or inspector who lawfully stopped the person for investigative purposes or for purposes of a United States border inspection.

'(E) The currency was found in close proximity to a measurable quantity of any controlled substance.

'(F) The currency was the subject of a positive alert by a properly trained dog that did not alert to a controlled sample of currency.

'(G) The currency at issue was acquired during a period of time when the person who acquired the property was engaged in a drug trafficking offense or within a reasonable time after such period, and there is no likely source for such property other than that offense.

'(H) The person transporting the currency had associated with, or was carrying telephone numbers, pager numbers, or other information providing a means of contacting, persons engaged in the illegal sale and distribution of controlled substances.

'(I) The currency was, 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 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) ((22 USCA 2291j))), as applicable.

'(J) Any person involved in the transportation or intended delivery of the currency has been convicted in any Federal, State, or foreign jurisdiction of a drug trafficking offense or a felony involving money laundering, or is a fugitive from prosecution for such offense.

'(3) The listing of probative factors in this subsection shall not preclude the development of other judicially recognized factors, or the establishment of a basis for forfeiture on criteria other than those set forth in this subsection.

'(4) In this subsection, the term 'drug trafficking offense' means with respect to an action under--

'(A) subsection (a)(6), any illegal exchange involving a controlled substance or other violation for which forfeiture is authorized under that subsection;

'(B) section 981(a)(1)(B) of title 18, United States Code, any offense against a foreign nation involving the manufacture, importation, sale, or distribution of a controlled substance for which forfeiture is authorized under that section; and

'(C) section 981(a)(1)(A) of title 18, United States Code, an offense involving the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance, which constitutes a specified unlawful activity (as defined in section 1956(c) of title 18, United States Code).'.

## **SEC. 25. USE OF FORFEITED FUNDS TO PAY RESTITUTION TO CRIME VICTIMS.**

(a) IN GENERAL- Section 981(e) of title 18, United States Code, is amended by striking paragraph (6) and inserting the following:

'(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'.

(b) PROCEEDS OF CRIME- Section 981(a)(1)(C) of title 18, United States Code, is amended by striking 'affecting a financial institution'.

## **SEC. 26. FUGITIVE DISENTITLEMENT.**

(a) IN GENERAL- Chapter 163 of title 28, United States Code, [FN3] is amended by adding at the end the following: 'Sec. 2466. Fugitive disentitlement

'Any person who, in order to avoid criminal prosecution, purposely leaves the jurisdiction of the United States, declines to enter or reenter the United States to submit to its jurisdiction, or otherwise evades the jurisdiction of the court in which a criminal case is pending against the person, 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 analysis for chapter 163 of title 28, United States Code, is amended by adding at the end the following:

'2466. Fugitive disentitlement.'

(c) EFFECTIVE DATE- The amendments made by this section shall apply to any case pending on or after the date of enactment this Act.

## **SEC. 27. ENFORCEMENT OF FOREIGN FORFEITURE JUDGMENT.**

(a) IN GENERAL- Chapter 163 of title 28, United States Code, [FN4] is amended by adding at the end the following:

'Sec. 2467. Enforcement of foreign judgment

'(a) DEFINITIONS- In this section--

'(1) the term 'foreign nation' means a country that has become a party to the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (referred to in this section as 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; and

'(2) the term 'value-based confiscation judgment' means 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, or any foreign offense described in section 1956(c)(7)(B) of title 18, 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-

'(1) IN GENERAL- A foreign nation seeking to have its value-based confiscation judgment registered and enforced by a district court of the United States under this section shall first submit a request to the Attorney General or the designee of the Attorney General, which request shall include--

'(A) a summary of the facts of the case and a description of the criminal proceeding that resulted in the value-based confiscation judgment;

- '(B) certified copies of the judgment of conviction and value- based confiscation judgment;
- '(C) an affidavit or sworn declaration establishing that the defendant received notice of the proceedings in sufficient time to enable the defendant to defend against the charges and that the value-based confiscation judgment rendered is in force and is not subject to appeal;
- '(D) an affidavit or sworn declaration that all reasonable efforts have been undertaken to enforce the value-based confiscation judgment against the property of the defendant, if any, in the foreign country; and
- '(E) such additional information and evidence as may be required by the Attorney General or the designee of the Attorney General.

'(2) CERTIFICATION OF REQUEST- The Attorney General or the designee of the Attorney General, in consultation with the Secretary of State or the designee of the Secretary, shall determine whether to certify the request, and such decision shall be final and not subject to either judicial review or review under subchapter II of chapter 5, or chapter 7, of title 5 (commonly known as the 'Administrative Procedure Act').

'(c) JURISDICTION AND VENUE-

'(1) IN GENERAL- If the Attorney General or the designee of the Attorney General certifies a request under subsection (b), the foreign nation may file a civil proceeding in district court of the United States seeking to enforce the foreign value-based confiscation judgment as if the judgment had been entered by a court in the United States.

'(2) PROCEEDINGS- In a proceeding filed under paragraph (1)--

'(A) the foreign nation shall be the plaintiff and the person against whom the value-based confiscation judgment was entered shall be the defendant;

'(B) 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; and

'(C) 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) IN GENERAL- 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 if the court finds that-

'(A) the value-based confiscation judgment was rendered under a system that 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.

'(2) EXCEPTION- Process to enforce a judgment under this section shall 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 to the extent that they are stated in the foreign judgment of conviction and value-based confiscation judgment.

'(f) CURRENCY CONVERSION- The rate of exchange in effect at the time the suit to enforce is filed by the foreign nation shall be used in calculating the amount stated in any value-based confiscation judgment requiring the payment of a sum of money submitted for registration.'

(b) CONFORMING AMENDMENT- The analysis for chapter 163 of title 28, United States Code, is amended by adding at the end the following:

'2467. Enforcement of foreign judgment.'

## **SEC. 28. ENCOURAGING USE OF CRIMINAL FORFEITURE AS AN ALTERNATIVE TO CIVIL FORFEITURE.**

Section 2461 of title 28, United States Code, is amended by adding at the end the following:

'(c) If 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 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 413 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 853).'

## **SEC. 29. APPLICATION OF PROCEDURES FOR DRUG CASES.**

Section 511(d) of the Controlled Substances Act (21 U.S.C. 881(d)) is amended by adding at the end the following: 'Chapter 46 of title 18, United States Code, applies to any seizure or forfeiture under this section, to the extent applicable and not inconsistent with this section.'

## **SEC. 30. APPLICATION OF PROCEDURES TO OTHER CIVIL FORFEITURES.**

(a) IN GENERAL- Chapter 46 of title 18, United States Code, [FN5] is amended by adding at the end the following:

'Sec. 987. Application of procedures

'The procedures set forth in this chapter relating to civil forfeiture shall apply to all civil forfeitures under any provision of this title.'

(b) CONFORMING AMENDMENT- The analysis for chapter 46 of title 18, United States Code, is amended by adding at the end the following:

987. Application of procedures.

## **SEC. 31. APPLICATION TO ALIEN SMUGGLING OFFENSES.**

(a) AMENDMENT OF THE IMMIGRATION AND NATIONALITY ACT- Section 274(b) of the Immigration and Nationality Act (8 U.S.C. 1324(b)) is amended to read as follows:

'(b) SEIZURE AND FORFEITURE-

'(1) IN GENERAL- Any conveyance, including any vessel, vehicle, or aircraft, that has been or is being used in the commission of a violation of subsection (a), the gross proceeds of such violation, and any property traceable to such conveyance or proceeds, shall be seized and subject to forfeiture.

'(2) APPLICABLE PROCEDURES- Seizures and forfeitures under this subsection shall be governed by the provisions of chapter 46 of title 18, United States Code, relating to civil forfeitures, including section 981(d) of such title, except that such duties as are imposed upon the Secretary of the Treasury under the customs laws described in that section shall be performed by such officers, agents, and other persons as may be designated for that purpose by the Attorney General.

'(3) PRIMA FACIE EVIDENCE IN DETERMINATIONS OF VIOLATIONS- In determining whether a violation of subsection (a) has occurred, any of the following shall be prima facie evidence that an alien involved in the alleged violation had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law:

'(A) Records of any judicial or administrative proceeding in which that alien's status was an issue and in which it was determined that the alien had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law.

'(B) Official records of the Service or of the Department of State showing that the alien had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law.'

'(C) Testimony, by an immigration officer having personal knowledge of the facts concerning that alien's status, that the alien had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law.'

(b) TECHNICAL CORRECTIONS TO EXISTING CRIMINAL FORFEITURE AUTHORITY- Section 982(a)(7) of title 18, United States Code, is amended--

(1) by striking '(A)';

(2) by striking subparagraph (B); and

(3) by redesignating clauses (i) and (ii) as subparagraphs (A) and (B), respectively;

(4) by redesignating subclauses (I) and (II) as clauses (i) and (ii), respectively;

(5) by inserting 'section 274(a), 274A(a)(1), or 274A(a)(2) of the Immigration and Nationality Act or' before 'section 1425' the first place it appears;

(6) in subparagraph (A), as redesignated by this subsection, by striking 'a violation of, or a conspiracy to violate, subsection (a)' and inserting 'the offense of which the person is convicted'; and

(7) in subparagraph (B)(i) and (ii), as redesignated by this subsection, by striking 'a violation of, or a conspiracy to violate, subsection (a)' and all that follows through 'of this title' each place it appears and inserting 'the offense of which the person is convicted'.

## **SEC. 32. EFFECTIVE DATES.**

(a) IN GENERAL- Unless otherwise specified in this Act, the amendments made by this Act apply to any forfeiture proceeding commenced on or after the date of enactment of this Act.

(b) ADMINISTRATIVE FORFEITURES- The amendments made by this Act relating to seizures and administrative forfeitures shall apply to seizures occurring on or after the 90th day after the date of enactment of this Act.

(c) CIVIL JUDICIAL FORFEITURES- The amendments made by this Act relating to judicial procedures applicable once a civil forfeiture complaint is filed by the Government shall apply to any case in which the forfeiture complaint is filed on or after the date of enactment of this Act.

(d) SUBSTANTIVE LAW- The amendments made by this Act expanding substantive forfeiture law to make property subject to civil or criminal forfeiture that was not previously subject to civil or criminal forfeiture shall apply to any offense occurring after the date of enactment of this Act.

FN[FN1] ((18 USCA 981)) ((18 USCA 984)) ((18 USCA 986))

FN[FN2] ((18 USCA 981)) ((18 USCA 982)) ((18 USCA 986))

FN[FN3] ((28 USCA 2461)) ((28 USCA 2462)) ((28 USCA 2463)) ((28 USCA 2464)) ((28 USCA 2465))

FN[FN4] ((28 USCA 2461)) ((28 USCA 2462)) ((28 USCA 2463)) ((28 USCA 2464)) ((28 USCA 2465))

FN[FN5] ((18 USCA 981)) ((18 USCA 982)) ((18 USCA 984)) ((18 USCA 986))  
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## Part 8

### **S.1931 (Hatch-Leahy Bill), Introductory Statements**

(Note: Text of S.1931 appears at the end.)

By Mr. HATCH (for himself and Mr. LEAHY):

**S. 1931.** A bill to provide a more just and uniform procedure for Federal civil forfeitures, and for other purposes; to the Committee on the Judiciary.

#### **Civil Asset Forfeiture Reform Act**

Mr. HATCH.

Mr. President, today Senator LEAHY and I are introducing a civil asset forfeiture reform bill.

First and foremost, I want to emphasize that civil asset forfeiture is an important tool in America's fight against crime and drugs. Last year, the federal government seized nearly \$500 million in assets. It is vitally important that the fruits of crime and the property used to commit crimes are forfeited to the government. In recent years, however, there have been numerous examples of civil asset forfeiture actions that should not have been taken. While the vast majority of civil asset forfeiture actions are justified, there have been cases in which government officials did not use good judgment. Some would even say that civil asset forfeiture has been abused in some instances by overzealous law enforcement officials.

I will mention just a few examples of such imprudent civil forfeiture actions. In *United States v. \$506,231*, 125 F.3d 442 (7th Cir. 1997), the court dismissed a forfeiture action involving \$506,231 and scolded the government for its conduct. In this case, state authorities obtained a warrant to search a pizzeria for stolen goods. During the search of the restaurant, authorities did not find any stolen goods, but they did discover a large amount of currency. Criminal charges were not filed against the owners of the restaurant. Nevertheless, alleging that the currency was related to narcotics, the federal government filed a civil complaint for forfeiture of the \$506,231.

Four years after the money was seized, the court dismissed the forfeiture complaint and returned the currency to its owner. The court found that the evidence "does not come close to showing any connection between the money and narcotics," that "there is no evidence that drug trafficking was going on at the pizzeria," and that "nothing ties this money to any narcotics activities that the government knew about or charged, or to any crime that was occurring when the government attempted to seize the property." At the conclusion of the case, the court stated that "we believe the government's conduct in forfeiture cases leaves much to be desired." \*S14629

Even more disturbing is *United States v. \$14,665*, 33 F. Supp. 2d 47 (D. Mass. 1998). In this case, airline officials informed the police that a passenger, Manuel Espinola, was carrying a large amount of currency in a briefcase. The police questioned Espinola about the \$14,665 in cash. Espinola, a 23-year-old man who purchased the plane ticket in his own name, told the police that he and his brother earned the money selling personal care products for a company called Equinox International. When the police asked Espinola what the money was going to be used for, he stated that he was planning to move to Las Vegas and intended to use the cash as a down payment on a home. Espinola told police that he did not deposit the currency in a bank because he was afraid that it might be attached due to a prior credit problem. Espinola also gave the police a pager number of a co-worker who he said could verify his employment and his plans in Las Vegas.

Based on Espinola's explanation, the police officer seized the money because the officer believed it was related to purchase narcotics. The officer did not arrest Espinola, who had no criminal record.

After the seizure, in an attempt to get his money back, Espinola submitted documents that largely confirmed his explanation of the currency, including receipts for personal care products from Equinox International and copies of a settlement check from a personal injury claim. By contrast, the government offered no additional evidence that the currency was related to drugs and was subject to forfeiture.

The court granted summary judgment to Espinola and, in its order, harshly criticized the forfeiture action. The court stated: "Even in the byzantine world of forfeiture law, this case is an example of overreaching. The government's showing of probable cause is completely inadequate, based on a troubling mix of baseless generalizations, leaps of logic or worse,

blatant ethnic stereotyping." Nearly two years after the police seized his money without any evidence it was related to narcotics, the court returned the currency to Espinola.

Other federal courts have also criticized federal civil forfeiture actions. For example, in 1992, the Second Circuit Court of Appeals stated: "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."

While I believe that these and other cases prove the need for some reform of civil asset forfeiture law, I want to take this opportunity to praise federal law enforcement officials. Federal law enforcement does an outstanding job fighting crime under the most difficult circumstances. In short, Mr. President, I believe that the problems with civil asset forfeiture have much more to do with defects in the law than with the character or competency of federal law enforcement officials. Senator LEAHY and I drafted this bill to improve civil asset forfeiture law and ensure the continued use of civil asset forfeiture in appropriate cases.

The Hatch-Leahy bill makes important improvements to existing law. I will describe a few of these improvements today. The first major reform places the burden of proof in civil asset forfeiture cases on the government throughout the proceeding. Under current law, the government is only required to make an initial showing of probable cause that the property is connected to criminal activity and is thus subject to forfeiture. After the government makes this modest showing, the burden then shifts to the property owner to prove that the property was not involved in criminal activity. Not surprisingly, the fact that the property owner bears the burden of proving the property is not subject to forfeiture has been extensively criticized by the federal judiciary and numerous legal commentators. As one federal court that has been particularly critical of civil asset forfeiture noted, placing the burden of proof on the property owner is a "constitutional anomaly." *United States v. \$49,576*, 116 F.3d 425 (9th. Cir. 1997). The court in *\$49,576* even questioned whether requiring a property owner to bear the burden of proof in a civil forfeiture action is constitutional: "We would find it surprising were the Constitution to permit such an important decision to turn on a meager burden of proof like probable cause."

I, too, believe that placing the burden of proof on the property owner contradicts our nation's traditional notions of justice and fairness. Under the Hatch-Leahy bill, the government will have the burden in civil forfeiture actions to prove by the preponderance of the evidence that the property is connected with criminal activity and is subject to forfeiture.

Another major reform in the Hatch-Leahy bill involves what is known as the cost bond. Under current civil forfeiture law, a property owner must post a cost bond of the lesser of \$5,000 or 10 percent of the value of the property seized in order to contest a seizure of property. It is important to note that the cost bond merely allows the property owner to contest the forfeiture. It does not entitle the property owner to the return of the property pending trial.

I believe that it is fundamentally unfair to require a person to post a bond in order to be allowed to contest the seizure of property. For example, what if the government required persons who were indicted to post a bond to contest the indictment? Such a requirement would be unconstitutional under the Sixth Amendment. I believe that requiring a property owner to post a bond to contest the seizure of property is no less objectionable. Such a requirement, Mr. President, seems un-American. The framers of our Constitution would be appalled to know that the federal government, after seizing private property, required the property owner to post a bond in order to contest the seizure.

The Justice Department argues that the cost bond requirement reduces frivolous claims. To address this concern, the Hatch-Leahy bill requires that a person who challenges a forfeiture must file his claim to the property under oath, subject to penalty of perjury. I predict that eliminating the cost bond will produce, at most, minor inconveniences because persons who file frivolous claims will be deterred by the substantial legal fees and costs incurred in contesting the forfeiture. After all, who is willing to hire counsel and pay other expenses to litigate a frivolous claim, especially when subject to penalty of perjury?

Another reform in the Hatch-Leahy bill addresses the situation in which the government's possession of seized property pending trial causes hardship to the property owner. Under current law, the government maintains possession of seized property pending trial even if it causes hardship to the property owner. A common example of such hardship is where the government seizes an automobile, and the seizure prevents the property owner or members of the property owner's family from getting to and from work pending the forfeiture trial. The Hatch-Leahy bill changes current law to allow, but not require, the court to release property pending trial if the court determines that the hardship to the property owner of continued possession by the government outweighs the risk that the property will be damaged or lost. This is a common sense reform that allows the court to release property in appropriate cases.

Another reform in the Hatch-Leahy bill involves reimbursement of attorney fees. The Hatch-Leahy bill awards attorney fees and costs to property owners who prevail against the government in civil forfeiture cases. The costs of contesting a civil forfeiture of property can be substantial. The award of attorney fees and costs to property owners who prevail against the government in civil forfeiture cases is justified because unlike criminal forfeiture actions, the property owner is not charged with a crime. Instead, the government proceeds "in rem" against the property. Given that the government does not

sue or indict the property owner, it is unfair for the property owner to have to incur attorney fees and costs when the government does not prevail in civil forfeiture actions.

The award of attorney fees is also justified because the government only has to prove its case against the property by a preponderance of the evidence. By contrast, the government must prove beyond a reasonable doubt that property is subject to forfeiture in **\*S14630** criminal forfeiture actions. If the government decides to pursue a civil forfeiture action instead of the more difficult to prove criminal forfeiture action, it should be obligated to pay the attorney fees and costs of the property owner when the property owner prevails.

Mr. President, I would like to emphasize that while the Hatch-Leahy Civil Asset Forfeiture Reform Act contains important reforms; it retains civil forfeiture as an important tool for law enforcement. In fact, the Hatch-Leahy bill is a cautious, responsible reform. Some would even argue that this bill is too modest.

A comparison of the reforms enacted by the State of California in 1993 is instructive. For example, California changed its civil forfeiture law to require the government to prove beyond a reasonable doubt and achieve a related criminal conviction in most civil asset forfeiture cases. The exception to this rule in California involves seizures of currency in excess of \$25,000. In these cases, the State must prove the currency is subject to forfeiture by clear and convincing evidence. Also, California abolished the cost bond in civil forfeiture cases.

In short, California's reforms go far beyond anything in the Hatch-Leahy bill, but these reforms have not undermined civil asset forfeiture as a law enforcement tool. The modest reforms in the Hatch-Leahy bill will add much needed protections for property owners at no significant costs to law enforcement. By making these needed reforms, the Hatch-Leahy bill will preserve civil forfeiture as a law enforcement tool for the future.

Lastly, I would like to thank Senator LEAHY and his staff for their tireless effort on this legislation. Senator LEAHY has been an advocate for civil asset forfeiture reform for many years. He is one of the leading champions of civil liberties in the Senate. This legislation would not have occurred without his interest and persistence, and I thank him for his efforts.

I ask unanimous consent that the bill and a section-by-section summary of the bill be included in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

## **S. 1931**

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

### **SECTION 1. SHORT TITLE.**

This Act may be cited as the "Civil Asset Forfeiture Reform Act".

### **SEC. 2. CREATION OF GENERAL RULES RELATING TO CIVIL FORFEITURE PROCEEDINGS.**

(a) IN GENERAL.-Chapter 46 of title 18, United States Code, is amended by inserting after section 981 the following:

#### **"s981A. General rules for civil forfeiture proceedings**

"(a) NOTICE; CLAIM; COMPLAINT.-(1)(A)(i) Except as provided in clauses (ii) and (iii), in any nonjudicial civil forfeiture proceeding under a civil forfeiture statute, with respect to which the Government must send written notice to interested parties, such notice shall be sent in a manner to achieve proper service as soon as practicable, and in no case more than 60 days after the date of the seizure.

"(ii) In a case in which the property is seized by a State or local law enforcement agency and turned over to a Federal law enforcement agency for the purpose of forfeiture under Federal law, notice shall be sent no more than 90 days after the date of seizure by the State or local law enforcement agency.

"(iii) If the identity or interest of a party is not determined until after the seizure or turnover but is determined before a declaration of forfeiture is entered, notice shall be sent to such interested party not later than 60 days after the determination by the Government of the identity of the party or the party's interest.

"(B) A court shall extend the period for sending notice under subparagraph (A) for a period not to exceed 60 days (which period may be further extended), if the court determines, based on a written ex parte certification of a supervisory official of the seizing agency, that there is reason to believe that notice may have an adverse result, including-

- "(i) endangering the life or physical safety of an individual;
- "(ii) flight from prosecution;
- "(iii) destruction of or tampering with evidence;
- "(iv) intimidation of potential witnesses; or
- "(v) otherwise seriously jeopardizing an investigation or unduly delaying a trial.

"(C) If the Government does not send notice of a seizure of property in accordance with subparagraph (A) to the person from whom the property was seized, and no extension of time is granted, the Government shall return the property to that person without prejudice to the right of the Government to commence a forfeiture proceeding at a later time.

"(2)(A) Any person claiming property seized in a nonjudicial forfeiture proceeding may file a claim with the appropriate official after the seizure.

"(B) A claim under subparagraph (A) may be filed not later than the deadline set forth in a personal notice letter, except that if that letter is not received, then a claim may be filed not later than 30 days after the date of final publication of notice of seizure.

"(C) The claim shall state the claimant's interest in the property and be made under oath, subject to penalty of perjury. The seizing agency shall make claim forms generally available on request.

"(D) Any person may make a claim under subparagraph (A) without posting bond with respect to the property which is the subject of the claim.

"(3)(A) Not later than 90 days after a claim has been filed, the Government shall file a complaint for forfeiture in the manner set forth in the Supplemental Rules for Certain Admiralty and Maritime Claims or return the property pending the filing of a complaint, except that a court in the district in which the complaint will be filed may extend the period for filing a complaint for good cause shown or upon agreement of the parties.

"(B) If the Government does not file a complaint for forfeiture or return the property, in accordance with subparagraph (A), it shall return the property and may not take any further action to effect the civil forfeiture of such property.

"(C) In lieu of, or in addition to, filing a civil forfeiture complaint, the Government may include a forfeiture allegation in a criminal indictment. In such case, the Government's right to continued possession of the property shall be governed by the applicable criminal forfeiture statute.

"(D) No complaint may be dismissed on the ground that the Government did not have adequate evidence at the time the complaint was filed to establish the forfeitability of the property by a preponderance of the evidence.

"(4)(A) In any case in which the Government files in the appropriate United States district court a complaint for forfeiture of property, any person claiming an interest in the seized property may file a claim asserting such person's interest in the property in the manner set forth in the Supplemental Rules for Certain Admiralty and Maritime Claims, except that such claim may be filed not later than 30 days after the date of service of the Government's complaint or, as applicable, not later than 30 days after the date of final publication of notice of the filing of the complaint.

"(B) A person asserting an interest in seized property, in accordance with subparagraph (A), shall file an answer to the Government's complaint for forfeiture not later than 20 days after the date of the filing of the claim.

"(b) APPOINTMENT OF COUNSEL.-(1) If-

"(A) a person in a judicial civil forfeiture proceeding under a civil forfeiture statute is financially unable to obtain representation by counsel; and

"(B)(i) the property subject to forfeiture is real property that is being used by the person as a primary residence; or

"(ii) the person is represented by counsel appointed under section 3006A of this title in connection with a related criminal case; the court may appoint or authorize counsel to represent that person with respect to the claim, as appropriate.

"(2) In determining whether to appoint or authorize counsel to represent a person asserting a claim under this subsection, the court shall take into account such factors as-

"(A) the person's standing to contest the forfeiture; and

"(B) whether the claim appears to be made in good faith.

"(3) The court shall set the compensation for representation under this subsection, which shall be equivalent to that provided for court-appointed representation under section 3006A of this title.

"(c) BURDEN OF PROOF.-In all suits or actions brought under any civil forfeiture statute for the civil forfeiture of any property, the burden of proof is on the Government to establish, by a preponderance of the evidence, that the property is subject to forfeiture. The Government may use evidence gathered after the filing of a complaint for forfeiture to establish, by a preponderance of the evidence, that property is subject to forfeiture.

"(d) INNOCENT OWNER DEFENSE.-(1) An innocent owner's interest in property shall not be forfeited under any civil forfeiture statute. The claimant shall have the burden of proving that he is an innocent owner by a preponderance of the evidence.

"(2)(A) With respect to a property interest in existence at the time the illegal conduct giving rise to forfeiture took place, the term 'innocent owner' means an owner who-

"(i) did not know of the conduct giving rise to forfeiture; or

"(ii) upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property.

"(B)(i) For the purposes of this paragraph, ways in which a person may show that such person did all that reasonably could be expected may include demonstrating that such person, to the extent permitted by law-**\*S14631**

"(I) gave timely notice to an appropriate law enforcement agency of information that led the person to know the conduct giving rise to a forfeiture would occur or has occurred; and

"(II) in a timely fashion revoked or attempted to revoke permission for those engaging in such conduct to use the property or took reasonable actions in consultation with a law enforcement agency to discourage or prevent the illegal use of the property.

"(ii) A person is not required by this subparagraph to take steps that the person reasonably believes would be likely to subject any person (other than the person whose conduct gave rise to the forfeiture) to physical danger.

"(3)(A) With respect to a property interest acquired after the conduct giving rise to the forfeiture has taken place, the term 'innocent owner' means a person who, at the time that person acquired the interest in the property-

"(i) was a bona fide purchaser or seller for value (including a purchaser or seller of goods or services for value); and

"(ii) did not know and was reasonably without cause to believe that the property was subject to forfeiture.

"(B) An otherwise valid claim under subparagraph (A) shall not be denied on the ground that the claimant gave nothing of value in exchange for the property if-

"(i) the property is the primary residence of the claimant;

"(ii) depriving the claimant of the property would deprive the claimant of the claimant's only means of maintaining adequate shelter in the community for the claimant and all dependents residing with the claimant;

"(iii) the property is not, and is not traceable to, the proceeds of any criminal offense; and

"(iv) the claimant acquired his or her interest in the property through marriage, divorce, or legal separation, or the claimant was the spouse or legal dependent of a person whose death resulted in the transfer of the property to the claimant through inheritance or probate; except that the court shall limit the value of any real property interest for which innocent ownership is recognized under this subparagraph to the value necessary to maintain adequate shelter in the community for such claimant and all dependents residing with the claimant.

"(4) Notwithstanding any provision of this subsection, no person may assert an ownership interest under this subsection in contraband or other property that it is illegal to possess.

"(e) MOTION TO SET ASIDE FORFEITURE.-(1) Any person entitled to written notice in any nonjudicial civil forfeiture proceeding under a civil forfeiture statute who does not receive such notice may file a motion to set aside a declaration of forfeiture with respect to that person's interest in the property, which motion shall be granted if-

"(A) the Government knew, or reasonably should have known, of the moving party's interest and failed to take reasonable steps to provide such party with notice; and

"(B) the moving party did not know or have reason to know of the seizure within sufficient time to file a timely claim.

"(2) If the court grants a motion under paragraph (1), the court shall set aside the declaration of forfeiture as to the interest of the moving party without prejudice to the right of the Government to commence a subsequent forfeiture proceeding as to the interest of the moving party, which proceeding shall be instituted within 60 days of the entry of the order granting the motion.

"(3) A motion under paragraph (1) may be filed not later than 6 years after the date that the claimant discovered or had reason to discover that the property was forfeited, subject to the doctrine of laches, except that no motion may be filed more than 11 years after the date that the Government's forfeiture cause of action accrued.

"(f) RELEASE OF SEIZED PROPERTY.-(1) A claimant under subsection (a) is entitled to immediate release of seized property if-

"(A) the claimant has a possessory interest in the property;

"(B) the claimant has sufficient ties to the community to provide assurance that the property will be available at the time of the trial;

"(C) the continued possession by the Government pending the final disposition of forfeiture proceedings will cause substantial hardship to the claimant, such as preventing the functioning of a business, preventing an individual from working, or leaving an individual homeless;

"(D) the claimant's likely hardship from the continued possession by the Government of the seized property outweighs the risk that the property will be destroyed, damaged, lost, concealed, or transferred if it is returned to the claimant during the pendency of the proceeding; and

"(E) none of the conditions set forth in paragraph (7) applies.

"(2) A claimant seeking release of property under this subsection must request possession of the property from the appropriate official, and the request must set forth the basis on which the requirements of paragraph (1) are met.

"(3) If not later than 10 days after the date of a request under paragraph (2) the property has not been released, the claimant may file a motion or complaint in the district court in which the complaint has been filed or, if no complaint has been filed, any district court that would have jurisdiction of forfeiture proceedings relating to the property, setting forth-

"(A) the basis on which the requirements of paragraph (1) are met; and

"(B) the steps the claimant has taken to secure release of the property from the appropriate official.

"(4) The court shall render a decision on a motion or complaint filed under paragraph (3) no later than 30 days after the date of the filing, unless such 30-day limitation is extended by consent of the parties or by the court for good cause shown.

"(5) If-

"(A) a motion or complaint is filed under paragraph (3); and

"(B) the claimant demonstrates that the requirements of paragraph (1) have been met; the district court shall order that the property be returned to the claimant, pending completion of proceedings by the Government to obtain forfeiture of the property.

"(6) If the court grants a motion or complaint under paragraph (3)-

"(A) the court may enter any order necessary to ensure that the value of the property is maintained while the forfeiture action is pending, including-

"(i) permitting the inspection, photographing, and inventory of the property;  
"(ii) fixing a bond in accordance with rule E(5) of the Supplemental Rules for Certain Admiralty and Maritime Claims; and

"(iii) requiring the claimant to obtain or maintain insurance on the subject property; and

"(B) the Government may place a lien against the property or file a lis pendens to ensure that the property is not transferred to another person.

"(7) This subsection shall not apply if the seized property-

"(A) is contraband, currency or other monetary instrument, or electronic funds unless such currency or other monetary instrument or electronic funds constitutes the assets of a legitimate business which has been seized;

"(B) is to be used as 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 claimant.

"(g) PROPORTIONALITY.-The claimant may petition the court to determine whether the forfeiture was constitutionally excessive. In making this determination, the court shall compare the forfeiture to the gravity of the offense giving rise to the forfeiture. If the court finds that the forfeiture is grossly disproportional to the offense it shall reduce or eliminate the forfeiture as necessary. The claimant shall have the burden of establishing that the forfeiture is grossly disproportional by a preponderance of the evidence at a hearing conducted by the court without a jury.

"(h) DEFINITIONS.-In this section:

"(1)(A) Except as provided in subparagraph (B), the term 'civil forfeiture statute' means any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense.

"(B) The term 'civil forfeiture statute' does not include-

"(i) the Tariff Act of 1930 or any other provision of law codified in title 19;

"(ii) the Internal Revenue Code of 1986;

"(iii) the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.);

"(iv) the Trading with the Enemy Act (50 U.S.C. App. 1 et seq.); or

"(v) section 1 of title VI of the Act of June 15, 1917 (40 Stat. 233; 22 U.S.C. 401).

"(2)(A) The term 'owner' means a person with an ownership interest in the specific property sought to be forfeited, including a leasehold, lien, mortgage, recorded security interest, or valid assignment of an ownership interest.

"(B) The term 'owner' does not include-

"(i) a person with only a general unsecured interest in, or claim against, the property or estate of another;

"(ii) a bailee unless the bailor is identified and the bailee shows a colorable legitimate interest in the property seized; or

"(iii) a nominee who exercises no dominion or control over the property.".

(b) TECHNICAL AND CONFORMING AMENDMENT.-The analysis for chapter 46 of title 18, United States Code, is amended by inserting after the item relating to section 981 the following:

"981A. General rules for civil forfeiture proceedings.".

**SEC. 3. COMPENSATION FOR DAMAGE TO SEIZED PROPERTY.**

(a) TORT CLAIMS ACT .-Section 2680(c) of title 28, United States Code, is amended-

(1) by striking "any goods or merchandise" and inserting "any goods, merchandise, or other property";

(2) by striking "law-enforcement" and inserting "law enforcement"; and

(3) by inserting before the period at the end the following: ", except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if-

"(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense; **\*S14632**

"(2) the interest of the claimant is not forfeited; and

"(3) the claimant is not convicted of a crime for which the interest of the claimant in the property would be subject to forfeiture under a Federal criminal forfeiture law.".

(b) DEPARTMENT OF JUSTICE.-

(1) IN GENERAL.-With respect to a claim that cannot be settled under chapter 171 of title 28, United States Code, the Attorney General may settle, for not more than \$50,000 in any case, a claim for damage to, or loss of, privately owned property caused by an investigative or law enforcement officer (as defined in section 2680(h) of title 28, United States Code) who is employed by the Department of Justice acting within the scope of his or her employment.

(2) LIMITATIONS.-The Attorney General may not pay a claim under paragraph

(1) that-

(A) is presented to the Attorney General more than 1 year after it occurs; or

(B) is presented by an officer or employee of the Federal Government and arose within the scope of employment.

**SEC. 4. ATTORNEY FEES, COSTS, AND INTEREST.**

(a) IN GENERAL.-Section 2465 of title 28, United States Code, is amended to read as follows:

"s2465. Return of property to claimant; liability for wrongful seizure; attorney fees, costs, and interest

"(a) Upon the entry of a judgment for the claimant in any proceeding to condemn or forfeit property seized or arrested under any provision of Federal law-

"(1) such property shall be returned forthwith to the claimant or his agent; and

"(2) if it appears that there was reasonable cause for the seizure or arrest, the court shall cause a proper certificate thereof to be entered and, in such case, neither the person who made the seizure or arrest nor the prosecutor shall be liable to suit or judgment on account of such suit or prosecution, nor shall the claimant be entitled to costs, except as provided in subsection (b).

"(b)(1) Except as provided in paragraph (2), in any civil proceeding to forfeit property under any provision of Federal law in which the claimant substantially prevails, the United States shall be liable for-

"(A) reasonable attorney fees and other litigation costs reasonably incurred by the claimant;

"(B) post-judgment interest, as set forth in section 1961 of this title; and

"(C) in cases involving currency, other negotiable instruments, or the proceeds of an interlocutory sale-

"(i) 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; and

"(ii) an imputed amount of interest that such currency, instruments, or proceeds would have earned at the rate described in section 1961, for any period during which no interest was paid (not including any period when the property reasonably was in use as evidence in an official proceeding or in conducting scientific tests for the purpose of collecting evidence).

"(2)(A) 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) The provisions of paragraph (1) shall not apply if the claimant is convicted of a crime for which the interest of the claimant in the property would be subject to forfeiture under a Federal criminal forfeiture law.".

(b) TECHNICAL AND CONFORMING AMENDMENT.-The analysis for chapter 163 of title 28, United States Code, is amended by striking the item relating to section 2465 and inserting following:  
"2465. Return of property to claimant; liability for wrongful seizure; attorney fees, costs, and interest.".

## **SEC. 5. SEIZURE WARRANT REQUIREMENT.**

(a) IN GENERAL.-Section 981(b) of title 18, United States Code, is amended to read as follows:

"(b)(1) Except as provided in section 985, any property subject to forfeiture to the United States under subsection (a) may be seized by the Attorney General and, 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-

"(A) a complaint for forfeiture based on probable cause has been filed in the United States district court and the court has issued an arrest warrant in rem pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims;

"(B) there is probable cause to believe that the property is subject to forfeiture and-

"(i) the seizure is made pursuant to a lawful arrest or search; or

"(ii) another exception to the Fourth Amendment warrant requirement would apply; or

"(C) the property was lawfully seized by a State or local law enforcement agency and has been transferred to a Federal agency in accordance with State law.

"(3) Notwithstanding the provisions of rule 41(a) of the 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, and executed in any district in which the property is found.".

(b) DRUG FORFEITURES.-Section 511(b) of the Controlled Substances Act (21 U.S.C. 881(b)) is amended to read as follows:

"(b) SEIZURE PROCEDURES.-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.".

## **SEC. 6. USE OF FORFEITED FUNDS TO PAY RESTITUTION TO CRIME VICTIMS.**

Section 981(e) of title 18, United States Code, is amended by striking paragraph (6) and inserting the following:

"(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".

## **SEC. 7. CIVIL FORFEITURE OF REAL PROPERTY.**

(a) IN GENERAL.-Chapter 46 of title 18, United States Code, is amended by inserting after section 984 the following:

"s985. Civil forfeiture of real property

"(a) Notwithstanding any other provision of law, all civil forfeitures of real property and interests in real property shall proceed as judicial forfeitures.

"(b)(1) Except as provided in this section-

"(A) real property that is the subject of a civil forfeiture action shall not be seized before entry of an order of forfeiture; and

"(B) the owners or occupants of the real property shall not be evicted from, or otherwise deprived of the use and enjoyment of, real property that is the subject of a pending forfeiture action.

"(2) The filing of a lis pendens and the execution of a writ of entry for the purpose of conducting an inspection and inventory of the property shall not be considered a seizure under this subsection.

"(c)(1) The Government shall initiate a civil forfeiture action against real property by-

"(A) filing a complaint for forfeiture;

"(B) posting a notice of the complaint on the property; and

"(C) serving notice on the property owner, along with a copy of the complaint.

"(2) If the property owner cannot be served with the notice under paragraph (1) because the owner-

"(A) is a fugitive;

"(B) resides outside the United States and efforts at service pursuant to Rule 4 of the Federal Rules of Civil Procedure are unavailing; or

"(C) cannot be located despite the exercise of due diligence, constructive service may be made in accordance with the laws of the State in which the property is located.

"(3) If real property has been posted in accordance with this subsection, it shall not be necessary for the court to issue an arrest warrant in rem, or to take any other action to establish in rem jurisdiction over the property.

"(d) Real property may be seized prior to the entry of an order of forfeiture if-

"(1) the Government notifies the court that it intends to seize the property before trial; and

"(2) the court-

"(A) issues a notice of application for warrant, causes the notice to be served on the property owner and posted on the property, and conducts a hearing to determine if there is probable cause for the forfeiture; or

"(B) makes an ex parte determination that there is probable cause for the forfeiture and that there are exigent circumstances that permit the government to seize the property without prior notice and an opportunity for the property owner to be heard.

For purposes of paragraph (2)(B), to establish exigent circumstances, the Government shall show that less restrictive measures such as a lis pendens, restraining order, or bond would not suffice to protect the Government's interests in preventing the sale, destruction, or continued unlawful use of the real property.

"(e) If the court authorizes a seizure of real property under subsection (d)(2), it shall conduct a prompt post-seizure hearing during which the property owner shall have an opportunity to contest the basis for the seizure.

"(f) This section-

"(1) applies only to civil forfeitures of real property and interests in real property;

"(2) does not apply to forfeitures of the proceeds of the sale of such property or interests, or of money or other assets intended to be used to acquire such property or interests; and

"(3) shall not affect the authority of the court to enter a restraining order relating to real property.".

(b) TECHNICAL AND CONFORMING AMENDMENT.-The analysis for chapter 46 of title 18, United States Code, is amended by inserting after the item relating to section 984 the following:

"985. Civil forfeiture of real property.".

## **SEC. 8. APPLICABILITY.**

This Act and the amendments made by this Act shall apply to any forfeiture proceeding commenced on or after the date of enactment of this Act. **\*S14633**

## **HATCH/LEAHY CIVIL ASSET FORFEITURE REFORM ACT-SECTION-BY-SECTION SUMMARY**

### **OVERVIEW**

The Hatch/Leahy Civil Asset Forfeiture Reform Act would provide a more uniform procedure for federal civil asset forfeitures while increasing the due process safeguards for property owners. Among other things, the bill (1) places the burden of proof in civil forfeiture proceedings upon the government, by a preponderance of the evidence; (2) allows for the provision of counsel to indigent claimants where the property at issue is the claimant's primary residence, and where the claimant is represented by court-appointed counsel in connection with a related criminal case; (3) requires the government to pay attorney fees, costs and interest in any civil forfeiture proceeding in which the claimant substantially prevails; (4) eliminates the cost bond requirement; (5) creates a uniform innocent owner defense; (6) allows property owners more time to challenge a seizure; (7) codifies existing practice with respect to Eighth Amendment proportionality review and seizures of real property; (8) permits the pre-adjudication return of property to owners upon a showing of hardship; and (9) allows property owners to sue the government for any damage to their property.

### **SECTION-BY-SECTION SUMMARY**

#### **SEC. 2. CREATION OF GENERAL RULES RELATING TO CIVIL FORFEITURE PROCEEDINGS.**

Creates a new section in federal criminal code (18 U.S.C. s981A) that establishes general rules for virtually all proceedings under a federal civil forfeiture statute.

Notice; claim; complaint. Subsection (a) establishes general procedures and deadlines for initiating civil forfeiture proceedings.

Paragraph (1) provides that, in general, a Federal law enforcement agency has 60 days to send notice of a seizure of property. A court shall extend the period for sending notice for 60 days upon written ex parte certification by the seizing agency that notice may have an adverse result. If the government fails to send notice, it must return the property, without prejudice to the right of the Government to commence a forfeiture proceeding at a later time.

Paragraph (2) allows property owners more time to challenge a seizure. Any person claiming an interest in seized property may file a claim not later than the deadline set forth in a personal notice letter, except that if such letter is not received, then a claim may be filed not later than 30 days after the date of final publication of notice of seizure. Claims shall be made under oath, subject to penalty of perjury. No cost bond need be posted.

Paragraph (3) allows the government 90 days after a claim has been filed to file a complaint for forfeiture or return the property, except that a court may extend the time for filing a complaint for good cause shown or upon agreement of the parties. If the government does not comply with this rule, it may not take further action to effect forfeiture of the property.

Paragraph (4) provides that any person claiming an interest in seized property must file a claim in court not later than 30 days after service of the government's complaint or, where applicable, not later than 30 days after final publication of notice of seizure. A claimant must file an answer to the government's complaint within 20 days of the filing of such claim.

Appointment of counsel. Subsection (b) permits a court to appoint counsel to represent an indigent claimant in a judicial civil forfeiture proceeding if the property subject to forfeiture is real property used by the claimant as a primary residence, or the claimant is already represented by a court-appointed attorney in connection with a related Federal criminal case.

Burden of proof. Subsection (c) shifts the burden of proof in civil asset forfeiture cases to the government, by a preponderance of the evidence. It also makes clear that the government may use evidence gathered after the filing of a complaint to meet that burden of proof.

Innocent owner. Subsection (d) codifies a uniform innocent owner defense. With respect to a property interest in existence at the time the illegal conduct giving rise to forfeiture took place, "innocent owner" means an owner who did not know of the conduct giving rise to forfeiture or who, upon learning of such conduct, did all that reasonably could be expected under the circumstances to terminate such use of the property. With respect to a property interest acquired after the conduct giving rise to the forfeiture has taken place, "innocent owner" means a person who, at the time that person acquired the interest in property, was a bona fide purchaser or seller for value and reasonably without cause to believe that the property was subject to forfeiture or, in limited circumstances involving a principal residence, a spouse or legal dependent.

Motion to set aside declaration of forfeiture. Subsection (e) provides that a person who was entitled to notice of a nonjudicial civil forfeiture who did not receive such notice may file a motion to set aside a declaration of forfeiture with respect to his or her interest in the property. This subsection codifies current case law holding that such motion must be filed not later than 6 years after the date that the claimant discovered or had reason to discover that the property was forfeited, but in no event more than 11 years after the government's cause of action in forfeiture accrued. The common law doctrine of laches applies to any motion made under this subsection. If such motion is granted, the government has 60 days to reinstitute proceedings against the property.

Release of property to avoid hardship. Subsection (f) entitles a claimant to immediate release of seized property in certain cases of hardship. Among other things, the claimant must have sufficient ties to the community to provide assurance that the property will be available at the time of the trial, the claimant's likely hardship from such continued possession outweighs the risk that the property will be destroyed, damaged, lost, concealed, or transferred if it is returned to the claimant during the pendency of the preceding. Hardship return of property does not apply to contraband, currency, electronic funds, property that is evidence of a crime, property that is specially designed to use in a crime, or any other item likely to be used to commit additional crimes if returned.

Proportionality review. Subsection (g) implements United States v. Bajakajian, 524 U.S. 321 (1998), which held that a punitive forfeiture violates the Excessive Fines Clause of the Eighth Amendment if it is grossly disproportionate to the gravity of the offense.

### **SEC. 3. COMPENSATION FOR DAMAGE TO SEIZED PROPERTY.**

Amends the federal Tort Claims Act to apply to claims based on injury or loss of property while in the possession of the government, if the property was seized for the purpose of forfeiture but the interest of the claimant was not forfeited.

### **SEC. 4. ATTORNEY FEES, COSTS AND INTEREST.**

Amends 28 U.S.C. s2465 to provide that, with limited exceptions, in any civil proceeding to forfeit property in which the claimant substantially prevails, the United States shall be liable for (1) reasonable attorney fees and other litigation costs reasonably incurred by the claimant; (2) post-judgment interest; and (3) in cases involving currency, negotiable instruments, or the proceeds of an interlocutory sale, any interest actually paid to the United States, or imputed interest (except where the property was in use as evidence or for testing).

### **SEC. 5. SEIZURE WARRANT REQUIREMENT.**

Amends 18 U.S.C. s981(b) to require that seizures be made pursuant to a warrant obtained in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure, with limited exceptions.

Implements United States v. James Daniel Good Real Property, 510 U.S. 43 (1993), which held that real property may not be seized, except in exigent circumstances, without giving a property owner notice of the proposed seizure and an opportunity for an adversarial hearing. All forfeitures of real property must proceed as judicial forfeitures. Real property may be seized before entry of an order of forfeiture only if notice has been served on the property owner and the court determines that there is probable cause for the forfeiture, or if the court makes an ex parte determination that there is probable cause for the forfeiture and exigent circumstances justify immediate seizure without a pre-seizure hearing.

### **SEC. 7. APPLICABILITY.**

Provides that all changes in the bill apply prospectively.

Mr. LEAHY.

Mr. President, asset forfeiture is a powerful crime-fighting tool. It has been a particularly potent weapon in the war on drugs, allowing the government to take the cars and boats and stash houses amassed by drug dealers and put them to honest

use. Last year alone, the government was able to seize nearly half a billion dollars worth of assets, cutting a big chunk out of criminals' profit stream and returning it to the law-abiding community.

Unfortunately, our nation's asset forfeiture is not fail-safe; it can be abused. In hearings on this issue, the Judiciary Committee has heard examples of what happens when prosecutorial zeal skirts the boundaries of due process, leading to the taking of private property regardless of whether the owner is innocent of, or even cognizant of, the property's use in an illegal act.

In recent years, our nation's asset forfeiture system has drawn increasing and exceedingly sharp criticism from scholars and commentators. Federal judges have also added their voices to the growing chorus of concern. In 1992, the Second Circuit Court of Appeals stated, "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." Four years later, the Eighth Circuit rebuked the government for capitalizing on the claimants' confusion to forfeit over \$70,000 of their currency, and expressed alarm that:

the war on drugs has brought us to the point where the government may seize . . . a citizen's property without any initial showing of cause, and put the onus on the citizen to perfectly navigate the bureaucratic labyrinth in order to liberate what is presumptively his or hers in the first place. . . . **\*S14634** Should the citizen prove inept, the government may keep the property, without ever having to justify or explain its actions.

Similarly, the Seventh Circuit recently expressed its belief that "the government's conduct in forfeiture cases leaves much to be desired," and ordered the return of over \$500,000 in currency that had been improperly seized from a Chicago pizzeria.

Civil asset forfeiture rests upon the medieval notion that property is somehow guilty when it causes harm to another. The notion of "guilty property" is what enables the government to seize property regardless of the guilt or innocence of the property owner. In many asset forfeiture cases, the person whose property is taken is never charged with any crime.

The "guilty property" notion also explains the topsy-turvy nature of today's civil forfeiture proceedings, in which the property owner-not the government- bears the burden of proof. Under current law, all the government must do is make an initial showing of probable cause that the property is "guilty" and subject to forfeiture; it is then up to the property owner to prove a negative- that the property was not involved in any wrongdoing.

It is time to reexamine the obsolete underpinnings of our civil forfeiture laws and bring these laws in line with more modern principles of due process and fair play. We must be especially careful to ensure that innocent property owners are adequately protected.

The Hatch-Leahy Civil Asset Forfeiture Reform Act provides greater safeguards for individuals whose property has been seized by the government. It incorporates all of the core reforms of H.R. 1658, which passed the House of Representatives in June by an overwhelming bipartisan majority. The Hatch-Leahy bill also includes a number of additional reforms which, among other things, establish a fair and uniform procedure for forfeiting real property, and entitle property owners to challenge a forfeiture as constitutionally excessive.

During our hearing this year on civil asset forfeiture reform, the Justice Department and other law enforcement organizations expressed concern that some of the reforms included in the House bill would interfere with the government's ability to combat crime. The bill we introduce today addresses the legitimate concerns of law enforcement. In particular, the bill puts the burden of proof on the government by a preponderance of the evidence, and not by clear and convincing evidence. The preponderance standard is used in virtually all other civil cases, and we believe it is sufficient to protect the interests of property owners.

We have also removed provisions in H.R. 1658 that would allow criminals to leave their ill-gotten gains to their heirs, and would bar the government from forfeiting property if it inadvertently sent notice of a seizure to the wrong address. These provisions did little more than create procedural "gotchas" for criminals and their heirs, and are neither necessary nor desirable as a matter of policy.

The Hatch-Leahy bill also differs from the House bill in its approach to the issue of appointed counsel. Under H.R. 1658, anyone asserting an interest in seized property could apply for a court-appointed lawyer. There is no demonstrated need for such an unprecedented extension of the right to counsel, nor is there any principled distinction between defendants in civil forfeiture actions and defendants in other federal enforcement actions who are not eligible for court-appointed counsel. Moreover, property owners who are indigent may be eligible to obtain representation through various legal aid clinics.

The Hatch-Leahy bill authorizes courts to appoint counsel for indigent claimants in just two limited circumstances. First, a court may appoint counsel in the handful of forfeiture cases in which the property at issue is the claimant's primary residence. When a forfeiture action can result in a claimant's eviction and homelessness, there is more at stake than just a property interest, and it is fair and just that the claimant be provided with an attorney if she cannot otherwise afford one. Second, if a claimant is already represented by a court-appointed attorney in a related federal criminal case, the court may authorize that attorney to represent the claimant in the civil forfeiture action. This is both fair and efficient, and eliminates any appearance that the government chose to pursue the forfeiture in a civil proceeding rather than as part of the criminal case in order to deprive the claimant of his right to counsel.

For claimants who were not appointed counsel by the court, the Hatch-Leahy bill allows for the recovery of reasonable attorney fees and costs if they substantially prevail in court. The bill also makes the government liable for post-judgment interest on any money judgment, and imputed interest in certain cases involving currency or negotiable instruments.

Another core reform of the Hatch-Leahy bill is the elimination of the so-called "cost bond." Under current law, a property owner that seeks to recover his property after it has been seized by the government must pay for privilege by posting a bond with the court. The government has strongly defended the "cost bond," not as a device for ensuring that its court costs are covered, but as a way of deterring frivolous claims. Of course, we are all in favor of deterring frivolous claims, but there are ways to deter frivolous claims without offending the fundamental principle of equal and open access to the courts, a bedrock of our American system of justice. The Hatch-Leahy bill provides that a person who challenges a forfeiture must file his claim on oath, under penalty of perjury. Claimants also remain subject to the general sanctions for bad faith in instituting or conducting litigation. Further, most claimants will continue to bear the substantial costs of litigating their claims in court. The additional financial burden of the "cost bond" serves no legitimate purpose.

Under current law, a property owner has only 20 days from the date of first publication of the notice of seizure to file a claim challenging an administrative forfeiture, and only 10 days to file a claim challenging a judicial forfeiture. It is therefore unlikely that anyone who misses the first of three published notices will be able to file a timely claim. The Hatch-Leahy bill extends the property owner's time to file a claim following administrative and judicial forfeiture actions to 30 days. The bill also codifies current Department of Justice policy with respect to the time period for sending notice of seizure, and establishes a 90-day period for filing a complaint. The bill leaves undisturbed current laws and procedures with respect to the proper form and content of notices, claims and complaints.

Finally, the Hatch-Leahy bill will allow property owners to hold on to their property while a case is in process, if they can show that continued possession of the government will cause substantial hardship to the owner, such as preventing him from working, and that this hardship outweighs the risk that the property will be destroyed or concealed if returned to the owner during the pendency of the case. Unlike H.R. 1658, the Hatch-Leahy bill adopts the primary safeguards that the Justice Department wanted added to the provision—that property owners must have sufficient ties to the community to provide assurance that the property will not disappear and that certain property, such as currency and property particularly suited for use in illegal activities, cannot be returned. As amended, the hardship provision in the Hatch-Leahy bill is substantially similar to the hardship provision in another civil asset forfeiture bill, S. 1701, which the Justice Department has endorsed.

The fact is, the Justice Department has endorsed most of the core reforms contained in the Hatch-Leahy bill. Indeed, the Department has already taken administrative steps to remedy many of the civil forfeiture abuses identified in recent years by the federal courts. For this, the Department is to be commended. But administrative policy can be modified on the whim of whoever is in charge, and the law remains susceptible to abuse.

It is time for Congress to catch up with the Justice Department and the courts on this important issue. Due to internecine fighting among law enforcement officials whose views Congress always wants to take into consideration, action on civil forfeiture reform has been delayed for far too long. The Hatch-Leahy bill strikes the appropriate middle ground between the **\*S14635** House bill and S. 1701, providing comprehensive and meaningful reform while ensuring the continued potency of civil asset forfeiture in the war on crime.

Senator HATCH and I share a longstanding and deeply-held appreciation for law enforcement and the officers who work on the front lines to protect our families and communities, and we have worked together on a number of crime-related issues in the past. I want to commend him for his commitment, not just to law enforcement, but to the rights of all Americans. It has been my pleasure to work with him on this issue, to bring balance back in the relationship between our police forces and the citizens of this country.

## PART 9

### Senate Passage of H.R. 1658

**As amended**, 146 Cong. Rec. S1753-02, 2000 WL 309749 (March 27, 2000)

Proceedings and Debates of the 106th Congress, Second Session  
Monday, March 27, 2000

#### **\*S1753 Civil Asset Forfeiture Reform Act of 2000**

Mr. SESSIONS.

Mr. President, I ask unanimous consent that the Senate now proceed to the consideration of H.R. 1658, reported today by the Judiciary Committee.

The PRESIDING OFFICER.

The clerk will report the bill by title.

The legislative clerk read as follows:

A bill (H.R. 1658) to provide a more just and uniform procedure for Federal civil forfeitures, and for other purposes.

There being no objection, the Senate proceeded to consider the bill, which had been reported by the Committee on the Judiciary with an amendment to strike out all after the enacting clause and insert the part printed in italic, as follows:

#### **[Text of HR 1658 as passed by the Senate appears in Part 10]**

Mr. HATCH.

Mr. President, I am pleased to announce that Chairman HYDE, Senator LEAHY and I reached an agreement with the Department of Justice and Senators SESSIONS and SCHUMER yesterday on civil forfeiture reform legislation. This is an important issue, and I am proud to support this legislation. While civil forfeiture is a valuable law enforcement tool, it has become increasingly clear that some reform of civil forfeiture law is necessary given the numerous controversial seizures of property in the last decade.

Federal civil forfeiture procedures, which are based largely on 19th century admiralty law, provide inadequate protections for private property. For example, under current Federal law, once the government seizes property, the burden of proof is on the property owner to prove that the property is not subject to forfeiture. After property is seized, the property owner must post a cost bond in order to contest the forfeiture. This bond requirement does not entitle the property owner to the return of the property, but merely allows the claimant to contest the forfeiture. If the property owner files a claim to the property, the government has up to five years to file a complaint for forfeiture.

The legislation agreed to today increases protections for property owners, while respecting the interests of law enforcement. Among other provisions, the bill places the burden of proof in civil forfeiture cases on the government throughout the proceeding; places reasonable time limits on the government in civil forfeiture actions; awards attorney fees and costs to property owners who prevail against the government in civil forfeiture cases; authorizes the court to release property pending trial in appropriate circumstances; eliminates the cost bond; and provides a uniform innocent owner defense to all federal civil forfeitures affected by the bill.

All of us here are committed to depriving criminals of the proceeds of crime. To further this goal, the bill increases the ability of the Justice Department to target criminal proceeds. The bill also extends criminal forfeiture authority to any Federal statute in which civil forfeiture authority exists in order to encourage the use of criminal forfeiture. In addition, the bill contains several mechanisms to deter and punish frivolous claims to seized property. Senator SESSIONS will describe these provisions in detail.

A broad coalition of organizations support this bill, including the Chamber of Commerce, the American Bankers Association, the National Association of Homebuilders, the National Association of Realtors, the Institute for Justice, Americans for Tax Reform, the National Rifle Association, the American Bar Association, and the Fraternal Order of

Police. In addition, six former Attorneys General—William Barr, Richard Thornburg, Edwin Meese, Benjamin Civiletti, Griffin Bell, and Nicholas Katzenbach—have endorsed the bill.

In closing, I would like to thank Senators SESSIONS and SCHUMER for their patience and cooperation. This agreement would not be possible without their hard work and dedication. Senator SESSIONS is to be especially commended. As a former United States Attorney and state Attorney General, he has more experience in civil forfeiture actions than any member of Congress. Senator SESSIONS has been an outstanding representative of the law enforcement community, and I am proud to have his support.

Finally, I would like to thank House Judiciary Chairman HENRY HYDE. No one has done more to advance the cause of civil forfeiture reform than Chairman HYDE. His 1995 book on civil forfeiture helped draw national attention to the need for reform. Last June, the House overwhelmingly passed the Hyde-Conyers civil forfeiture reform bill. This victory for forfeiture reform was due in large measure to HENRY HYDE's stature and commitment.

Thank you for your attention to this important reform legislation.

Mr. LEAHY.

Mr. President, at long last, after years of effort and several weeks of intensive, tedious and seemingly endless negotiations, we have reached agreement on civil asset forfeiture reform legislation. This is a significant improvement over the current system and should go a long way toward stemming the abuses that have so offended Americans across the country and the political spectrum. It is not often that we see the U.S. Chamber of Commerce, ACLU, NRA, National Association of Criminal Defense Lawyers, American Bankers Association, the Institute of Justice, Americans for Tax Reform, and the American Bar Association joining together on the same side of a legislative effort. Working with Chairman HATCH, Chairman HYDE, Mr. CONYERS, Senator SESSIONS and Senator SCHUMER, we have crafted a good **\*S1760** bill, a balanced bill and a reform package that should move forward as consensus legislation and be enacted without further delay this year. I want to thank all who have worked with us in this process. In particular, I want to thank Janet Reno, our Attorney General, for working with us, meeting with us and lending her support to this effort and joining our coalition by agreeing to the consensus civil asset forfeiture reform legislation that the Senate is passing today.

Asset forfeiture is a powerful crime-fighting tool. It has been a particularly potent weapon in the war on drugs, allowing the government to take the cars and boats and stash houses amassed by drug dealers and put them to honest use. Last year alone, the government was able to seize nearly half a billion dollars worth of assets, cutting a big chunk out of criminals' profit stream and returning it to the law-abiding community.

Unfortunately, our nation's asset forfeiture is not fail-safe; it can be and has been abused. In hearings on this issue, the Judiciary Committee has heard examples of what happens when prosecutorial zeal skirts the boundaries of due process, leading to the taking of private property regardless of whether the owner is innocent of, or even cognizant of, the property's use in an illegal act, or whether the seizure is entirely out of proportion to the criminal conduct alleged.

I am well aware from incidents in Vermont about how aggressive use by Federal and State law enforcement official of civil asset forfeiture laws can appear unfair and excessive, and thereby fuel public distrust of the government in general and law enforcement in particular. For example, in 1989, federal prosecutors seized a Vermont homestead that a family had built and lived in for over a decade. The husband had pleaded guilty in State court to growing six marijuana plants, without his wife's knowledge, and was sentenced to 50 hours of community service, which he fulfilled by building bookshelves for the local public library.

Yet, one year after his arrest, Vermont State police brought his arrest to the attention of the federal authorities and Federal marshals seized the family's home and 49 surrounding acres. Hundreds of Vermonters rallied to the family's defense, including former prosecutors, until the case was settled with no seizure of the property.

In another civil asset forfeiture case, federal prosecutors again seized the home and 10 acres of a Vermont woman in Richmond, Vermont, after two hidden patches of marijuana plants were discovered on her property. Criminal charges against the woman were dismissed when she established she was unaware that her daughter and daughter's boyfriend were cultivating the plants. Three years after the seizure, in 1990, a federal judge ordered the government to return the property to the woman, but by that time it had been destroyed by fire.

By contrast to the obligation under Vermont law that law enforcement agencies must "ensure that the property is properly maintained," 18 V.S.A. § 4246, the federal authorities who made the seizure of this property had no such obligation and did not take good care of the property.

In yet another civil asset forfeiture case, federal prosecutors in 1990, seized the home and 10.7 acres of a family in Craftsbury Common, Vermont, after the homeowners were convicted in State court of cultivating marijuana and given suspended sentences three years earlier in 1987.

Given the fact that in each of these cases, the underlying criminal charges were prosecuted by the State but the forfeiture action was taken federally, one might ask why these related proceedings were divided between the State and Federal authorities? The answer is simple: Vermont law does not allow the forfeiture of real property "which is occupied as the primary residence of a person involved in the violation and a member or members of that person's family." 18 V.S.A. s 4241(a)(5).

Moreover, under Vermont law, state law enforcement authorities carry a heavier burden "of proving all material facts by clear and convincing evidence." 18 V.S.A. s 4244(c). By contrast, federal forfeiture procedures provide more latitude on the property subject to seizure and more lenient requirements for federal law enforcement authorities to meet.

While federal authorities in Vermont have in recent years avoided such egregious asset forfeiture abuses, that is not the situation in other jurisdictions, prompting increasing and exceedingly sharp criticism from scholars and commentators of the federal asset forfeiture system, which in general requires far less from the government than any State forfeiture law.

Federal judges have also added their voices to the growing chorus of concern. In 1992, the Second Circuit Court of Appeals stated: "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." Four years later, the Eighth Circuit rebuked the government for capitalizing on the claimants' confusion to forfeit over \$70,000 of their currency, and expressed alarm that:

<T>he war on drugs has brought us to the point where the government may seize . . . a citizen's property without any initial showing of cause, and put the onus on the citizen to perfectly navigate the bureaucratic labyrinth in order to liberate what is presumptively his or hers in the first place. . . . Should the citizen prove inept, the government may keep the property, without ever having to justify or explain its actions.

Similarly, the Seventh Circuit recently expressed its belief that " the government's conduct in forfeiture cases leaves much to be desired," and ordered the return of over \$500,000 in currency that had been improperly seized from a Chicago pizzeria.

Under current law, the property owner-not the government-bears the burden of proof. All the government must do is make an initial showing of probable cause that the property is "guilty" and subject to forfeiture. The property owner must then prove a negative-that the property was not involved in any wrongdoing. It is time to bring this law in line with our modern principles of due process and fair play, and reform forfeiture procedures to ensure that innocent property owners are adequately protected.

The Hyde-Conyers civil asset forfeiture reform bill, H.R. 1658, passed the House by an overwhelming bipartisan majority (375-48) last June. After lengthy negotiations with the Department of Justice, Chairman HATCH and I introduced a Senate civil asset forfeiture reform bill, S.1931. Our bill addressed every major concern that the Department had raised in our hearings and in the Statement of Administration Policy regarding the Hyde-Conyers bill, and struck a fair compromise on those issues.

For example, the Hyde-Conyers bill put the burden of proof on the Government by clear and convincing evidence. We put the burden of proof on the Government by a preponderance of the evidence. The preponderance standard is used in virtually all other civil cases, and we believe it is sufficient to protect the interests of property owners.

The Hyde-Conyers bill authorized courts to appoint counsel for any indigent person who asserted an interest in seized property. Although I am sympathetic to that proposal-justice should not be only for the wealthy-the Administration strongly opposed it. We provided for appointment of counsel only in the rare case where the property subject to forfeiture was the claimant's primary residence. In other cases, a claimant could recoup attorney fees only if she substantially prevailed in challenging the forfeiture.

We are grateful for the support of so many members of the Committee and others over the last year. The Hatch-Leahy bill was endorsed by the last six Attorneys General of the United States from both parties, William Barr, Richard Thornburgh, Edwin Meese, Benjamin Civiletti, Griffin Bell, and Nicholas Katzenbach, and a wide range of organizations.

Although I knew that we had met the Department more than half way in our bill, we did not stop there. We have met with and worked with Senators SESSIONS and SCHUMER, who had introduced a different type of bill, to see whether we might find common ground. After weeks of intensive efforts, we succeeded in coming together. For our part, Chairman HATCH and I accepted more than 30 substantive changes to the provisions in the Hatch-Leahy bill, plus about a dozen

new sections to the bill that give law enforcement new, but measured, authority. In **\*S1761** essence we combined the Hatch-Leahy Civil Asset Forfeiture Reform Act, S. 1931, with suggestions from the Sessions-Schumer bill to form a civil asset forfeiture legislative package that we can all agree to support.

Among the important reforms made by the Hatch-Leahy-Sessions-Schumer substitute amendment to H.R. 1658, which the Senate passes today, are the following:

Burden of proof. The substitute amendment puts the burden of proof on the government by a preponderance of the evidence.

Cost bond. Another core reform of the substitute amendment is the elimination of the so-called "cost bond." Under current law, a property owner who seeks to recover his property after it has been seized by the government must pay for the privilege by posting a bond with the court. No other federal statute requires a cost bond, and no State requires a cost bond in civil forfeiture cases.

The government has defended the cost bond, not as a device for ensuring that its court costs are covered, but as a way of deterring frivolous claims. Of course, we are all in favor of deterring frivolous claims, but there are ways to deter frivolous claims without offending the fundamental principle of equal and open access to the courts, a bedrock of our American system of justice.

The substitute amendment provides that a person who challenges a forfeiture must file his claim on oath, under penalty of perjury. It also provides for imposition of a civil fine, in cases where the claimant's assertion of an interest in the property was frivolous. In addition, claimants will continue to bear the substantial costs of litigating their claims in court, and they and their attorneys will remain subject to the general sanctions for bad faith in instituting or conducting litigation. Frivolous prisoner claimants will be barred from repeated filings on proper court findings. The added burden of the "cost bond" serves no legitimate purpose.

Legal assistance and attorney fees. The substitute amendment permits courts to authorize counsel to represent an indigent claimant only if the claimant is already represented by a court-appointed attorney in connection with a related federal criminal case. This is both fair and efficient, and eliminates any appearance that the government chose to pursue the forfeiture in a civil proceeding rather than as part of the criminal case in order to deprive the claimant of his right to counsel.

Beyond this, the substitute amendment ensures that when the government seeks to forfeit an indigent person's primary residence, that person will be afforded representation by the Legal Services Corporation. When a forfeiture action can result in a claimant's eviction and homelessness, there is more at stake than just a property interest, and it is fair and just that the claimant be provided with an attorney if he cannot otherwise afford one. The Legal Services Corporation will be paid by the government for providing representation in these cases.

For claimants who are not provided with counsel, the substitute allows for the recovery of reasonable attorney fees and costs if they substantially prevail on their claim. The bill also makes the government liable for post-judgment interest on any money judgment, and imputed interest in certain cases involving currency or negotiable instruments.

Filing deadlines. Under current law, a property owner has only 20 days from the date of first publication of the notice of seizure to file a claim challenging an administrative forfeiture, and only 10 days to file a claim challenging a judicial forfeiture. It is therefore unlikely that anyone who misses the first of three published notices will be able to file a timely claim. The substitute extends the property owner's time to file a claim following the commencement of an administrative or judicial forfeiture action to 30 days. The bill also codifies current Department of Justice policy with respect to the time period for sending notice of seizure, and establishes a 90-day period for filing a complaint.

Release of property for hardship. The substitute will allow a property owner to hold on to his property pending the final disposition of the case, if he can show that continued possession by the government will cause the owner substantial hardship, such as preventing him from working, and that this hardship outweighs the risk that the property will be destroyed or concealed if returned to the owner during the pendency of the case. Unlike H.R. 1658, the substitute adopts the primary safeguards that the Justice Department wanted added to the provision—that property owners must have sufficient ties to the community to provide assurance that the property will not disappear, and that certain property, such as currency and property particularly outfitted for use in illegal activities, shall not be returned. Government can not obtain a grand jury subpoena to obtain such documents.

Criminal proceeds. The substitute also brings clarity and fairness to the confused body of case law concerning the definition of criminal proceeds. Specifically, in cases involving lawful goods or lawful services that are sold or provided in an illegal manner, the term "proceeds" is defined to mean the amount of money acquired through the illegal transactions resulting in the forfeiture, less the direct costs incurred in providing the goods or services. An exception is made for cases

involving certain health care fraud schemes, since it would make no sense to allow those who provide unnecessary services to deduct the cost of those unnecessary services. Having resolved this important matter, the substitute amendment broadly extends the government's authority to forfeit criminal proceeds under the civil asset forfeiture laws.

Fugitive disentitlement. The Supreme Court in 1996 disallowed the judge-made doctrine that a fugitive avoiding the jurisdiction of the U.S. courts in a criminal case may not contest a civil forfeiture; however, the Court left open the possibility that Congress could establish such doctrine by statute. The Court was responding, in part, to the government's record of seeking forfeiture of property even though the property is not subject to forfeiture (e.g., because the statute of limitations has expired), when the government believes that the fugitive owner will not be permitted to contest the forfeiture. Opponents of the fugitive disentitlement doctrine say that the prosecutors have gone so far as to indict people whom they know will never return to this country, so that they can invoke the doctrine in civil forfeiture proceedings against such persons' U.S. assets. The substitute provides a statutory basis for a judge to disallow a civil asset forfeiture claim by a fugitive, while leaving judges discretion to allow such a claim in the interests of justice.

Senator HATCH and I share a longstanding and deeply-held appreciation for law enforcement and the officers who work on the front lines to protect our families and communities, and we have worked together on a number of crime-related issues in the past. Recently, for example, we have led the Senate in passing a number of legislative initiatives of importance to State and local law enforcement, including the Bulletproof Vests Partnership Act of 1998, Crime Identification Technology Act of 1998, Care for Police Survivors Act of 1998, the Railroad Police Officers Training Act of 1999, and the Methamphetamine Anti-Proliferation Act of 1999. I want to commend him for his commitment, not just to law enforcement, but to the rights of all Americans. It has been my pleasure to work with him on this issue, to bring balance back in the relationship between our police forces and the citizens of this country.

It has been a privilege to work with Representatives HYDE and CONYERS on this important legislation. And we greatly appreciate the contributions made by Senators SESSIONS and SCHUMER, both knowledgeable and experienced legislators in this area.

I would also like to thank the Senate and House staff who worked so hard to bring this matter to closure: On my staff, Julie Katzman and Beryl Howell; in addition, George Fishman, who has been dedicated to this project for so many years, Manus Cooney, Rhett DeHart, Ed Haden, Ben Lawsy, Tom Mooney, John Dudas, Julian Epstein, Perry Apelbaum, and Cori Flam-their efforts made this day possible. Thanks are also due to Bill Jensen and the other hardworking members of the Senate's Office of Legislative Counsel. **\*S1762**

Finally, I would like to express my gratitude to David Smith, a leading expert on civil asset forfeiture, who gave tirelessly of his time over the past few months. His expertise and good counsel were invaluable in producing the legislation that the Senate passes today.

It is time for Congress to catch up with the American people and the courts and do the right thing on this important issue of fairness. I am glad that the Senate is acting without delay to pass this long overdue reform legislation.

Mr. SESSIONS.

Mr. President, I ask unanimous consent that the committee substitute be agreed to, the bill be read a third time and passed, the motion to reconsider be laid upon the table, and that any statements relating to the bill be printed in the RECORD.

The PRESIDING OFFICER.

Without objection, it is so ordered.

The committee substitute was agreed to.

The bill (H.R. 1658), as amended, was read a third time and passed.

Mr. SESSIONS.

Mr. President, the bill we have just considered is a very important piece of legislation that has been the subject of considerable effort for over a year now in the Judiciary Committee in the House.

Great efforts have been expended by all parties interested in this legislation to achieve a piece of legislation that would provide enhanced protections to private property owners and at the same time would not undermine, in a real and significant and unnecessary way, the ability of law enforcement agencies to seize and forfeit to the interest of the Government assets from illegal drug dealers and other criminal assets that are forfeited.

In the early 1980s, this Congress passed one of its most historic pieces of legislation that attacked crime in America. It was the asset forfeiture law. At that time, I was a U.S. attorney in Mobile, AL. This Federal law became a daily part of the work of my office.

We instructed our assistant U.S. attorneys that whenever they were prosecuting a drug case, it was not just enough to sentence and punish the criminal, they ought to be sure the ill-gotten gains, the profits they made from selling illegal substances in this country, would be seized and forfeited to the United States.

On a regular basis that was done all over this country. It was a major, important, historic step against crime, particularly against drug crime in America. Hundreds of millions, perhaps billions of dollars, have been forfeited from illegal enterprises since that day. The forfeitures are conducted under this Federal law, although States have the ability to forfeit assets, too.

In Federal court, the Government had to prove its case, seize the asset; a cost bond would be posted by the defendant if he wished to contest the seizure, and a court would hear the case and make a ruling in that fashion.

A number of people believed strongly that requiring a person to post a cost bond was not a healthy thing under our legal system. They wanted to change that. Chairman HENRY HYDE in the House Judiciary Committee felt that way; so did Senator ORRIN HATCH, chairman of the Senate Judiciary Committee. We began to analyze and study what we could do to deal with this problem of asset forfeiture.

At the time, Senators SCHUMER, THURMOND, BIDEN, and myself introduced asset forfeiture reform legislation in the Senate. Senators HATCH and LEAHY introduced another piece of legislation that was closer to the Hyde bill.

For some months now, we have worked together to see what we could do to protect legitimate constitutional rights of American citizens, while at the same time protecting this tremendous asset to law enforcement of the seizing and forfeiting of assets.

It is wrong, in my opinion, for a person who has made his money and his livelihood for years selling dope in America to go to jail and leave a mansion out there that he can come back to and the Federal taxpayers having to pay for his time in jail, or to have bank accounts with hundreds of thousands of dollars in them and not have that seized by the Government but, in fact, serving his time in jail and getting out and living high off the ill-gotten gains he achieved as a drug trafficker.

I would say, 98 percent of forfeitures in America today in Federal court are as a result of drug cases.

In my relatively small office in Alabama, when I was a U.S. attorney, we seized probably \$8 million to \$10 million that we actually turned into the Federal Treasury, after expenses and other items were paid.

In one case, we seized a Corvette automobile that was rumored to be worth hundreds of thousands of dollars because it was a unique Corvette. In fact, the drug dealer's car eventually was sold for \$170,000, as I remember. We seized mansions in Florida on the Gulf Coast. We seized bank accounts in foreign countries-big freighters, small boats, expensive sail boats, automobiles of all kinds, and bank accounts into the millions of dollars.

These are effective tools against the drug trafficking industry. In fact, many countries now recognize that, and they are at this time attempting to pass similar laws in their countries. It certainly is important to America.

I believed very strongly that when we set about amending this law, we do not need to place any unnecessary burdens on law enforcement and the prosecutors who will have to handle these cases. In fact, a large percentage, perhaps 90 percent or more, of these cases are confessed by the defendant because he has to establish where he got this money. Not many people can explain why they have \$50,000 in cash in the trunk of their car along with maybe a few kilograms of cocaine. Normally, there is evidence in addition that they have been a drug dealer and that they haven't had employment; that their house note is being paid in cash. Oftentimes they paid for their Mercedes automobile in cash, those kinds of things. So the proof turns out to be pretty good, as a normal rule.

I believe the negotiation over this legislation was a fine example of the Senate at work; the Senate and House, as a matter of fact. We believe the agreement that has been reached today will both satisfy the House Judiciary Committee leadership and the Senate Judiciary Committee leadership. Now it has already passed the Senate. If the identical bill passes in the House, it will become law. We will have done what we set out to do, to pass legislation that will strengthen protections and civil liberties in America without undermining the rule of law in this country.

I was proud to be a part of that. We worked very hard on it. I express particular appreciation to my staff on the Judiciary Committee: Kristi Lee, who is now U.S. Magistrate in Mobile, AL, and Ed Haden, who is with me today, who both worked with extraordinary skill to make this legislation become a reality.

In recent weeks, I am particularly proud of the work Ed Haden has done to be firm and strong for good, solid legislation that could have the support of law enforcement in America.

I also express my appreciation for the leadership of Senator HATCH who chairs the Judiciary Committee. His skill and knowledge on these issues is unsurpassed, and his dedication to American law is unsurpassed.

I also was extraordinarily impressed with the commitment and knowledge and ability of Chairman HENRY HYDE of the House Judiciary Committee. His insight and commitment to making this law better was remarkable, and I think the result has been something of which we can all be proud.

**146 Cong. Rec. S1753-02, 2000 WL 309749 (Cong.Rec.)**

## Part 10

### House Passage of H.R.1658, Floor Statements

146 Cong.Rec. H2040-01, 2000 WL 368969 (Cong.Rec.)

Congressional Record -- House of Representatives  
Proceedings and Debates of the 106th Congress, Second Session  
Tuesday, April 11, 2000

#### **\*H2040 Civil Asset Forfeiture Reform Act of 2000**

Mr. HYDE.

Mr. Speaker, I move to suspend the rules and concur in the Senate amendment to the bill (H.R. 1658) to provide a more just and uniform procedure for Federal civil forfeitures, and for other purposes.

The Clerk read as follows:

Senate amendment:

Strike out all after the enacting clause and insert:

#### **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

**(a) SHORT TITLE.**-This Act may be cited as the "Civil Asset Forfeiture Reform Act of 2000".

**(b) TABLE OF CONTENTS.**-The table of contents for this Act is as follows:

Sec. 1. Short title; table of contents.  
Sec. 2. Creation of general rules relating to civil forfeiture proceedings.  
Sec. 3. Compensation for damage to seized property.  
Sec. 4. Attorney fees, costs, and interest.  
Sec. 5. Seizure warrant requirement.  
Sec. 6. Use of forfeited funds to pay restitution to crime victims.  
Sec. 7. Civil forfeiture of real property.  
Sec. 8. Stay of civil forfeiture case.  
Sec. 9. Civil restraining orders.  
Sec. 10. Cooperation among Federal prosecutors.  
Sec. 11. Statute of limitations for civil forfeiture actions.  
Sec. 12. Destruction or removal of property to prevent seizure.  
Sec. 13. Fungible property in bank accounts.  
Sec. 14. Fugitive disentitlement.  
Sec. 15. Enforcement of foreign forfeiture judgment.  
Sec. 16. Encouraging use of criminal forfeiture as an alternative to civil forfeiture.  
Sec. 17. Access to records in bank secrecy jurisdictions.  
Sec. 18. Application to alien smuggling offenses.  
Sec. 19. Enhanced visibility of the asset forfeiture program.  
Sec. 20. Proceeds.  
Sec. 21. Effective date.

#### **SEC. 2. CREATION OF GENERAL RULES RELATING TO CIVIL FORFEITURE PROCEEDINGS.**

(a) IN GENERAL.-Chapter 46 of title 18, United States Code, is amended by inserting after section 982 the following:  
"s983. General rules for civil forfeiture proceedings

"(a) NOTICE; CLAIM; COMPLAINT.-

"(1)(A)(i) Except as provided in clauses (ii) through (v), in any nonjudicial civil forfeiture proceeding under a civil forfeiture statute, with respect to which the Government is required to send written notice to interested parties, such notice

shall be sent in a manner to achieve proper notice as soon as practicable, and in no case more than 60 days after the date of the seizure.

"(ii) No notice is required if, before the 60-day period expires, the Government files a civil judicial forfeiture action against the property and provides notice of that action as required by law.

"(iii) If, before the 60-day period expires, the Government does not file a civil judicial forfeiture action, but does obtain a criminal indictment containing an allegation that the property \*H2041 is subject to forfeiture, the government shall either-

"(I) send notice within the 60 days and continue the nonjudicial civil forfeiture proceeding under this section; or

"(II) terminate the nonjudicial civil forfeiture proceeding, and take the steps necessary to preserve its right to maintain custody of the property as provided in the applicable criminal forfeiture statute.

"(iv) In a case in which the property is seized by a State or local law enforcement agency and turned over to a Federal law enforcement agency for the purpose of forfeiture under Federal law, notice shall be sent not more than 90 days after the date of seizure by the State or local law enforcement agency.

"(v) If the identity or interest of a party is not determined until after the seizure or turnover but is determined before a declaration of forfeiture is entered, notice shall be sent to such interested party not later than 60 days after the determination by the Government of the identity of the party or the party's interest.

"(B) A supervisory official in the headquarters office of the seizing agency may extend the period for sending notice under subparagraph (A) for a period not to exceed 30 days (which period may not be further extended except by a court), if the official determines that the conditions in subparagraph (D) are present.

"(C) Upon motion by the Government, a court may extend the period for sending notice under subparagraph (A) for a period not to exceed 60 days, which period may be further extended by the court for 60-day periods, as necessary, if the court determines, based on a written certification of a supervisory official in the headquarters office of the seizing agency, that the conditions in subparagraph (D) are present.

"(D) The period for sending notice under this paragraph may be extended only if there is reason to believe that notice may have an adverse result, including-

"(i) endangering the life or physical safety of an individual;

"(ii) flight from prosecution;

"(iii) destruction of or tampering with evidence;

"(iv) intimidation of potential witnesses; or

"(v) otherwise seriously jeopardizing an investigation or unduly delaying a trial.

"(E) Each of the Federal seizing agencies conducting nonjudicial forfeitures under this section shall report periodically to the Committees on the Judiciary of the House of Representatives and the Senate the number of occasions when an extension of time is granted under subparagraph (B).

"(F) If the Government does not send notice of a seizure of property in accordance with subparagraph (A) to the person from whom the property was seized, and no extension of time is granted, the Government shall return the property to that person without prejudice to the right of the Government to commence a forfeiture proceeding at a later time. The Government shall not be required to return contraband or other property that the person from whom the property was seized may not legally possess.

"(2)(A) Any person claiming property seized in a nonjudicial civil forfeiture proceeding under a civil forfeiture statute may file a claim with the appropriate official after the seizure.

"(B) A claim under subparagraph (A) may be filed not later than the deadline set forth in a personal notice letter (which deadline may be not earlier than 35 days after the date the letter is mailed), except that if that letter is not received, then a claim may be filed not later than 30 days after the date of final publication of notice of seizure.

"(C) A claim shall-

- "(i) identify the specific property being claimed;
- "(ii) state the claimant's interest in such property (and provide customary documentary evidence of such interest if available) and state that the claim is not frivolous; and
- "(iii) be made under oath, subject to penalty of perjury.

"(D) A claim need not be made in any particular form. Each Federal agency conducting nonjudicial forfeitures under this section shall make claim forms generally available on request, which forms shall be written in easily understandable language.

"(E) Any person may make a claim under subparagraph (A) without posting bond with respect to the property which is the subject of the claim.

"(3)(A) Not later than 90 days after a claim has been filed, the Government shall file a complaint for forfeiture in the manner set forth in the Supplemental Rules for Certain Admiralty and Maritime Claims or return the property pending the filing of a complaint, except that a court in the district in which the complaint will be filed may extend the period for filing a complaint for good cause shown or upon agreement of the parties.

"(B) If the Government does not-

- "(i) file a complaint for forfeiture or return the property, in accordance with subparagraph (A); or
- "(ii) before the time for filing a complaint has expired-

"(I) obtain a criminal indictment containing an allegation that the property is subject to forfeiture; and

"(II) take the steps necessary to preserve its right to maintain custody of the property as provided in the applicable criminal forfeiture statute, the Government shall promptly release the property pursuant to regulations promulgated by the Attorney General, and may not take any further action to effect the civil forfeiture of such property in connection with the underlying offense.

"(C) In lieu of, or in addition to, filing a civil forfeiture complaint, the Government may include a forfeiture allegation in a criminal indictment. If criminal forfeiture is the only forfeiture proceeding commenced by the Government, the Government's right to continued possession of the property shall be governed by the applicable criminal forfeiture statute.

"(D) No complaint may be dismissed on the ground that the Government did not have adequate evidence at the time the complaint was filed to establish the forfeitability of the property.

"(4)(A) In any case in which the Government files in the appropriate United States district court a complaint for forfeiture of property, any person claiming an interest in the seized property may file a claim asserting such person's interest in the property in the manner set forth in the Supplemental Rules for Certain Admiralty and Maritime Claims, except that such claim may be filed not later than 30 days after the date of service of the Government's complaint or, as applicable, not later than 30 days after the date of final publication of notice of the filing of the complaint.

"(B) A person asserting an interest in seized property, in accordance with subparagraph (A), shall file an answer to the Government's complaint for forfeiture not later than 20 days after the date of the filing of the claim.

"(b) REPRESENTATION.-

"(1)(A) If a person with standing to contest the forfeiture of property in a judicial civil forfeiture proceeding under a civil forfeiture statute is financially unable to obtain representation by counsel, and the person is represented by counsel appointed under section 3006A of this title in connection with a related criminal case, the court may authorize counsel to represent that person with respect to the claim.

"(B) In determining whether to authorize counsel to represent a person under subparagraph (A), the court shall take into account such factors as-

- "(i) the person's standing to contest the forfeiture; and
- "(ii) whether the claim appears to be made in good faith.

"(2)(A) If a person with standing to contest the forfeiture of property in a judicial civil forfeiture proceeding under a civil forfeiture statute is financially unable to obtain representation by counsel, and the property subject to forfeiture is real property that is being used by the person as a primary residence, the court, at the request of the person, shall insure that the person is represented by an attorney for the Legal Services Corporation with respect to the claim.

"(B)(i) At appropriate times during a representation under subparagraph (A), the Legal Services Corporation shall submit a statement of reasonable attorney fees and costs to the court.

"(ii) The court shall enter a judgment in favor of the Legal Services Corporation for reasonable attorney fees and costs submitted pursuant to clause (i) and treat such judgment as payable under section 2465 of title 28, United States Code, regardless of the outcome of the case.

"(3) The court shall set the compensation for representation under this subsection, which shall be equivalent to that provided for court-appointed representation under section 3006A of this title.

"(c) BURDEN OF PROOF.-In a suit or action brought under any civil forfeiture statute for the civil forfeiture of any property-

"(1) the burden of proof is on the Government to establish, by a preponderance of the evidence, that the property is subject to forfeiture;

"(2) the Government may use evidence gathered after the filing of a complaint for forfeiture to establish, by a preponderance of the evidence, that property is subject to forfeiture; and

"(3) if the Government's theory of forfeiture is that the property was used to commit or facilitate the commission of a criminal offense, or was involved in the commission of a criminal offense, the Government shall establish that there was a substantial connection between the property and the offense.

"(d) INNOCENT OWNER DEFENSE.-

"(1) An innocent owner's interest in property shall not be forfeited under any civil forfeiture statute. The claimant shall have the burden of proving that the claimant is an innocent owner by a preponderance of the evidence.

"(2)(A) With respect to a property interest in existence at the time the illegal conduct giving rise to forfeiture took place, the term 'innocent owner' means an owner who-

"(i) did not know of the conduct giving rise to forfeiture; or

"(ii) upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property.

"(B)(i) For the purposes of this paragraph, ways in which a person may show that such person did all that reasonably could be expected may include demonstrating that such person, to the extent permitted by law-

"(I) gave timely notice to an appropriate law enforcement agency of information that led the person to know the conduct giving rise to a forfeiture would occur or has occurred; and

"(II) in a timely fashion revoked or made a good faith attempt to revoke permission for those engaging in such conduct to use the property or took reasonable actions in consultation with a law enforcement agency to discourage or prevent the illegal use of the property.

"(ii) A person is not required by this subparagraph to take steps that the person reasonably believes would be likely to subject any person (other than the person whose conduct gave rise to the forfeiture) to physical danger.

"(3)(A) With respect to a property interest acquired after the conduct giving rise to the forfeiture has taken place, the term 'innocent owner' means a person who, at the time that person acquired the interest in the property-

"(i) was a bona fide purchaser or seller for value (including a purchaser or seller of goods or services for value); and

"(ii) did not know and was reasonably without cause to believe that the property was subject to forfeiture. **\*H2042**

"(B) An otherwise valid claim under subparagraph (A) shall not be denied on the ground that the claimant gave nothing of value in exchange for the property if-

"(i) the property is the primary residence of the claimant;

"(ii) depriving the claimant of the property would deprive the claimant of the means to maintain reasonable shelter in the community for the claimant and all dependents residing with the claimant;

"(iii) the property is not, and is not traceable to, the proceeds of any criminal offense; and

"(iv) the claimant acquired his or her interest in the property through marriage, divorce, or legal separation, or the claimant was the spouse or legal dependent of a person whose death resulted in the transfer of the property to the claimant through inheritance or probate; except that the court shall limit the value of any real property interest for which innocent ownership is recognized under this subparagraph to the value necessary to maintain reasonable shelter in the community for such claimant and all dependents residing with the claimant.

"(4) Notwithstanding any provision of this subsection, no person may assert an ownership interest under this subsection in contraband or other property that it is illegal to possess.

"(5) If the court determines, in accordance with this section, that an innocent owner has a partial interest in property otherwise subject to forfeiture, or a joint tenancy or tenancy by the entirety in such property, the court may enter an appropriate order-

"(A) severing the property;

"(B) 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

"(C) 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.

"(6) In this subsection, the term 'owner'

"(A) means a person with an ownership interest in the specific property sought to be forfeited, including a leasehold, lien, mortgage, recorded security interest, or valid assignment of an ownership interest; and

"(B) does not include-

"(i) a person with only a general unsecured interest in, or claim against, the property or estate of another;

"(ii) a bailee unless the bailor is identified and the bailee shows a colorable legitimate interest in the property seized; or

"(iii) a nominee who exercises no dominion or control over the property.

"(e) MOTION TO SET ASIDE FORFEITURE.-

"(1) Any person entitled to written notice in any nonjudicial civil forfeiture proceeding under a civil forfeiture statute who does not receive such notice may file a motion to set aside a declaration of forfeiture with respect to that person's interest in the property, which motion shall be granted if-

"(A) the Government knew, or reasonably should have known, of the moving party's interest and failed to take reasonable steps to provide such party with notice; and

"(B) the moving party did not know or have reason to know of the seizure within sufficient time to file a timely claim.

"(2)(A) Notwithstanding the expiration of any applicable statute of limitations, if the court grants a motion under paragraph (1), the court shall set aside the declaration of forfeiture as to the interest of the moving party without prejudice to the right of the Government to commence a subsequent forfeiture proceeding as to the interest of the moving party.

"(B) Any proceeding described in subparagraph (A) shall be commenced-

"(i) if nonjudicial, within 60 days of the entry of the order granting the motion; or

"(ii) if judicial, within 6 months of the entry of the order granting the motion.

"(3) A motion under paragraph (1) may be filed not later than 5 years after the date of final publication of notice of seizure of the property.

"(4) If, at the time a motion made under paragraph (1) is granted, the forfeited property has been disposed of by the Government in accordance with law, the Government may institute proceedings against a substitute sum of money equal to the value of the moving party's interest in the property at the time the property was disposed of.

"(5) A motion filed under this subsection shall be the exclusive remedy for seeking to set aside a declaration of forfeiture under a civil forfeiture statute.

"(f) RELEASE OF SEIZED PROPERTY.-

"(1) A claimant under subsection (a) is entitled to immediate release of seized property if-

"(A) the claimant has a possessory interest in the property;

"(B) the claimant has sufficient ties to the community to provide assurance that the property will be available at the time of the trial;

"(C) the continued possession by the Government pending the final disposition of forfeiture proceedings will cause substantial hardship to the claimant, such as preventing the functioning of a business, preventing an individual from working, or leaving an individual homeless;

"(D) the claimant's likely hardship from the continued possession by the Government of the seized property outweighs the risk that the property will be destroyed, damaged, lost, concealed, or transferred if it is returned to the claimant during the pendency of the proceeding; and

"(E) none of the conditions set forth in paragraph (8) applies.

"(2) A claimant seeking release of property under this subsection must request possession of the property from the appropriate official, and the request must set forth the basis on which the requirements of paragraph (1) are met.

"(3)(A) If not later than 15 days after the date of a request under paragraph (2) the property has not been released, the claimant may file a petition in the district court in which the complaint has been filed or, if no complaint has been filed, in the district court in which the seizure warrant was issued or in the district court for the district in which the property was seized.

"(B) The petition described in subparagraph (A) shall set forth-

"(i) the basis on which the requirements of paragraph (1) are met; and

"(ii) the steps the claimant has taken to secure release of the property from the appropriate official.

"(4) If the Government establishes that the claimant's claim is frivolous, the court shall deny the petition. In responding to a petition under this subsection on other grounds, the Government may in appropriate cases submit evidence *ex parte* in order to avoid disclosing any matter that may adversely affect an ongoing criminal investigation or pending criminal trial.

"(5) The court shall render a decision on a petition filed under paragraph (3) not later than 30 days after the date of the filing, unless such 30-day limitation is extended by consent of the parties or by the court for good cause shown.

"(6) If-

"(A) a petition is filed under paragraph (3); and

"(B) the claimant demonstrates that the requirements of paragraph (1) have been met; the district court shall order that the property be returned to the claimant, pending completion of proceedings by the Government to obtain forfeiture of the property.

"(7) If the court grants a petition under paragraph (3)-

"(A) the court may enter any order necessary to ensure that the value of the property is maintained while the forfeiture action is pending, including-

"(i) permitting the inspection, photographing, and inventory of the property;

"(ii) fixing a bond in accordance with rule E(5) of the Supplemental Rules for Certain Admiralty and Maritime Claims; and

"(iii) requiring the claimant to obtain or maintain insurance on the subject property; and

"(B) the Government may place a lien against the property or file a lis pendens to ensure that the property is not transferred to another person.

"(8) This subsection shall not apply if the seized property-

"(A) is contraband, currency, or other monetary instrument, or electronic funds unless such currency or other monetary instrument or electronic funds constitutes the assets of a legitimate business which has been seized;

"(B) is to be used as 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 claimant.

"(g) PROPORTIONALITY.-

"(1) The claimant under subsection (a)(4) may petition the court to determine whether the forfeiture was constitutionally excessive.

"(2) In making this determination, the court shall compare the forfeiture to the gravity of the offense giving rise to the forfeiture.

"(3) The claimant shall have the burden of establishing that the forfeiture is grossly disproportional by a preponderance of the evidence at a hearing conducted by the court without a jury.

"(4) If the court finds that the forfeiture is grossly disproportional to the offense it shall reduce or eliminate the forfeiture as necessary to avoid a violation of the Excessive Fines Clause of the Eighth Amendment of the Constitution.

"(h) CIVIL FINE.-

"(1) In any civil forfeiture proceeding under a civil forfeiture statute in which the Government prevails, if the court finds that the claimant's assertion of an interest in the property was frivolous, the court may impose a civil fine on the claimant of an amount equal to 10 percent of the value of the forfeited property, but in no event shall the fine be less than \$250 or greater than \$5,000.

"(2) Any civil fine imposed under this subsection shall not preclude the court from imposing sanctions under rule 11 of the Federal Rules of Civil Procedure.

"(3) In addition to the limitations of section 1915 of title 28, United States Code, in no event shall a prisoner file a claim under a civil forfeiture statute or appeal a judgment in a civil action or proceeding based on a civil forfeiture statute if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous or malicious, unless the prisoner shows extraordinary and exceptional circumstances.

"(i) CIVIL FORFEITURE STATUTE DEFINED.-In this section, the term 'civil forfeiture statute'-

"(1) means any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense; and

"(2) does not include-

"(A) the Tariff Act of 1930 or any other provision of law codified in title 19;

"(B) the Internal Revenue Code of 1986;

"(C) the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.);

"(D) the Trading with the Enemy Act (50 U.S.C. App. 1 et seq.); or

"(E) section 1 of title VI of the Act of June 15, 1917 (40 Stat. 233; 22 U.S.C. 401).".

(b) TECHNICAL AND CONFORMING AMENDMENT.-The analysis for chapter 46 of title 18, \*H2043 United States Code, is amended by inserting after the item relating to section 982 the following:

"983. General rules for civil forfeiture proceedings.".

(c) STRIKING SUPERSEDED PROVISIONS.-

(1) CIVIL FORFEITURE.-Section 981(a) of title 18, United States Code, is amended-

(A) in paragraph (1), by striking "Except as provided in paragraph (2), the" and inserting "The"; and

(B) by striking paragraph (2).

(2) DRUG FORFEITURES.-Paragraphs (4), (6) and (7) of section 511(a) of the Controlled Substances Act (21 U.S.C. 881(a) (4), (6) and (7)) are each amended by striking ", except that" and all that follows before the period at the end.

(3) AUTOMOBILES.-Section 518 of the Controlled Substances Act (21 U.S.C. 888) is repealed.

(4) FORFEITURES IN CONNECTION WITH SEXUAL EXPLOITATION OF CHILDREN.- Paragraphs (2) and (3) of section 2254(a) of title 18, United States Code, are each amended by striking ", except that" and all that follows before the period at the end.

(d) LEGAL SERVICES CORPORATION REPRESENTATION.-Section 1007(a) of the Legal Services Corporation Act (42 U.S.C. 2996f(a)) is amended-

(1) in paragraph (9), by striking "and" after the semicolon;

(2) In paragraph (10), by striking the period and inserting "; and"; and

(3) by adding at the end the following:

"(11) ensure that an indigent individual whose primary residence is subject to civil forfeiture is represented by an attorney for the Corporation in such civil action."

### **SEC. 3. COMPENSATION FOR DAMAGE TO SEIZED PROPERTY.**

(a) TORT CLAIMS ACT.-Section 2680(c) of title 28, United States Code, is amended-

(1) by striking "any goods or merchandise" and inserting "any goods, merchandise, or other property";

(2) by striking "law-enforcement" and inserting "law enforcement"; and

(3) by inserting before the period at the end the following: ", except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if-

"(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

"(2) the interest of the claimant was not forfeited;

"(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

"(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.".

(b) DEPARTMENT OF JUSTICE.-

(1) IN GENERAL.-With respect to a claim that cannot be settled under chapter 171 of title 28, United States Code, the Attorney General may settle, for not more than \$50,000 in any case, a claim for damage to, or loss of, privately owned

property caused by an investigative or law enforcement officer (as defined in section 2680(h) of title 28, United States Code) who is employed by the Department of Justice acting within the scope of his or her employment.

(2) LIMITATIONS.-The Attorney General may not pay a claim under paragraph (1) that-

(A) is presented to the Attorney General more than 1 year after it accrues; or

(B) is presented by an officer or employee of the Federal Government and arose within the scope of employment.

#### **SEC. 4. ATTORNEY FEES, COSTS, AND INTEREST.**

(a) IN GENERAL.-Section 2465 of title 28, United States Code, is amended to read as follows:

"s2465. Return of property to claimant; liability for wrongful seizure; attorney fees, costs, and interest

"(a) Upon the entry of a judgment for the claimant in any proceeding to condemn or forfeit property seized or arrested under any provision of Federal law-

"(1) such property shall be returned forthwith to the claimant or his agent; and

"(2) if it appears that there was reasonable cause for the seizure or arrest, the court shall cause a proper certificate thereof to be entered and, in such case, neither the person who made the seizure or arrest nor the prosecutor shall be liable to suit or judgment on account of such suit or prosecution, nor shall the claimant be entitled to costs, except as provided in subsection (b).

"(b)(1) Except as provided in paragraph (2), in any civil proceeding to forfeit property under any provision of Federal law in which the claimant substantially prevails, the United States shall be liable for-

"(A) reasonable attorney fees and other litigation costs reasonably incurred by the claimant;

"(B) post-judgment interest, as set forth in section 1961 of this title; and

"(C) in cases involving currency, other negotiable instruments, or the proceeds of an interlocutory sale-

"(i) 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; and

"(ii) an imputed amount of interest that such currency, instruments, or proceeds would have earned at the rate applicable to the 30-day Treasury Bill, for any period during which no interest was paid (not including any period when the property reasonably was in use as evidence in an official proceeding or in conducting scientific tests for the purpose of collecting evidence), commencing 15 days after the property was seized by a Federal law enforcement agency, or was turned over to a Federal law enforcement agency by a State or local law enforcement agency.

"(2)(A) 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) The provisions of paragraph (1) shall not apply if the claimant is convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.

"(C) If there are multiple claims to the same property, the United States shall not be liable for costs and attorneys fees associated with any such claim if the United States-

"(i) promptly recognizes such claim;

"(ii) promptly returns the interest of the claimant in the property to the claimant, if the property can be divided without difficulty and there are no competing claims to that portion of the property;

"(iii) does not cause the claimant to incur additional, reasonable costs or fees; and

"(iv) prevails in obtaining forfeiture with respect to one or more of the other claims.

"(D) If the court enters judgment in part for the claimant and in part for the Government, the court shall reduce the award of costs and attorney fees accordingly.".

(b) TECHNICAL AND CONFORMING AMENDMENT.-The analysis for chapter 163 of title 28, United States Code, is amended by striking the item relating to section 2465 and inserting following:

"2465. Return of property to claimant; liability for wrongful seizure; attorney fees, costs, and interest.".

## **SEC. 5. SEIZURE WARRANT REQUIREMENT.**

(a) IN GENERAL.-Section 981(b) of title 18, United States Code, is amended to read as follows:

"(b)(1) Except as provided in section 985, any property subject to forfeiture to the United States under subsection (a) may be seized by the Attorney General and, 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-

"(A) a complaint for forfeiture has been filed in the United States district court and the court issued an arrest warrant in rem pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims;

"(B) there is probable cause to believe that the property is subject to forfeiture and-

"(i) the seizure is made pursuant to a lawful arrest or search; or

"(ii) another exception to the Fourth Amendment warrant requirement would apply; or

"(C) the property was lawfully seized by a State or local law enforcement agency and transferred to a Federal agency.

"(3) Notwithstanding the provisions of rule 41(a) of the 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, and may be executed in any district in which the property is found, or transmitted to the central authority of any foreign state for service in accordance with any treaty or other international agreement. Any motion for the return of property seized under this section shall be filed in the district court in which the seizure warrant was issued or in the district court for the district in which the property was seized.

"(4)(A) 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 in the district in which the property is located 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 at a hearing conducted in the manner provided in rule 43(e) of the Federal Rules of Civil Procedure.

"(B) 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."

(b) DRUG FORFEITURES.-Section 511(b) of the Controlled Substances Act (21 U.S.C. 881(b)) is amended to read as follows:

"(b) SEIZURE PROCEDURES.-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.".

## **SEC. 6. USE OF FORFEITED FUNDS TO PAY RESTITUTION TO CRIME VICTIMS.**

Section 981(e) of title 18, United States Code, is amended by striking paragraph (6) and inserting the following:

"(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 \*H2044 constituting the underlying specified unlawful activity; or".

## **SEC. 7. CIVIL FORFEITURE OF REAL PROPERTY.**

(a) IN GENERAL.-Chapter 46 of title 18, United States Code, is amended by inserting after section 984 the following:

"s985. Civil forfeiture of real property

"(a) Notwithstanding any other provision of law, all civil forfeitures of real property and interests in real property shall proceed as judicial forfeitures.

"(b)(1) Except as provided in this section-

"(A) real property that is the subject of a civil forfeiture action shall not be seized before entry of an order of forfeiture; and

"(B) the owners or occupants of the real property shall not be evicted from, or otherwise deprived of the use and enjoyment of, real property that is the subject of a pending forfeiture action.

"(2) The filing of a lis pendens and the execution of a writ of entry for the purpose of conducting an inspection and inventory of the property shall not be considered a seizure under this subsection.

"(c)(1) The Government shall initiate a civil forfeiture action against real property by-

"(A) filing a complaint for forfeiture;

"(B) posting a notice of the complaint on the property; and

"(C) serving notice on the property owner, along with a copy of the complaint.

"(2) If the property owner cannot be served with the notice under paragraph (1) because the owner-

"(A) is a fugitive;

"(B) resides outside the United States and efforts at service pursuant to rule 4 of the Federal Rules of Civil Procedure are unavailing; or

"(C) cannot be located despite the exercise of due diligence, constructive service may be made in accordance with the laws of the State in which the property is located.

"(3) If real property has been posted in accordance with this subsection, it shall not be necessary for the court to issue an arrest warrant in rem, or to take any other action to establish in rem jurisdiction over the property.

"(d)(1) Real property may be seized prior to the entry of an order of forfeiture if-

"(A) the Government notifies the court that it intends to seize the property before trial; and

"(B) the court-

"(i) issues a notice of application for warrant, causes the notice to be served on the property owner and posted on the property, and conducts a hearing in which the property owner has a meaningful opportunity to be heard; or

"(ii) makes an ex parte determination that there is probable cause for the forfeiture and that there are exigent circumstances that permit the Government to seize the property without prior notice and an opportunity for the property owner to be heard.

"(2) For purposes of paragraph (1)(B)(ii), to establish exigent circumstances, the Government shall show that less restrictive measures such as a lis pendens, restraining order, or bond would not suffice to protect the Government's interests in preventing the sale, destruction, or continued unlawful use of the real property.

"(e) If the court authorizes a seizure of real property under subsection (d)(1)(B)(ii), it shall conduct a prompt post-seizure hearing during which the property owner shall have an opportunity to contest the basis for the seizure.

"(f) This section-

"(1) applies only to civil forfeitures of real property and interests in real property;

"(2) does not apply to forfeitures of the proceeds of the sale of such property or interests, or of money or other assets intended to be used to acquire such property or interests; and

"(3) shall not affect the authority of the court to enter a restraining order relating to real property.".

(b) TECHNICAL AND CONFORMING AMENDMENT.-The analysis for chapter 46 of title 18, United States Code, is amended by inserting after the item relating to section 984 the following:

"985. Civil forfeiture of real property.".

## **SEC. 8. STAY OF CIVIL FORFEITURE CASE.**

(a) 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 the court determines that civil discovery will adversely affect the ability of the Government 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 the court determines that-

"(A) the claimant is the subject of a related criminal investigation or case;

"(B) the claimant has standing to assert a claim in the civil forfeiture proceeding; and

"(C) continuation of the forfeiture proceeding will burden the right of the claimant 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 1 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 1 party to pursue discovery while the other party is substantially unable to do so.

"(4) In this subsection, the terms 'related criminal case' and 'related criminal investigation' mean an actual prosecution or investigation in progress at the time at which the request for the stay, or any subsequent motion to lift 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 2 proceedings, without requiring an identity with respect to any 1 or more factors.

"(5) In requesting a stay under paragraph (1), the Government may, in appropriate cases, submit evidence *ex parte* in order to avoid disclosing any matter that may adversely affect an ongoing criminal investigation or pending criminal trial.

"(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 this subsection and shall not preclude the Government from objecting to the standing of the claimant by dispositive motion or at the time of trial.".

(b) DRUG FORFEITURES.-Section 511(i) of the Controlled Substances Act (21 U.S.C. 881(i)) is amended to read as follows:

"(i) The provisions of section 981(g) of title 18, United States Code, regarding the stay of a civil forfeiture proceeding shall apply to forfeitures under this section.".

## **SEC. 9. CIVIL RESTRAINING ORDERS.**

Section 983 of title 18, United States Code, as added by this Act, is amended by adding at the end the following:

"(j) RESTRAINING ORDERS; PROTECTIVE ORDERS.-

"(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of satisfactory performance bonds, create receiverships, appoint conservators, custodians, appraisers, accountants, or trustees, or take any other action to seize, secure, maintain, or preserve the availability of property subject to civil forfeiture-

"(A) upon the filing of a civil forfeiture complaint alleging that the property with respect to which the order is sought is subject to civil forfeiture; or

"(B) prior to the filing of such a complaint, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that-

"(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

"(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered.

"(2) An order entered pursuant to paragraph (1)(B) shall be effective for not more than 90 days, unless extended by the court for good cause shown, or unless a complaint described in paragraph (1)(A) has been filed.

"(3) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when a complaint has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought is subject to civil forfeiture and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than 10 days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.

"(4) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.".

## **SEC. 10. COOPERATION AMONG FEDERAL PROSECUTORS.**

Section 3322(a) of title 18, United States Code, is amended-

(1) by striking "civil forfeiture under section 981 of title 18, United States Code, of property described in section 981(a)(1)(C) of such title" and inserting "any civil forfeiture provision of Federal law"; and

(2) by striking "concerning a banking law violation".

## **SEC. 11. STATUTE OF LIMITATIONS FOR CIVIL FORFEITURE ACTIONS.**

Section 621 of the Tariff Act of 1930 (19 U.S.C. 1621) is amended by inserting ", or in the case of forfeiture, within 2 years after the time when the involvement of the property in the alleged offense was discovered, whichever was later" after "within five years after the time when the alleged offense was discovered".

## **SEC. 12. DESTRUCTION OR REMOVAL OF PROPERTY TO PREVENT SEIZURE.**

Section 2232 of title 18, United States Code, is amended-

(1) by striking subsections (a) and (b);

(2) by inserting "(e) FOREIGN INTELLIGENCE SURVEILLANCE.-" before "Whoever, having knowledge that a Federal officer";

(3) by redesignating subsection (c) as subsection (d); and

(4) by inserting before subsection (d), as redesignated, the following:

"(a) DESTRUCTION OR REMOVAL OF PROPERTY TO PREVENT SEIZURE.-Whoever, before, during, or after any search for or seizure of property by \*H2045 any person authorized to make such search or seizure, knowingly destroys, damages, wastes, disposes of, transfers, or otherwise takes any action, or knowingly attempts to destroy, damage, waste, dispose of, transfer, or otherwise take any action, for the purpose of preventing or impairing the Government's lawful authority to take such property into its custody or control or to continue holding such property under its lawful custody and control, shall be fined under this title or imprisoned not more than 5 years, or both.

"(b) IMPAIRMENT OF IN REM JURISDICTION.-Whoever, knowing that property is subject to the in rem jurisdiction of a United States court for purposes of civil forfeiture under Federal law, knowingly and without authority from that court, destroys, damages, wastes, disposes of, transfers, or otherwise takes any action, or knowingly attempts to destroy, damage, waste, dispose of, transfer, or otherwise take any action, for the purpose of impairing or defeating the court's continuing in rem jurisdiction over the property, shall be fined under this title or imprisoned not more than 5 years, or both.

"(c) NOTICE OF SEARCH OR EXECUTION OF SEIZURE WARRANT OR WARRANT OF ARREST IN REM.-Whoever, having knowledge that any person authorized to make searches and seizures, or to execute a seizure warrant or warrant of arrest in rem, in order to prevent the authorized seizing or securing of any person or property, gives notice or attempts to give notice in advance of the search, seizure, or execution of a seizure warrant or warrant of arrest in rem, to any person shall be fined under this title or imprisoned not more than 5 years, or both.".

## **SEC. 13. FUNGIBLE PROPERTY IN BANK ACCOUNTS.**

(a) IN GENERAL.-Section 984 of title 18, United States Code, is amended-

(1) by striking subsection (a) and redesignating subsections (b), (c), and (d) as subsections (a), (b), and (c), respectively;

(2) in subsection (a), as redesignated-

(A) by striking "or other fungible property" and inserting "or precious metals"; and

(B) in paragraph (2), by striking "subsection (c)" and inserting "subsection (b)";

(3) in subsection (c), as redesignated-

(A) by striking paragraph (1) and inserting the following: "(1) Subsection (a) does 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."; and

(B) in paragraph (2), by striking "(2) As used in this section, the term" and inserting the following:

"(2) In this subsection-

"(A) the term 'financial institution' includes a foreign bank (as defined in section 1(b)(7) of the International Banking Act of 1978 (12 U.S.C. 3101(b)(7))); and

"(B) the term"; and

(4) by adding at the end the following:

"(d) Nothing in this section may be construed to limit the ability of the Government to forfeit property under any provision of law if the property involved in the offense giving rise to the forfeiture or property traceable thereto is available for forfeiture.".

## **SEC. 14. FUGITIVE DISENTITLEMENT.**

(a) IN GENERAL.-Chapter 163 of title 28, United States Code, is amended by adding at the end the following: "s2466. Fugitive disentitlement

"A judicial officer may disallow a person from using 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 upon a finding that such person-

"(1) after notice or knowledge of the fact that a warrant or process has been issued for his apprehension, in order to avoid criminal prosecution-

"(A) purposely leaves the jurisdiction of the United States;

"(B) declines to enter or reenter the United States to submit to its jurisdiction; or

"(C) otherwise evades the jurisdiction of the court in which a criminal case is pending against the person; and

"(2) is not confined or held in custody in any other jurisdiction for commission of criminal conduct in that jurisdiction.".

(b) CONFORMING AMENDMENT.-The analysis for chapter 163 of title 28, United States Code, is amended by adding at the end the following:

"2466. Fugitive disentitlement".

(c) EFFECTIVE DATE.-The amendments made by this section shall apply to any case pending on or after the date of enactment of this Act.

## **SEC. 15. ENFORCEMENT OF FOREIGN FORFEITURE JUDGMENT.**

(a) IN GENERAL.-Chapter 163 of title 28, United States Code, is amended by adding at the end the following:

"s2467. Enforcement of foreign judgment

"(a) DEFINITIONS.-In this section-

"(1) the term 'foreign nation' means a country that has become a party to the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (referred to in this section as 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; and

"(2) the term 'forfeiture or confiscation judgment' means a final order of a foreign nation compelling a person or entity-

"(A) to pay a sum of money representing the proceeds of an offense described in Article 3, Paragraph 1, of the United Nations Convention, or any foreign offense described in section 1956(c)(7)(B) of title 18, or property the value of which corresponds to such proceeds; or

"(B) to forfeit property involved in or traceable to the commission of such offense.

"(b) REVIEW BY ATTORNEY GENERAL.-

"(1) IN GENERAL.-A foreign nation seeking to have a forfeiture or confiscation judgment registered and enforced by a district court of the United States under this section shall first submit a request to the Attorney General or the designee of the Attorney General, which request shall include-

"(A) a summary of the facts of the case and a description of the proceedings that resulted in the forfeiture or confiscation judgment;

"(B) certified copy of the forfeiture or confiscation judgment;

"(C) an affidavit or sworn declaration establishing that the defendant received notice of the proceedings in sufficient time to enable the defendant to defend against the charges and that the judgment rendered is in force and is not subject to appeal; and

"(D) such additional information and evidence as may be required by the Attorney General or the designee of the Attorney General.

"(2) CERTIFICATION OF REQUEST.-The Attorney General or the designee of the Attorney General shall determine whether, in the interest of justice, to certify the request, and such decision shall be final and not subject to either judicial review or review under subchapter II of chapter 5, or chapter 7, of title 5 (commonly known as the 'Administrative Procedure Act')."

"(c) JURISDICTION AND VENUE.-

"(1) IN GENERAL.-If the Attorney General or the designee of the Attorney General certifies a request under subsection (b), the United States may file an application on behalf of a foreign nation in district court of the United States seeking to enforce the foreign forfeiture or confiscation judgment as if the judgment had been entered by a court in the United States.

"(2) PROCEEDINGS.-In a proceeding filed under paragraph (1)-

"(A) the United States shall be the applicant and the defendant or another person or entity affected by the forfeiture or confiscation judgment shall be the respondent;

"(B) 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; and

"(C) 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) ENTR Y AND ENFORCEMENT OF JUDGMENT.-

"(1) IN GENERAL.-The district court shall enter such orders as may be necessary to enforce the judgment on behalf of the foreign nation unless the court finds that-

"(A) the judgment was rendered under a system that provides tribunals or procedures incompatible with the requirements of due process of law;

"(B) the foreign court lacked personal jurisdiction over the defendant;

"(C) the foreign court lacked jurisdiction over the subject matter;

"(D) the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him or her to defend; or

"(E) the judgment was obtained by fraud.

"(2) PROCESS.-Process to enforce a judgment under this section shall be in accordance with rule 69(a) of the Federal Rules of Civil Procedure.

"(e) FINALITY OF FOREIGN FINDINGS.-In entering orders to enforce the judgment, the court shall be bound by the findings of fact to the extent that they are stated in the foreign forfeiture or confiscation judgment.

"(f) CURRENCY CONVERSION.-The rate of exchange in effect at the time the suit to enforce is filed by the foreign nation shall be used in calculating the amount stated in any forfeiture or confiscation judgment requiring the payment of a sum of money submitted for registration.".

(b) CONFORMING AMENDMENT.-The analysis for chapter 163 of title 28, United States Code, is amended by adding at the end the following:

"2467. Enforcement of foreign judgment.".

**SEC. 16. ENCOURAGING USE OF CRIMINAL FORFEITURE AS AN ALTERNATIVE TO CIVIL FORFEITURE.**

Section 2461 of title 28, United States Code, is amended by adding at the end the following:

"(c) If 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 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 413 of the Controlled Substances Act (21 U.S.C. 853), other than subsection (d) of that section.".

**SEC. 17. ACCESS TO RECORDS IN BANK SECRECY JURISDICTIONS.**

Section 986 of title 18, United States Code, is amended by adding at the end the following:

"(d) ACCESS TO RECORDS IN BANK SECRECY JURISDICTIONS.-

"(1) IN GENERAL.-In any civil forfeiture case, or in any ancillary proceeding in any criminal forfeiture case governed by section 413(n) of the Controlled Substances Act (21 U.S.C. 853(n)), in which-

"(A) financial records located in a foreign country may be material-

"(i) to any claim or to the ability of the Government to respond to such claim; or  
"(ii) in a civil forfeiture case, to the ability of the Government to establish the forfeitability of the property; and  
**\*H2046**

"(B) it is within the capacity of the claimant to waive the claimant's rights under applicable financial secrecy laws, or to obtain the records so that such records can be made available notwithstanding such secrecy laws; the refusal of the claimant to provide the records in response to a discovery request or to take the action necessary otherwise to make the records available shall be grounds for judicial sanctions, up to and including dismissal of the claim with prejudice.

"(2) PRIVILEGE.-This subsection shall not affect the right of the claimant to refuse production on the basis of any privilege guaranteed by the Constitution of the United States or any other provision of Federal law.".

## **SEC. 18. APPLICATION TO ALIEN SMUGGLING OFFENSES.**

(a) AMENDMENT OF THE IMMIGRATION AND NATIONALITY ACT.-Section 274(b) of the Immigration and Nationality Act (8 U.S.C. 1324(b)) is amended to read as follows:

"(b) SEIZURE AND FORFEITURE.-

"(1) IN GENERAL.-Any conveyance, including any vessel, vehicle, or aircraft, that has been or is being used in the commission of a violation of subsection (a), the gross proceeds of such violation, and any property traceable to such conveyance or proceeds, shall be seized and subject to forfeiture.

"(2) APPLICABLE PROCEDURES.-Seizures and forfeitures under this subsection shall be governed by the provisions of chapter 46 of title 18, United States Code, relating to civil forfeitures, including section 981(d) of such title, except that such duties as are imposed upon the Secretary of the Treasury under the customs laws described in that section shall be performed by such officers, agents, and other persons as may be designated for that purpose by the Attorney General.

"(3) PRIMA FACIE EVIDENCE IN DETERMINATIONS OF VIOLATIONS.-In determining whether a violation of subsection (a) has occurred, any of the following shall be prima facie evidence that an alien involved in the alleged violation had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law:

"(A) Records of any judicial or administrative proceeding in which that alien's status was an issue and in which it was determined that the alien had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law.

"(B) Official records of the Service or of the Department of State showing that the alien had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law.

"(C) Testimony, by an immigration officer having personal knowledge of the facts concerning that alien's status, that the alien had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law.".

(b) TECHNICAL CORRECTIONS TO EXISTING CRIMINAL FORFEITURE AUTHORITY.-Section 982(a)(6) of title 18, United States Code, is amended-

(1) in subparagraph (A)-

(A) by inserting "section 274(a), 274A(a)(1), or 274A(a)(2) of the Immigration and Nationality Act or" before "section 1425" the first place it appears;

(B) in clause (i), by striking "a violation of, or a conspiracy to violate, subsection (a)" and inserting "the offense of which the person is convicted"; and

(C) in subclauses (I) and (II) of clause (ii), by striking "a violation of, or a conspiracy to violate, subsection (a)" and all that follows through "of this title" each place it appears and inserting "the offense of which the person is convicted";

(2) by striking subparagraph (B); and

(3) in the second sentence-

- (A) by striking "The court, in imposing sentence on such person" and inserting the following:
  - "(B) The court, in imposing sentence on a person described in subparagraph (A)"; and
  - (B) by striking "this subparagraph" and inserting "that subparagraph".

## **SEC. 19. ENHANCED VISIBILITY OF THE ASSET FORFEITURE PROGRAM.**

Section 524(c)(6) of title 28, United States Code, is amended to read as follows:

"(6)(A) The Attorney General shall transmit to Congress and make available to the public, not later than 4 months after the end of each fiscal year, detailed reports for the prior fiscal year as follows:

- "(i) A report on total deposits to the Fund by State of deposit.
- "(ii) A report on total expenses paid from the Fund, by category of expense and recipient agency, including equitable sharing payments.
- "(iii) A report describing the number, value, and types of properties placed into official use by Federal agencies, by recipient agency.
- "(iv) A report describing the number, value, and types of properties transferred to State and local law enforcement agencies, by recipient agency.
- "(v) A report, by type of disposition, describing the number, value, and types of forfeited property disposed of during the year.
- "(vi) A report on the year-end inventory of property under seizure, but not yet forfeited, that reflects the type of property, its estimated value, and the estimated value of liens and mortgages outstanding on the property.
- "(vii) A report listing each property in the year-end inventory, not yet forfeited, with an outstanding equity of not less than \$1,000,000.

"(B) The Attorney General shall transmit to Congress and make available to the public, not later than 2 months after final issuance, the audited financial statements for each fiscal year for the Fund.

"(C) Reports under subparagraph (A) shall include information with respect to all forfeitures under any law enforced or administered by the Department of Justice.

"(D) The transmittal and publication requirements in subparagraphs (A) and (B) may be satisfied by-

"(i) posting the reports on an Internet website maintained by the Department of Justice for a period of not less than 2 years; and

"(ii) notifying the Committees on the Judiciary of the House of Representatives and the Senate when the reports are available electronically.".

## **SEC. 20. PROCEEDS.**

(a) **FORFEITURE OF PROCEEDS.**-Section 981(a)(1)(C) of title 18, United States Code, is amended by striking "or a violation of section 1341" and all that follows and inserting "or any offense constituting 'specified unlawful activity' (as defined in section 1956(c)(7) of this title), or a conspiracy to commit such offense.".

(b) **DEFINITION OF PROCEEDS.**-Section 981(a) of title 18, United States Code, is amended by adding at the end the following:

"(2) For purposes of paragraph (1), the term 'proceeds' is defined as follows:

"(A) In cases involving illegal goods, illegal services, unlawful activities, and telemarketing and health care fraud schemes, the term 'proceeds' means property of any kind obtained directly or indirectly, as the result of the commission of the offense giving rise to forfeiture, and any property traceable thereto, and is not limited to the net gain or profit realized from the offense.

"(B) In cases involving lawful goods or lawful services that are sold or provided in an illegal manner, the term 'proceeds' means the amount of money acquired through the illegal transactions resulting in the forfeiture, less the direct costs incurred in providing the goods or services. The claimant shall have the burden of proof with respect to the issue of direct costs. The direct costs shall not include any part of the overhead expenses of the entity providing the goods or services, or any part of the income taxes paid by the entity.

"(C) In cases involving fraud in the process of obtaining a loan or extension of credit, the court shall allow the claimant a deduction from the forfeiture to the extent that the loan was repaid, or the debt was satisfied, without any financial loss to the victim.".

## **SEC. 21. EFFECTIVE DATE.**

Except as provided in section 14(c), this Act and the amendments made by this Act shall apply to any forfeiture proceeding commenced on or after the date that is 120 days after the date of enactment of this Act.

The SPEAKER pro tempore.

Pursuant to the rule, the gentleman from Illinois (Mr. HYDE) and the gentlewoman from Texas (Ms. JACKSON-LEE) each will control 20 minutes.

The Chair recognizes the gentleman from Illinois (Mr. HYDE).

## **GENERAL LEAVE**

Mr. HYDE.

Mr. Speaker, I ask unanimous consent that all Members may have 5 legislative days within which to revise and extend their remarks on H.R. 1658.

The SPEAKER pro tempore.

Is there objection to the request of the gentleman from Illinois?

There was no objection.

Mr. HYDE.

Mr. Speaker, I yield myself such time as I may consume.

(Mr. HYDE asked and was given permission to revise and extend his remarks.)

Mr. HYDE.

Mr. Speaker, this bill represents the culmination of a 7-year effort to reform our Nation's civil asset forfeiture laws. We would not be here today without the momentum generated by the House's passage of H.R. 1658 last June by the overwhelming vote of 375-48. That vote was made possible by the tireless support of my colleagues, the gentleman from Michigan (Mr. CONYERS), the ranking member of the Committee on the Judiciary; the gentleman from Georgia (Mr. BARR); and the gentleman from Massachusetts (Mr. FRANK) and their staffs.

House passage was also made possible by the support of a multitude of organizations who put aside their differences to work toward a common goal: the National Association of Criminal Defense Lawyers, Americans for Tax Reform, the American Civil Liberties Union, the National Rifle Association, the American Bar Association, the National Association of Realtors, the Credit Union National Association, the American Bankers Association, the Aircraft Owners and Pilots Association, the National Association of Home Builders, the Boat Owners Association of the United States, United States Chamber of Commerce, the National Apartment Association, the American Hotel and Motel Association, and the Law Enforcement Alliance of America.

H.R. 1658 only got us through the House. Forfeiture reform would not **\*H2047** have become a reality had the cause not been adopted by ORRIN HATCH, the chairman of the Senate Committee on the Judiciary; and PAT LEAHY, the committee's ranking member. I owe a debt of gratitude to the Senators and their staffs for succeeding in crafting a bill that could get through the Senate and yet retain all the necessary elements of reform.

I must thank Senators SESSIONS and SCHUMER and their staffs for negotiating in the utmost good faith in helping craft a bill that both reforms our forfeiture laws and yet leaves civil forfeitures as an important crime-fighting tool for Federal, State, and local law enforcement.

Similar thanks must go to Attorney General Reno and Assistant Attorney General Robert Raben. They can all be proud of what they helped to accomplish.

I also must thank our former colleague Bob Bauman and Brenda Grantland of Forfeiture Endangers American Rights for their long and dedicated work on behalf of forfeiture reform, and Chicago Tribune columnist Stephen Chapman for first alerting me to the great abuses of forfeiture laws.

And I must thank David Smith, who has been there since the beginning. David helped me draft my first forfeiture reform bill, the Civil Asset Forfeiture Reform Act of 1993, and helped draft Senators LEAHY's and HATCH's reform bill and helped draft the Senate-passed bill we are considering today. This bill is truly his accomplishment.

And finally, George Fishman of our Committee on the Judiciary staff has been tireless in helping shepherd this legislation through the House and Senate.

Let me briefly outline the main points of H.R. 1658 as passed by the Senate. The bill makes eight fundamental reforms:

(1) The bill requires the Government to prove by a preponderance of the evidence that the property is subject to forfeiture. Currently, when a property owner goes to Federal court to challenge a seizure of property, all the Government needs to do is make an initial showing of probable cause that the property is subject to civil forfeiture. The owner then must establish that the property is innocent.

(2) The bill provides that if the Government's theory of forfeiture is that the property was used to commit or facilitate the commission of a crime or was involved in the commission of a crime, the Government must show that there was a substantial connection between the property and the crime.

(3) The bill provides that property can be released by a Federal court pending final disposition of a civil forfeiture case if continued possession by the Government would cause the property owner substantial hardship, such as preventing the functioning of a business or leaving an individual homeless, and the likely hardship outweighs the risks that the property will be destroyed, damaged, lost, concealed or transferred if returned to the owner.

(4) The bill provides that property owners who substantially prevail in court proceedings challenging the seizure of their property will receive reasonable attorney's fees. In addition, the bill allows a court to provide counsel for indigents if they are represented by appointed counsel in related criminal cases. Currently, property owners who successfully challenge the seizure of their property almost never are awarded attorney's fees. In addition, indigents have no right to appointed counsel in civil forfeiture cases.

(5) The bill eliminates the cost bond requirement, under which a property owner must now post a bond of the lesser of \$5,000 or 10 percent of the value of the property seized merely for the right to contest a civil forfeiture in Federal court. The bill provides that if a court finds that a claimant's assertion of an interest in property was frivolous, the court may impose a civil fine.

(6) The bill creates a uniform innocent owner defense for all Federal civil forfeiture statutes. Importantly, the defense protects property owners who have given timely notice to the police of the illegal use of their property and have in a timely fashion revoked or made a good faith attempt to revoke permission to use the property from those engaging in the illegal conduct.

(7) The bill allows property owners to sue the Federal Government for compensation for damage to their property when they prevail in civil forfeiture actions. Currently, the Federal Government is exempt from liability for damage caused during the handling or storage of property being detained by law enforcement officers.

(8) The bill provides a uniform definition of the forfeitable proceeds of criminal acts. In cases involving illegal goods or services, unlawful activities and telemarketing and health care fraud schemes, proceeds are properties obtained directly or indirectly as a result of the commission of the offenses giving rise to forfeiture, and any properties traceable thereto, and are not limited to the net gain or profit realized from the offenses. In cases involving lawful goods or services that are sold or provided in an illegal manner, proceeds are money acquired through the illegal transactions less the direct costs incurred in providing the goods or services.

H.R. 1658 also contains a number of provisions addressing the needs of the Justice Department and State and local law enforcement.

These include increasing the availability of criminal forfeiture and the civil forfeiture of the proceeds of crimes, relaxing the statute of limitations governing civil forfeiture actions, allowing Federal courts discretionary use of the fugitive disentitlement doctrine, allowing Federal courts to enhance forfeiture judgments of foreign nations, allowing Federal courts to impose sanctions up to and including dismissal of an owner's claim if property owners who have filed claims in civil forfeiture cases refuse to provide the government with access to potentially material financial records in foreign countries, and allowing Federal courts to issue civil restraining orders against property where there is a substantial probability the government will prevail in civil forfeiture actions.

This bill is one we can all be proud of. It returns civil asset forfeiture to the ranks of respected law enforcement tools that can be used without risk to the civil liberties and property rights of American citizens. We are all better off that this is so.

Mr. Speaker, I insert into the RECORD at this point a Congressional Budget Office letter on this matter. I urge my colleagues to support this bill today.

U.S. CONGRESS CONGRESSIONAL BUDGET OFFICE, Washington, DC, April 5, 2000.  
Hon. ORRIN G. HATCH, Chairman, Committee on the Judiciary,  
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1658, the Civil Asset Forfeiture Reform Act of 2000.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Lanette J. Keith (for federal costs), who can be reached at 226-2860, and Shelley Finlayson (for the state and local impact), who can be reached at 225-3220.

Sincerely,  
BARRY B. ANDERSON  
(For Dan L. Crippen, Director).  
Enclosure.

## **CONGRESSIONAL BUDGET OFFICE COST ESTIMATE**

### **H.R. 1658-Civil Asset Forfeiture Reform Act of 2000**

Summary: H.R. 1658 would make many changes to federal asset forfeiture laws that would affect the processing of about 60,000 civil seizures conducted each year by the Department of Justice (DOJ) and the Department of the Treasury. (The Treasury Department makes an additional 50,000 seizures annually that would not be affected by this act.) Assuming appropriation of the necessary amounts, CBO estimates that implementing H.R. 1658 would cost \$9 million over the 2001-2005 period to pay for additional costs of court-appointed counsel that would be authorized by this legislation. In addition, enacting the legislation would affect direct spending and receipts; therefore, pay-as-you-go procedures would apply.

Because CBO expects that enacting H.R. 1658 would result in fewer civil seizures by DOJ and the Treasury Department, we estimate that governmental receipts (i.e., revenues) deposited into the Assets Forfeiture Fund and the Treasury Forfeiture Fund would decrease by about \$115 million each year beginning in fiscal year 2001. Under current law, both forfeiture funds are authorized to collect revenue and spend the balance without further appropriation. Thus, the corresponding direct spending from the two funds would also decline, but with some lag. CBO estimates that enacting this provision would decrease projected surpluses by a total of \$46 million over the fiscal years 2001 and 2002 (the difference between lower revenues and lower direct spending over those years), \*H2048 but that by fiscal year 2003 the changes in receipts and spending would be equal, resulting in no net budgetary impact thereafter.

H.R. 1658 also would require the Legal Services Corporation (LSC) to represent certain claimants in civil forfeiture cases and would require the federal government to reimburse the LSC for its costs. CBO estimates that this provision would increase direct spending by \$5 million over the 2001-2005 period.

In addition, H.R. 1658 would make the federal government liable for any property damage, attorney fees, and pre-judgment and post-judgment interested payments on certain assets to prevailing parties in civil forfeiture proceedings. CBO cannot estimate either the likelihood or the magnitude of such awards because there is no basis for predicting either the outcome of possible litigation or the amount of compensation.

H.R. 1658 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA), but CBO expects that enacting this legislation would lead to a reduction in payments to state and local governments from the Assets Forfeiture Fund and the Treasury Forfeiture Fund.

Description of the Act's major provisions: H.R. 1658 would make various changes to federal laws relating to the forfeiture of civil assets. In particular, the act would:

Establish a short statutory time limit for the federal government to notify interested parties of a seizure and to file a complaint;

Eliminate the cost bond requirement, whereby claimants have to post bond in an amount of the lesser of \$5,000 or 10 percent of the value of the seized property (but not less than \$250) to preserve the right to contest a forfeiture;

Permit federal courts to appoint counsel for certain indigent claimants;

Increase the federal government's burden of proof to a preponderance of the evidence;

Require the federal government to compensate prevailing claimants for property damage;

Establish the federal government's liability for payment of attorney fees and pre-judgment and post-judgment interest; and

Authorize the use of forfeited funds to pay restitution to crime victims.

**Estimated cost to the Federal Government:** As shown in the following table, CBO estimates that implementing H.R. 1658 would increase discretionary spending for court-appointed counsel by \$9 million over the 2001-2005 period, assuming appropriation of the necessary funds. (For the purposes of this estimate, CBO assumes that spending for this purpose would be funded with appropriated amounts from the Defender Services account.) In addition, we estimate that over the 2001-2005 period, the reductions in direct spending of funds from forfeited assets would be smaller than the reductions in revenues estimated to occur as a result of enacting H.R. 1658, resulting in a net cost of \$46 over the five-year period. Finally, CBO estimates that additional payments to the Legal Services Corporation would be about \$1 million each year. The costs of this legislation fall within budget function 750 (administration of justice).

**Basis of estimate:** For purposes of this estimate, CBO assumes that H.R. 1658 will be enacted by the end of fiscal year 2000 and that the necessary amounts will be appropriated for each fiscal year. We also assume that outlays for defender services and the use of forfeiture receipts will continue to follow historical patterns.

**Spending subject to appropriation**

H.R. 1658 would allow for court-appointed counsel for certain parties contesting a forfeiture who already have been appointed counsel in a related criminal case. The act also would eliminate the requirement that claimants post bond before the case is tried in federal court. Consequently, CBO anticipates that enacting H.R. 1658 would make it easier for people whose assets have been seized to challenge the forfeiture of such assets. Based on information from DOJ, we estimate that the percentage of seizures that would result in contested civil cases would increase from 5 percent annually to at least 20 percent in fiscal year 2001. As the defense bar becomes increasingly aware of and more familiar with the provisions of H.R. 1658, CBO expects that the percentage of contested civil cases would increase to about 30 percent each year.

While the decision to appoint counsel would be at the discretion of the judge assigned to each case, CBO expects that judges would not want to encourage litigation in many cases. Moreover, CBO expects that many of the contested cases would involve larger assets, and such cases usually do not involve indigent claimants who would need court-appointed counsel. Based on information from DOJ, CBO estimates that a small number of indigent claimants in civil forfeiture cases would also have a criminal case pending. Specifically, we estimate that court-appointed counsel would be provided in about 5 percent of contested civil cases. In addition, because forfeiture cases involve property, the courts might have to appoint more than one attorney to represent multiple claimants in the same case. Historical data suggest an average of 1.5 claims per case.

While H.R. 1658 does not specify a level of compensation paid to court-appointed counsel for a civil forfeiture case, CBO expects such payment would be equivalent to amounts paid in criminal cases. Based on information from the Administrative Office of the United States Courts, CBO estimates that court-appointed counsel would be paid about \$3,000 per claimant per case. In total, we estimate that additional defender services related to civil asset forfeiture proceedings would cost about \$9 million over the next five years.

In addition, other discretionary spending could be affected by this act. On the one hand, the federal court system could require additional resources in the future if additional cases are brought to trial and the amount of time spent on each case

increases. On the other hand, some savings in law enforcement resources could be realized if fewer seizures and conducted each year. While CBO cannot predict the amount of any such costs or savings, we expect that, on balance, implementing the act would result in no significant additional discretionary spending other than the increases for court-appointed co-counsel.

#### Revenues and direct spending

Based on information from DOJ and the Treasury Department, CBO estimates that about 23,000 seizures that would otherwise occur each year under current law would be eliminated under H.R. 1658. (Such seizures primarily involve assets whose value is less than \$25,000.) The various changes to civil forfeiture laws under this act would make proving cases more difficult and more time-consuming for the federal government. In many instances, law enforcement agencies, including the state and local agencies that work on investigations jointly with the federal government and then receive a portion of the receipts generated from the forfeitures, may determine that certain cases, especially those with a value less than \$25,000, may no longer be cost-effective to pursue. While the federal government and other law enforcement agencies would take a few years following enactment of the legislation to realize the full effects of its provisions on the forfeiture and claims process, CBO expects that the total number of seizures would decrease by nearly 40 percent. CBO estimates that such a reduction in seizures would reduce total forfeiture receipts by about \$115 million in fiscal year 2001 and by \$575 million over the 2001-2005 period.

The receipts deposited into the Assets Forfeiture Fund and the Treasury Forfeiture Fund are used to pay for all costs associated with the operation of the forfeiture program, the payment of equitable shares of proceeds to foreign, state, and local law enforcement agencies, and other expenses not directly associated with a forfeiture case, such as payment of awards to informants. In recent \*H2049 years about 67 percent of total asset forfeiture receipts collected in a given year are spent in the same year in which they are collected; therefore, we estimate that enacting H.R. 1658 would result in a decrease in federal spending of \$76 million in fiscal year 2001, \$108 million in 2001, and \$115 million annually in subsequent years.

In addition, H.R. 1658 would require the Legal Service Corporation to represent claimants in financial need and whose claim involves an asset that is the claimant's primary residence. Under H.R. 1658, the court must enter a judgment in favor of the LSC for the cost of legal representation. Based on historical data, CBO estimates that such judgments would increase direct spending by about \$1 million a year.

#### Additional potential budgetary impacts

In addition, this act would make the federal government liable for any property damage, attorney fees, and pre-judgment and post-judgment interest payments on certain assets to prevailing parties in civil forfeiture proceedings. However, CBO cannot estimate either the likelihood or the magnitude of such awards because there is no basis for predicting either the outcome of possible litigation or the amount of compensation. Compensation payments could come from appropriated funds or occur without further appropriation from the Judgment Fund, or from both sources.

**Pay-as-you-go considerations:** The Balanced Budget and Emergency Deficit Control Act sets up pay-as-you-go procedures for legislation affecting direct spending or receipts. The following table summarizes the estimated pay-as-you-go effects of H.R. 1658. For the purposes of enforcing pay-as-you-go procedures, only the effects in the current year, the budget year, and the succeeding four years are counted.

**Estimated impact on state, local, and tribal governments:** H.R. 1658 contains no intergovernmental mandates as defined in UMRA. However, because CBO expects that the seizure of assets would decline under the act, CBO estimates that payments to state and local law enforcement agencies from the Assets Forfeiture Fund and the Treasury Forfeiture Fund would decline by about \$230 million over the 2001-2005 period. State and local law enforcement agencies receive, on average, about 40 percent of the receipts in these forfeiture funds either because they participate in joint investigations that result in the seizure of assets, or because they turn over assets seized in their own investigations to the federal government, which conducts the civil asset forfeiture case. In both cases the receipts from a seizure are accumulated in the funds and a portion is distributed to state and local agencies according to their involvement.

**Estimated impact on the private sector:** This act would impose no new private-sector mandates as defined in UMRA.

Previous CBO transmitted a cost estimate for H.R. 1658 as reported by the House Committee on the Judiciary on June 18, 1999. While the two versions of the legislation are similar, we estimate they would have different costs. CBO estimates the House version would result in a greater loss of forfeiture receipts, by \$25 million annually, than the version approved by the Senate Committee on the Judiciary because the House version would place the burden of proof in assets forfeiture cases more heavily on the federal government.

In addition, the House version of H.R. 1658 would not require payments to the Legal Services Corporation for representation of certain claimants whose principal residence has been seized. Finally, CBO estimates that the Senate

version of the legislation would authorize less spending than the House version for the legal representation of indigent claimants because it restricts the eligibility requirements for this service more than the House legislation. We estimate this representation would cost about \$2 million annually under the Senate version and about \$13 million annually under the House version.

Estimate prepared by: Federal Costs: Lanette J. Keith. Impact on State, Local, and Tribal Governments: Shelley Finlayson. Impact on the Private Sector: John Harris.

Estimate approved by: Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

Mr. Speaker, since no Committee Report was filed for H.R. 1658 by the Senate Judiciary Committee, the House Judiciary Committee Report remains the best legislative history as to the bill. See H.R. Rep. No. 106-192 (1999). However, since new provisions were added to the bill in the Senate and other provisions were modified from their original House form, it will be useful for me to make a number of clarifying points.

### **STANDARD OF PROOF (SECTION 2-CREATING 18 U.S.C. SEC. 983(C))**

H.R. 1658, as amended by the Senate, reduced the standard of proof the government has to meet in civil asset forfeiture cases from clear and convincing evidence to a preponderance of the evidence. While this is obviously a lower standard, Congress remains extremely dubious as to the probative value of certain types of evidence in meeting this standard.

First, as noted in the Committee Report to H.R. 1658, Congress is very skeptical that a person's carrying of "unreasonably large" quantities of cash is indicative of involvement in the drug trade. See H.R. Rep. No. 106-192 at 8. Many federal courts have ruled that a person's carrying of large amounts of cash does not even meet the current government burden of probable cause. The Seventh Circuit so ruled in U.S. v. \$506,231 in U.S. Currency, 125 F. 3d 442 (7th Cir. 1997). The court found that "<a>s far as we can tell, no court in the nation has yet held that, standing alone, the mere existence of currency, even a lot of it, is illegal. We are certainly not willing to be the first to so hold." Id. at 452. The court also found it necessary to remind a U.S. Attorney that "the government may not seize money, even half a million dollars, based on its bare assumption that most people do not have huge sums of money lying about, and if they do, they must be involved in narcotics trafficking or some other sinister activity." Id. at 454 (emphasis in original). The Ninth Circuit found similarly. See U.S. v. \$191,910 in U.S. Currency, 16 F.3d 1051, 1072 (9th Cir. 1994) ("<A>ny amount of money, standing alone, would probably be insufficient to establish probable cause for forfeiture."); See also U.S. v. One Lot of U.S. Currency (\$36,634), 103 F.3d 1048, 1055 n.9 (1st Cir. 1997); U.S. v. \$121,100, 999 F.2d 1503, 1507 (11th Cir. 1993). Congress disagrees with those courts that have suggested otherwise. See U.S. v. \$37,780 in U.S. Currency, 920 F.2d 159, 162 (2nd Cir. 1990). Clearly, if large amounts of cash do not meet the probable cause standard, they do not meet the higher standard of preponderance of the evidence.

The government can rely on large amounts of cash in conjunction with other evidence in attempting to meet its standard of proof. For instance, large amounts of cash found in proximity to drugs are often relied upon. However, the probative value of this evidence is much lower when the amount of drugs found is consistent with personal use. See U.S. v. Real Property Located at 110 Collier Dr., 793 F. Supp. 1048, 1052 (N.D. Ala. 1992) ("The simultaneous presence of \$8,861 in mildewed currency and a small amount of drugs for personal use . . . does not establish probable cause that the currency was intended to be used for the exchange of drugs.")

In any event, the relative evidentiary contribution of cash in meeting a standard of proof, especially one raised above mere probable cause, should rarely be significant. Why? As the court found in U.S. v. One Lot of U.S. Currency Totalling \$14,665, 33 F. Supp.2d 47 (D. Mass. 1998), reliance on cash can involve invidious assumptions: "<m>any immigrants and Americans with limited means-hard working and law abiding-prefer to use cash in lieu of bank accounts and credit cards. \* \* \* Indeed, the whole notion that carrying cash is indicative of illegal conduct reflects class and cultural biases that are profoundly troubling." Id. at 53-54.

Of especially little probative value is the method by which cash is carried. As the court found in One Lot of U.S. Currency Totalling \$14,665:

I do not doubt that drug couriers and dealers use rubber bands to bundle their illgotten gains. However, drug dealers also presumably use belts to hold up their trousers; under the government's analysis, if <the claimant> was wearing a belt at the time of the seizure, it would suggest his involvement with illegal activity. Although many courts appear to disagree, I find that the government's 'rubber band' hypothesis doesn't stretch quite that far.

Id. at 54 (footnotes omitted). See also \$506,231 in U.S. Currency, 125 F.3d at 452.

The second type of evidence whose probative value is questioned by Congress is the fact that airline tickets are purchased with cash. See H.R. Rep. No. 106-192 at 8. See also One Lot of U.S. Currency (\$36,634), 103 F.3d at 1055 n. 9.

U.S. v. \$40,000 in U.S. Currency, 999 F. Supp. 234, 238 (D.P.R. 1998); U.S. v. Funds in the Amount of \$9,800, 952 F. Supp. 1254, 1261 (N.D. Ill. 1996).

The third type of disfavored evidence is narcotic dog alerts on currency. As one commentator has noted:

It has been estimated that one out of every three circulating bills has been involved in a cocaine transaction. Cocaine and other drugs attach to the oily surface of currency in a variety of ways. Each contaminated bill contaminates others as they pass through cash \*H2050 registers, cash drawers, wallets, and counting machines. If, in fact, a substantial part of the currency in this country will cause a trained dog to alert, then the alert obviously has no evidentiary value.

Smith, 1 Prosecution and Defense of Forfeiture Cases sec. 4.03, p. 4- 82.3 (footnotes omitted). The author cites experts finding that 70-97% of all currency is contaminated with cocaine. Id. at sec. 4.03, p. 4-82.1-4-82.2.

Many federal courts have agreed as to the low probative value of dog alerts. See, e.g., \$506,231 in U.S. Currency, 125 F.3d at 453; Muhammed v. Drug Enforcement Agency, 92 F.3d 648, 653 (8th Cir. 1996) ("The fact of contamination, alone, is virtually meaningless and gives no hint of when or how the cash became so contaminated."); U.S. v. \$5,000 in U.S. Currency, 40 F.3d 846, 849 (6th Cir. 1994) ("<T>he evidentiary value of narcotics dog's alert < is> minimal.") (footnote omitted); U.S. v. U.S. Currency, \$30,060, 39 F.3d 1039 (9th Cir. 1994) ("<T>he continued reliance of courts and law enforcement officers on <drug dog alerts> to separate 'legitimate' currency from 'drug- connected' currency is logically indefensible." Id. at 1043, quoting Jones v. U.S. Drug Enforcement Administration, 819 F. Supp. 698, 721 (M.D. Tenn. 1993) (footnote omitted)); U.S. v. \$53,082 in U.S. Currency, 985 F.2d 245 (6th Cir. 1993) ("<A> court should 'seriously question the value of a dog's alert without other persuasive evidence. . . .'" Id. at 250-51 n.5, quoting U.S. v. \$80,760 in U.S. Currency, 781 F. Supp. 462, 476 (N.D. Tex. 1991), aff'd, 978 F.2d 709 (5th Cir. 1992); One Lot of U.S. Currency Totalling \$14,665, 33 F. Supp.2d at 58. See also U.S. v. \$639,558 in U.S. Currency, 955 F.2d 712, 714 n.2 (D.C. Cir. 1992). Dog alerts of little value in meeting a standard of probable cause, and are of even less value in meeting a standard of preponderance of the evidence.

Adding the above factors together, "<t>he government must come forward with more than a 'drug-courier profile' and a positive dog sniff <to meet the standard of probable cause>." Funds in the Amount of \$9,800, 952 F. Supp. at 1261." As the court ruled in \$80,760 in U.S. Currency, 781 F. Supp. at 475, "<p>ofile characteristics are of little value in the forfeiture context without other persuasive evidence establishing the requisite substantial connection." See also Jones, 819 F. Supp. at 719 ("The mere fact that a traveler matches some elements of a drug courier profile does not amount to even articulable suspicion, much less probable cause."). The same holds true, to an even greater extent, when the standard is preponderance of the evidence.

Lastly, "<a>n owner does not have to prove where he obtained money until the government demonstrates that it has <met its burden> to believe the money is forfeitable." \$506,231 in U.S. Currency, 125 F.3d at 454.

I should also note that while hearsay may be used to establish probable cause for seizure, see U.S. v. One 56 Foot Motor Yacht Named Tahuna, 702 F.2d 1276, 1282-83 (9th Cir. 1983), it is not admissible to establish the forfeitability of property by a preponderance of the evidence. And, while the government may use evidence obtained after the forfeiture complaint is filed to establish the forfeitability of the property by a preponderance of the evidence, the government must still have had enough evidence to establish probable cause at the time of filing (or seizure, if earlier). The bill is not intended to limit the right of either party to bring a motion for summary judgment after the filing of the complaint pursuant to Fed. R. Civ. P. 56(a) or 56(b).

## **FACILITATING PROPERTY (SECTION 2-CREATING 18 U.S.C. SEC. 983(C))**

While H.R. 1658 as it was introduced and originally passed in the House contained no provision reforming the standards regarding "facilitation" forfeiture, this is an issue about which I have been long concerned. See Hyde, Forfeiting Our Property Rights: Is Your Property Safe From Seizure? 61 (1995) I am gratified that it is addressed in the Senate amendment to H.R. 1658.

There are many facilitation-type civil forfeiture provisions in the U.S. Code. Most importantly, the federal drug laws make subject to civil forfeiture "<a>ll conveyances . . . which are used, or intended for use . . . in any manner to facilitate the transportation, sale, receipt, possession, or concealment of <controlled substances> . . . ." 21 U.S.C. sec. 881(a)(4). They also make subject to forfeiture "<a>ll moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter . . .", 21 U.S.C. sec. 881(a)(6), and "<a>ll real property . . . which is used, or intended to be used, in any manner or part, to . . . facilitate the commission of a violation of this subchapter punishable by more than one year's imprisonment . . . <,>" 21 U.S.C. sec. 881(a)(7). Also, federal law make subject to civil forfeiture "<a>ny property, real or personal, involved in a transaction or attempted transaction in violation of <certain money laundering laws> . . ." 18 U.S.C. sec. 981(a)(1)(A).

How strong need the connection be between the "facilitating" property and the underlying crime? As to 881(a)(6), courts have interpreted its legislative history as requiring there to be a "substantial connection" between the property and the crime. See Psychotropic Substances Act of 1978, Joint Explanatory Statements of Titles II and III, 95th Cong., 2nd Sess., reprinted in 1978 U.S. Code Cong. & Admin News 9518, 9522.

As to 881(a)(7), many courts require there to be a substantial connection. See, e.g., U.S. v. Parcel of Land & Residence at 28 Emery St., 914 F.2d 1, 3-4 (1st Cir. 1990); U.S. v. 26.075 Acres, Located in Swift Creek Township, 687 F. Supp. 1005 (E.D.N.C. 1988), aff'd sub nom. U.S. v. Santoro, 866 F.2d 1538, 1542 (4th Cir. 1989); U.S. v. Forfeiture, Stop Six Center, 781 F. Supp. 1200, 1205-06 (N.D. Tex. 1991). Others do not. The Seventh Circuit has ruled that the facilitating property need only have "more than an incidental or fortuitous connection to criminal activity . . ." U.S. v. Real Estate Known as 916 Douglas Ave., 903 F.2d 490, 493 (7th Cir. 1990), cert. denied sub nom. Born v. U.S. 498 U.S. 1126 (1991). See also U.S. v. Property at 4492 S. Livonia Rd., 889 F.2d 1258, 1269 (2nd Cir. 1989) (test is "sufficient nexus").

How significant is the difference? The Seventh Circuit in 916 Douglas Ave. has found that "<t>he difference between th<e substantial connection> approach and our own appears largely to be semantic rather than practical." 903 F.2d at 494. This might be the case - the Fourth Circuit has ruled that under the substantial connection test, "<a>t minimum, the property must have more than an incidental or fortuitous connection to criminal activity<!>" U.S. v. Schifferli, 895 F.2d 987, 990 (4th Cir. 1990). Some courts don't even feel the need to choose between the tests, ruling that facilitation has been shown in particular cases under either test. See U.S. v. Rd 1, Box 1, Thompsontown, 952 F.2d 53, 57 (3rd Cir. 1991); U.S. v. Real Property and Residence at 3097 S.W. 111th Ave., 921 F.2d 1551, 1556 (11th Cir. 1991), cert. denied, 111 S.Ct. 1090 (1991).

As to 881(a)(4), some courts have applied the substantial connection test. See U.S. v. 1966 Beechcraft Aircraft, 777 F.2d 947, 953 (4th Cir. 1985); U.S. v. One 1979 Porsche Coupe, 709 F.2d 1424, 1426 (11th Cir. 1983). Others have not. See U.S. v. 1964 Beechcraft Baron Aircraft, 691 F.2d 725, 727 (5th Cir. 1982), cert. denied, 461 U.S. 914 (1983).

H.R. 1658 provides that the substantial connection test should be used whenever facilitating property is subject to civil forfeiture under the U.S. Code. And the test is intended to mean something, it is intended to require that facilitating property have a connection to the underlying crime significantly greater than just "incidental or fortuitous."

In one area in particular, courts have been much too liberal in finding facilitation. An especially high standard should have to be met before we dispossess a person or family of their home. A primary residence should be accorded far greater protection than mere personal property. See U.S. v. Certain Lots in Virginia Beach, 657 F. Supp. 1062, 1065 (E.D. Va. 1987). But, courts have not always felt this way in applying section 881(a)(7). In U.S. v. Premises and Real Property at 250 Kreag Rd., 739 F. Supp. 120, 124 (W.D.N.Y. 1990), the court found a home forfeitable because the owner grew 17 stalks of marijuana in his backyard of home for personal use (standard used was unclear). See also U.S. v. One Parcel of Real Property, 960 F.2d 200, 205 (1st Cir. 1992). The court in 916 Douglas Ave. found a home forfeitable on the basis of three phone calls made to or from it regarding the sale of two ounces of cocaine. "The loss of one's home for the sale of a small amount of cocaine is undoubtedly a harsh penalty", but that is what Congress intended. 903 F.2d at 494 (no substantial connection needed). In U.S. v. Plescia, 48 F.3d 1452, 1462 (7th Cir. 1995), one phone call to set up a large drug deal resulted in the forfeiture of a home (no substantial connection needed). See also U.S. v. Zuniga, 835 F. Supp. 622 (M.D. Fla. 1993) (Under a "substantial connection" or lesser test, ten calls involving drug offenses resulted in the forfeiture of a house (under a criminal forfeiture statute with an "identical" burden as 881(a)(7))). None of these cases would meet the substantial connection test provided in H.R. 1658.

Under the substantial connection test, should an entire bank account be forfeitable because some of its assets were involved in money laundering? In U.S. v. All Monies (\$477,048.62 in account #90-3617-3, 754 F. Supp. 1467 (D.Haw. 1991), the court ruled that under sec. 881(a)(6) and 18 U.S.C. sec. 981(a)(1)(A), the government showed probable cause that an entire bank account worth approximately \$477,000 was forfeitable for being involved in/facilitated drug and money laundering offenses, not just the approximately \$242,000 in the account representing the proceeds of a drug crime. The court found that "both the legitimate and tainted money in the \*H2051 account aided <the laundering of drug proceeds>. The account provided a repository for the drug proceeds in which the legitimate money could provide a 'cover' for those proceeds, thus making it more difficult to trace the proceeds." Id. at 1475-76 (substantial connection required).

Such a doctrine can quickly lead to unfair and disproportionate results. The 10th Circuit presents the proper limitation:

<T>he mere pooling or commingling of tainted and untainted funds in an account does not, without more, render the entire contents of the account subject to forfeiture. . . . <F>orfeiture of legitimate and illegitimate funds commingled in an account is proper as long as the government demonstrates that the . . . <owner> pooled the funds to facilitate, i.e., disguise the nature and source of, his scheme.

\* \* \*

U.S. v. Bornfield, 145 F.3d 1123, 1135 (10th Cir. 1998) (criminal forfeiture under 18 U.S.C. sec. 982(a)(1)) (citations omitted) (standard used was unclear). See also U.S. v. Contents of Account, 847 F. Supp. 329, 335 (S.D.N.Y. 1994) ("The facilitation theory is appropriate in the present case where <the owner> established and controlled the <accounts>, and commingled legitimate and illegitimate funds in these accounts, for the purpose of disguising the nature and source of the proceeds of <the> scheme.") (forfeiture under 18 U.S.C. sec. 981(a)(1)(A)) (standard used was unclear).

Under H.R. 1658's substantial connection test, in order for an entire bank account composed of both tainted and untainted funds to be forfeitable, a primary purpose of its establishment or maintenance must be to disguise a money laundering scheme. This rule should also apply when the government seeks to forfeit an entire business because tainted funds were laundered in a firm bank account. For the business to be forfeitable, a primary purpose for the establishment or maintenance of the entire business must be to disguise a money laundering scheme. See U.S. v. Any and All Assets of Shane Co., 816 F. Supp. 389, 401 (M.D.N.C. 1991) (Business that was a front for money laundering was forfeitable.) (forfeiture under 18 U.S.C. sec. 981(a)(1)(A) (substantial connection required).

## **PROPORTIONALITY (SECTION 2-CREATING 18 U.S.C. SEC. 983(G))**

This provision is designed to codify U.S. v. Bajakajian 524 U.S. 321 (1998).

## **STATUTE OF LIMITATIONS (SECTION 11)**

This provision amends 19 U.S.C. sec. 1621, enlarging the time in which the government may commence a civil forfeiture action by allowing the government to commence an action within five years after the time the alleged offense was discovered, or two years after the time when the involvement of the property in an offense is discovered, whichever is later. 19 U.S.C. sec. 1621 has been construed as requiring the government to exercise reasonable care and diligence in seeking to learn the facts disclosing the alleged wrong. Thus, the courts have held under sec. 1621 that 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. See Smith, 1 Prosecution and Defense of Forfeiture Cases sec. 12.02. This construction will require the government to exercise reasonable diligence in seeking discovery of assets involved in an offense once the offense is discovered.

The provision should not be read as extending the statute of limitations in cases that are already time-barred as of the date of enactment of the bill.

## **UNIFORM DEFINITION OF PROCEEDS (SECTION 20)**

S. 1931's uniform definition of proceeds is self-explanatory. However, it is important to note Congress' disapproval of the "ink drop" test for proceeds forfeiture developed by the Eleventh Circuit. In U.S. v. One Single Family Residence, 933 F.2d 976, 981 (11th Cir. 1991) (proceeds forfeiture under 21 U.S.C. sec. 881(a)(6)), the court ruled that "<a>s to a wrongdoer, any amount of the invested proceeds traceable to drug activities forfeits the entire property. We have never held that as to a wrongdoer only the funds traceable to illegal activities may be forfeited." To the contrary, only that portion of a piece of property purchased with tainted funds is forfeitable.

## **DESTRUCTION OR REMOVAL OF PROPERTY (SECTION 12)**

18 U.S.C. sec. 2232 is amended to expand the scope of conduct which constitutes an offense for damaging or removing property which is subject to a lawful search or seizure. Subsection (a), which makes it a crime to damage or remove property which has not yet been seized, should be interpreted in a commonsense fashion to apply to a person or persons who had knowledge that a law enforcement agency is attempting, has attempted, or was about to attempt to seize the property. Subsection (b), which has been added to this section, makes it an offense to remove or destroy property which is already the subject of the in rem jurisdiction of a United States District Court.

## **EFFECTIVE DATE (SECTION 21)**

For purposes of the effective date provision, the date on which a forfeiture proceeding is commenced is the date on which the first administrative notice of forfeiture relating to the seized property is sent. The purpose of this provision is to give the Justice Department and the U.S. courts four months from the date of enactment of the bill to educate their employees as to the bill's changes in forfeiture law.

Mr. Speaker, I reserve the balance of my time.

Ms. JACKSON-LEE of Texas.

Mr. Speaker, I yield myself such time as I may consume.

(Ms. JACKSON-LEE of Texas asked and was given permission to revise and extend her remarks.)

Ms. JACKSON-LEE of Texas.

Mr. Speaker, this legislation has been long in coming. I know on behalf of the gentleman from Michigan (Mr. CONYERS), we want to thank the gentleman from Illinois (Mr. HYDE) because this is legislation that the gentleman from Illinois has worked on extensively and without rest. The gentleman from Illinois has worked in a bipartisan manner. He has those of us who have had disagreements sometimes rally around this legislation because in every single one of our districts we found someone's mother, someone's wife, someone's sister, some innocent person who has been law abiding but because we are part of a great family, have found some family member outside of the law who has brought down the heavy hand of the law on hardworking people who have retained, if you will, or worked hard for the properties that they have.

I want to pay tribute to the gentleman; and I know the gentleman from Michigan would because, as I just heard a few moments ago, this is truly a bipartisan bill. I want to distinguish the fact that this is on the suspension calendar because we have had some vigorous debates here just earlier this morning about the process of suspensions bypassing committee, and I would not want this legislation to be defined accordingly.

This bill has been worked and worked and worked and your staff, George, we thank you, we know you have been on the battle line working hard to make sure that this comes together. I want to acknowledge Perry Apelbaum and Cori Flam likewise and say that we rise in support of this legislation, a bipartisan bill that is a result of extensive negotiations and deliberations with our colleagues in the Senate, Senators HATCH, LEAHY, SESSIONS and SCHUMER as well as the Department of Justice. I might do a slight editorial note and say that out of the bipartisan effort, the bill from the House may not be the exact same and I might have wanted the bill from the House maybe because I am a House Member but we are gratified that we finally resolved it and it has come back for a vote.

Mr. Speaker, the Civil Asset Forfeiture Reform Act makes common sense changes to our civil asset forfeiture laws to make these procedures fair and more equitable. H.R. 1658 strikes the right balance between the needs of law enforcement and the right of individuals to not have their property forfeited without proper safeguards. I recall that we actually had hearings on this, and I recall some of the really horrific stories of individuals losing their only house, their only source of income because of this law.

Would you believe that under current law, the government can confiscate an individual's private property on the mere showing of probable cause? That is under current law. Then even though that person has never been arrested, much less convicted of a crime, the government requires a person to file action in a Federal court to prove that the property is not subject to forfeiture just to get the property back. Well, that is true.

We can imagine that the gentleman from Michigan enthusiastically embraced and worked with the gentleman from Illinois on this legislation. There is no question that forfeiture laws can, as Congress intended, serve legitimate law enforcement purposes. My own police department, a simple and small example, promotes and utilizes or has utilized civil forfeiture laws as relates to drug intervention and drug crimes. But they are currently susceptible to abuse. That is why the bill makes reforms to the current civil forfeiture regimen.

To highlight a few examples, the bill places the burden of proof where it belongs, with the government agency **\*H2052** that performed the seizure, and it protects individuals from the difficult task of proving a negative, in other words, proving that their property was not subject to forfeiture. H.R. 1658 also permits the awarding of attorney's fees if the claimant substantially prevails, creates an innocent owner defense and permits a court to provisionally return property to a claimant on a showing of substantial hardship where, for example, the forfeiture crippled the functioning of a business, prevented an individual from working or left an individual homeless. Is that not justice for Americans? These reforms simply balance the scales so that innocent people have a level playing field on which to challenge improper seizures.

H.R. 1658 also makes certain changes to help law enforcement crack down on criminal activities. For example, the bill permits courts to enter restraining orders to secure the availability of the property subject to civil forfeiture, and it clarifies that the law prohibiting the removal or destruction of property to avoid prosecution applies to seizures as well as forfeitures.

As I see the ranking member on the floor of the House, I know that he will have much to say about this bipartisan effort. But I am hoping that this bill, although it appears on the suspension calendar, will evidence the hard work that we have done collectively on the Committee on the Judiciary on this very issue. I thank both the chairman and the ranking member for their efforts. I am very proud to support this bill today personally and to ask my colleagues to join us in supporting this important legislation.

Mr. Speaker, I am in support of this bill which calls for civil asset forfeiture reform. This is a good bipartisan bill which now shifts the burden of proof to the government to prove by clear and convincing evidence when seizing property and permits the appointment of counsel for indigent claimants while protecting innocent owners.

Unlike criminal forfeiture, civil forfeiture requires no due process before a property owner is required to surrender their property.

Studies suggest that minorities are acutely affected by civil asset forfeitures. As we are well aware by now, racial profiling by the police has alarmingly increased the number of cases of minorities involved in traffic stops, airport searches and drug arrests. These cases afford the government, sometimes justifiably, with the opportunity to seize property. Since 1985, the justice department's asset forfeiture fund increased from \$27 million to \$338 million.

Since a deprivation of liberty is not implicated in a civil forfeiture, the government is not bound by the constitutional safeguards of criminal prosecution. The government needs only show probable cause that the property is subject to forfeiture. The burden shifts to property owner to prove that the property is not subject to forfeiture.

The property owner may exhaust his or her financial assets in attorney's fees to fight for the return of property. If the financial burden of attorney's fees is not rushing enough, the owner has to post a bond worth 10 percent of the value of the property, before contesting the forfeiture. Independent owners are not entitled to legal counsel.

Interestingly enough, persons charged in criminal cases are entitled to a hearing in court and the assistance of counsel. The government need not charge a property owner with a crime when seizing property under civil laws. The result is that an innocent person, or a person not charged with a crime, has fewer rights than the accused criminal. This anomaly must end.

Reform of civil asset forfeiture laws is long overdue. I urge you to support this bill to ensure that innocent owners are provided some measure of due process before their property is seized.

Mr. Speaker, I reserve the balance of my time.

Mr. HYDE.

Mr. Speaker, I yield such time as he may consume to the distinguished gentleman from Georgia (Mr. BARR).

Mr. BARR of Georgia.

Mr. Speaker, I thank the distinguished chairman of the Committee on the Judiciary for yielding me this time. I would like to commend the gentleman from Illinois for his tremendous work over many years' time on reforming Federal asset forfeiture laws which, as we all know, are an important tool for Federal law enforcement and indirectly for local law enforcement which frequently because of their participation in cases resulting in seized assets participate in the disposition of those seized assets once they are forfeited.

Many of us, including myself as a former United States attorney, while having tremendous regard and respect for our civil asset forfeiture laws and what an important tool they are for law enforcement also recognize they are subject to abuse and have been abused. This legislation on which the gentleman from Illinois has been working for many years and which will be one of the most important hallmarks of his tenure as both chairman of the Committee on the Judiciary and his long and distinguished service as a Member of the House of Representatives will go a long way towards bringing back into balance a system that has become sorely out of balance. I commend the gentleman for his work, and I commend both sides of the aisle for bringing this forward in a bipartisan manner. I urge its adoption.

Mr. Speaker, I also rise today with the chairman of the Committee on the Judiciary to discuss the intent of section 983(a)(2)(C)(ii) which states, "A claim shall state the claimant's interest in such property and provide customary documentary evidence of such interest if available and state that the claim is not frivolous."

Mr. Speaker, I interpret this language to require only *prima facie* evidence to establish such an interest. I assume the gentleman from Illinois concurs with my representation but would like for the record to clarify what type of documentation would be necessary to establish this interest in the seized property, sufficient to make a claim under this legislation.

This documentary evidence should be fairly easy to obtain while still establishing the claimant has a legitimate, nonfrivolous interest in such property. This interest can be established by documents including but not limited to a copy of an automobile title, a loan statement for a home, or a note from a bank for a monetary account. For property such as cash in which no documentary evidence is normally available, this provision would be loosely applied and there would be an assumption of the claimant's interest in such property by simply making a claim and asserting its nonfrivolous nature.

Mr. HYDE.

Mr. Speaker, if the gentleman will yield, I thank the gentleman from Georgia for bringing this issue to the attention of the House. The gentleman's explanation is accurate and reflects the intent of the legislation. There was a need for such an explanation and I appreciate the gentleman from Georgia's clarification of this issue.

Mr. BARR of Georgia.

I thank the gentleman for engaging in the colloquy.

Mr. HYDE.

Mr. Speaker, I yield myself 30 seconds. I want to thank the gentlewoman from Texas for her very cordial remarks. I want to particularly thank the gentleman from Michigan and his staff and make a point. This Committee on the Judiciary in this House of Representatives can work together in a bipartisan fashion to turn out good legislation. This is one example. There are many others. This bill had its genesis in a newspaper article written by Steve Chapman of the Chicago Tribune several years ago. When I read what was going on under civil asset forfeiture, I thought it was more appropriate for the Soviet Union than the United States, and it has taken 7 years but we are there today and it is a great moment.

Mr. Speaker, I yield 2 minutes to the gentleman from New York (Mr. SWEENEY).

Mr. SWEENEY.

Mr. Speaker, I thank the gentleman for yielding me this time. I want to say, a year ago I rose on this floor with my colleagues the gentleman from Arkansas (Mr. HUTCHINSON) and the gentleman from New York (Mr. WEINER) in opposition to this bill. I come today in support of this particular provision. I rose in opposition a year ago because I was concerned about the effects on criminal justice and specifically the effects on law enforcement, but I have to point out that the chairman and the Committee on the Judiciary, as has been noted, in a bipartisan manner has done a tremendous job to ease those concerns.

They have provided us great improvements on the bill. The compromise provides important procedural protections to law-abiding property owners without compromising law enforcement's ability to shut down criminal enterprises. Specifically the bill shifts the burden of proof in forfeiture cases from \*H2053 property owners to the government with the appropriate threshold of a preponderance of the evidence.

The compromise also limits the appointment of court-appointed lawyers to indigent claimants whose primary residence is subject to forfeiture. I want to say that there is one concern that I have and I think a couple of my colleagues have as well as it relates to this legislation, and, that is, that we have a continuing reservation that the removal of the cost bond requirement could impair the asset forfeiture program in the future.

We know that the Justice Department is already overwhelmed with challenges to asset seizures, and I am fearful that the removal of the cost bond could further paralyze that effort. But let me say this, I hope to and I know my colleagues who stood with me a year ago hope to work with the chairman and the committee to oversee the implementation of cost bond provisions requiring up-front certification and posthearing penalties and ensure that my fears do not become a reality for law enforcement. But overall, Mr. Speaker, this is a victory for the American people. I want to salute the Committee on the Judiciary and its great chairman. I urge support for this bill.

The SPEAKER pro tempore (Mr. PEASE).

Without objection, the gentleman from Michigan (Mr. CONYERS) will control the time previously granted to the gentlewoman from Texas (Ms. JACKSON-LEE).

There was no objection.

Mr. CONYERS.

Mr. Speaker, I yield myself 2 minutes.

I would like to begin by pointing out that the chairman of this committee and I have worked together on this measure for at least a couple of Congresses. I have been working on it, also, unbeknownst to the gentleman from Illinois in the Committee on Government Reform. I think we have come quite a long way. The bill retains the core of some of the main reforms that was in Hyde-Conyers.

We have adopted the Senate version. But the shifting of the burden of proof is very important. The appointment of counsel is a critical improvement. The return of property in case of substantial hardship is very important. And the innocent owner defense is now strong in the bill. The claim for property damages while in the government's custody is a valid concern. And an award of interest. The bill allows prejudgment interest to be awarded when cash is improperly seized by the government. And we eliminate the cost of bond which would be a part of the current requirement that a claimant challenging a civil asset forfeiture file a cost of bond.

Who would have believed that under our current law, the government can confiscate an individual's private property on a mere showing of probable cause? Then even though a person has never been arrested, not to mention convicted, of a crime, the government requires the person to file an action to prove that the property is not subject to forfeiture to get the property back.

It is important that we have asset forfeiture, but this puts it under controls that have not existed before.

Mr. Speaker, I reserve the balance of my time.

Mr. Speaker, I yield 11/2 minutes to the gentleman from New York (Mr. WEINER), a distinguished member of the Committee on the Judiciary.

Mr. WEINER.

Mr. Speaker, I rise in support of the Senate amendments to H.R. 1658, and I want to commend the gentleman from Illinois (Chairman HYDE), our chairman, for his year-long effort to reform our asset forfeiture laws. The gentleman quite literally wrote the book on the subject. When the history is written of his prodigious work in this House, this certainly warrants mention.

Last year, a somewhat divided House considered H.R. 1658. While it garnered the support of the majority of our colleagues, it was adamantly opposed by the administration, as well as by every major law enforcement group. Because of this opposition, I offered, along with the gentleman from Arkansas (Mr. HUTCHINSON) and the gentleman from New York (Mr. SWEENEY), a substitute version of H.R. 1658 on the floor of the House.

The substitute would have made needed reforms by placing the burden of proof on the Government to prove by a preponderance of the evidence that property seized was used in an illegal activity. It would have allowed for counsel to be appointed in those proceedings. It would have protected innocent owners, and it would have allowed property to be returned to claimants in instances of hardship.

It was, I thought, a balanced approach that had the support of all major law enforcement organizations, as well as 155 of my colleagues. That amendment failed, although it had some support, and many of us voted against the base bill for that reason.

Mr. Speaker, today's amendment, today's bill I am pleased to vote in favor of. It puts the burden of proof where it should be, on the Government; and it rightfully protects the owners and spouses and children, if they can show they were not involved in illegal activity.

Perhaps, most importantly, today's bill has the approval of the men and women of law enforcement. Like our substitute, today's bill allows civil asset forfeiture to continue to be used as a tool by police and prosecutors across the country to shut down crack houses and seize drug-running speedboats.

Mr. Speaker, I applaud the authors of this compromise and my colleagues who voted in favor of reform originally.

Mr. CONYERS.

Mr. Speaker, I yield myself such time as I may consume, merely to point out in the colloquy between the gentleman from Georgia and the gentleman from Illinois (Mr. HYDE), the distinguished chairman of the committee, that I stand in agreement about the interpretation given by the chairman of section 983A(2)(c)(2), which dealt with the claimant's interests in such property and provide customary documentary evidence of such evidence, if available, and state that the claim is not frivolous.

Mr. Speaker, I just wanted to join in a clarification of the intent that, for example, a person should not be barred from challenging an improper forfeiture if he or she has misplaced a receipt or if the person does not have the evidence on hand. I think that response is consistent with the gentleman from Illinois (Mr. HYDE) and the gentleman from Georgia, and I just wanted to weigh in on that.

This has taken quite awhile, but it is an important measure, and my compliments are out to the gentleman from Illinois (Mr. HYDE), the chairman of the committee, and to all of the Members who have gone through a rethinking process to bring the bill to the kind of support that I believe it is enjoying on the floor this afternoon.

Mr. Speaker, I began looking at this matter from the old Government Operations Committee, and I was very pleased to learn that the gentleman from Illinois had, indeed, studied the matter, had put together his thoughts in a book on the matter, and it led us to bringing forth a bill jointly that now has the imprimatur, I believe, of most of the Members in both bodies.

It is in that spirit that we will want to make sure that it is implemented fairly and that it adds to the good body of law that comes out of the House Committee on the Judiciary.

Mr. Speaker, with those remarks, I reserve the balance of our time.

Mr. HYDE.

Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, I wish to express my gratitude again to the gentleman from Michigan (Mr. CONYERS) and his staff and everyone who worked on this bill. We did not mention Jon Dudas and Rick Filkins. I just want to say, George Fishman who is sitting here, he was the single most indispensable element of this bill, and I am grateful to him.

Mr. BARR of Georgia.

Mr. Speaker, I would like to thank Mr. HYDE for working so rigorously to come to a reasonable agreement with the Senate on civil asset forfeiture reform. The compromise is fair and will restore fairness to this process.

Civil asset forfeiture is a mechanism allowing law enforcement authorities to seize assets such as homes, property, cash, and cars that are used in furtherance of criminal activity. However, in recent years, the laws have been used overly broadly, and have been cited by civil libertarians as excessive and open to abuse.

One of the most important challenges Congress faces is balancing individual liberties against the need for effective law enforcement. Generally, our laws do this fairly well. \*H2054 However, our civil asset forfeiture laws are tilted too far in one direction. Current civil asset forfeiture laws allow police to seize a person's assets, regardless of whether the person has been, or ever is, convicted of a crime, if police have nothing more than probable cause to believe the property was used for criminal purposes. You are presumed guilty until you can prove yourself innocent.

In effect, our current asset forfeiture system targets both criminals and law-abiding citizens, takes their cars, cash, homes, and property away, and then forces them to prove they are innocent in order to get their assets back. The goal of this reform legislation is to change a system that sometimes violates the rights of the law-abiding, while retaining those provisions that allow law enforcement to target criminals, and hit them where it hurts-in their pocket books.

As I know from my service as a federal prosecutor, the majority of jurisdictions in America use asset forfeiture laws sensibly and fairly. Unfortunately, in some cases, law enforcement officers intentionally target citizens and seize their assets, because they know proving innocence under the constraints of the current law is extremely difficult if not impossible. The burden of proof for the government is minimal, the person may have less than 2 weeks to file a defense, and they have to post a bond even though the government has seized their assets.

H.R. 1658 was introduced to address this matter of allowing law enforcement to use this important tool of asset forfeiture, while still requiring them to be more mindful of due process and individual rights.

This legislation enjoys wide bi-partisan support, and passed the House on June 24, 1999 by a vote of 375-48. Additionally, the 65,000 member Law Enforcement Alliance of America supports it, as do many other line officers and retired police chiefs from across America. It returns balance and fairness to an area of law that has been abused to violate the rights of innocent citizens for too long.

This reform legislation does not deny law enforcement the ability to seize and forfeit assets that truly are used for criminal endeavors. It does, however, more properly balance those powers against civil liberties.

Mr. UDALL of Colorado.

Mr. Speaker, I strongly support this measure. Passage of this bill is long overdue, and I urge all Members to join me in voting to send it to the President for signing into law.

Since the House passed this bill last year, it has been the subject of intensive negotiations that have involved the administration and law enforcement organizations as well as Members of both the House and Senate. Those negotiations have resulted in the revised version of the bill now before the House. I am sure that it is not everything that some might want, but it is acceptable to all concerned, and I think it deserves approval.

Enactment of this bill will correct serious imbalances in the law regarding civil forfeitures-cases in which the government seizes property allegedly connected to a violation of law. Under current law, seized property won't be returned unless the person whose property was seized can prove either that the property was not connected to the alleged crime or that the owner did not know about or consent to the allegedly illegal use of the property.

This bill shifts the burden of proof to the government, where it belongs, so that it would be up to the government to show by preponderance of the evidence that an asset was sufficiently connected to a crime to be subject to civil forfeiture. While this is a somewhat less stringent requirement than in the bill as originally passed by the House, it is a great improvement over the current law.

The bill also makes a number of other important improvements over the current law. It will require that seizures be made pursuant to a warrant. It will eliminate the need for people to post a bond in order to contest a civil-forfeiture case. It will create a uniform "innocent owner" defense for all civil-forfeiture cases. It will allow property to be released from government custody before final disposition of a case where continued custody would be a hardship to the owner outweighing any risk to the government. And it will allow people to seek to recover from the government if seized property is damaged while in custody.

I congratulate all those whose hard work has made it possible for the bill to be on the floor today, and I urge its approval.

Mr. Speaker, with great pleasure, I yield back the balance of my time.

The SPEAKER pro tempore (Mr. OSE).

The question is on the motion offered by the gentleman from Illinois (Mr. HYDE) that the House suspend the rules and concur in the Senate amendment to the bill, H.R. 1658.

The question was taken; and (two-thirds having voted in favor thereof) the rules were suspended and the Senate amendment was concurred in.

The motion to reconsider is laid on the table.

**146 Cong. Rec. H2040-01, 2000 WL 368969 (Cong. Rec.)**

# Index

## 18 U.S.C. § 981

### § 981(a)(1)(C)

§ 981(a)(1)(C), Cassella 1996 Hearing on HR 1916 .....	117
§ 981(a)(1)(C), DOJ 1996 Forfeiture Act .....	50, 88
Cassella's 1997 Testimony .....	209
§ 981(a)(1)(C), H.R. Rep. 105-358(I) .....	246, 253
Analysis of 1999 DOJ Forfeiture Bill .....	375
H.R. Rep. 105-358(I) .....	224

### § 981(a)(2)

§ 981(a)(2), DOJ 1996 Forfeiture Act .....	50, 89
§ 983(a)(2), Cassella 1996 Hearing on HR 1916 .....	113
§ 981(a)(2), H.R. Rep. 105-358(I) .....	225, 247, 253
§ 981(a)(2), Comments from House Passage of HR 1658 .....	457
§ 981(a)(2), Hyde's Statement During House Passage of HR 1658 .....	450
§ 981(a)(2), Leahy's Statement During Senate Passage of HR 1658 .....	427

### § 981(b)

§ 981(b), DOJ 1996 Forfeiture Act .....	38, 76
§ 981(b), H.R. Rep. 105-358(I) .....	226, 254
§ 981(b), from extract of 1999 DOJ Forfeiture Bill .....	372
§ 981(b), Section Analysis from S.1931 (Hatch-Leahy Bill) .....	421

### § 981(e)(6)

§ 981(e)(6), Cassella 1996 Hearing on HR 1916 .....	118
§ 981(e)(6), DOJ 1996 Forfeiture Act .....	55, 97
§ 981(e)(6), H.R. Rep. 105-358(I) .....	227, 255
§ 981(e)(6), extract of 1999 DOJ Forfeiture Bill .....	376

### § 981(g)

§ 981(g), DOJ 1996 Forfeiture Act .....	75
§ 981(g), from extract of 1999 DOJ Forfeiture Bill .....	369

## 18 U.S.C. § 982

§ 982(a)(7), analysis of 1999 DOJ Forfeiture Bill .....	375
§ 982(a)(7), H.R. Rep. 105-358(I) .....	234

## 18 U.S.C. § 983

D. Smith's 1997 Testimony .....	211
§ 983(a), H.R. Rep. 105-358(I) .....	250

### § 983(a)(1)

§ 983(a)(1) .....	207
§ 983(a)(1), H.R. Rep. 105-358(I) .....	219, 250
§ 983(a)(1), H.R. Rep. 106-192 .....	283
§ 983(a)(1), Holder's 7/21/99 Senate Testimony .....	355
§ 983(a)(1), Section Analysis from S.1931 (Hatch-Leahy Bill) .....	420
§§ 983(a)(1), 983(a)(3), Smith's 1997 Testimony .....	212

### § 983(a)(2)

§ 983(a)(2), Hatch's statement on S.1931 (Hatch-Leahy Bill) .....	411
§ 983(a)(2), H.R. Rep. 105-358(I) .....	220, 246, 251
§ 983(a)(2), Barr's Comments from House Passage of HR 1658 .....	459
§ 983(a)(2), Cassella 1996 Hearing on HR 1916 .....	113
§ 983(a)(2), Conyers' 6/24/99 House Testimony .....	300
§ 983(a)(2), Conyers' Comments from House Passage of HR 1658 .....	461
§ 983(a)(2), H.R. Rep. 106-192 .....	281, 284
§ 983(a)(2), Leahy's Statement During Senate Passage of HR 1658 .....	427
§ 983(a)(2), Section Analysis from S.1931 (Hatch-Leahy Bill) .....	420, 423

### § 983(a)(3)

§ 983(a)(3), DOJ 1996 Forfeiture Act .....	29, 67
§ 983(a)(3), H.R. Rep. 105-358(I) .....	220, 251
§ 983(a)(3), H.R. Rep. 106-192 .....	284
§ 983(a)(3), Section Analysis from S.1931 (Hatch-Leahy Bill) .....	420

<b>§ 983(a)(4)</b>	
§ 983(a)(4), DOJ 1996 Forfeiture Act .....	30, 33, 67, 71
§ 983(a)(4), H.R. Rep. 105-358(I) .....	220, 246, 251
§ 983(a)(4), H.R. Rep. 106-192 .....	284
§ 983(a)(4), Section Analysis from S.1931 (Hatch-Leahy Bill) .....	420
<b>§ 983(b)</b>	
§ 983(b), Cassella 1996 Hearing on HR 1916 .....	117
§ 983(b), H.R. Rep. 105-358(I) .....	220, 243
§ 983(b), Buffone's 7/21/99 Senate Testimony .....	383
§ 983(b), Conyers' 6/24/99 House Testimony .....	300
§ 983(b), H.R. Rep. 106-192 .....	279, 284, 287
§ 983(b), Holder's 7/21/99 Senate Testimony .....	355
§ 983(b), Leahy's Statement During Senate Passage of HR 1658 .....	426, 427
§ 983(b), Section Analysis from S.1931 (Hatch-Leahy Bill) .....	420, 423
§ 983(b), Smith's 1997 Testimony .....	211
<b>§ 983(c)</b>	
§ 983(c), Cassella 1996 Hearing on HR 1916 .....	113
§ 983(c), Cassella 1997 Hearing .....	205
§ 983(c) .....	207
§ 983(c), DOJ 1996 Forfeiture Act .....	29, 30, 31, 68
§ 983(c), H.R. Rep. 105-358(I) .....	221
§ 983(c), Budget Estimate for HR 1658 .....	455
§ 983(c), Buffone's 7/21/99 Senate Testimony .....	383
§ 983(c), H.R. Rep. 105-358(I) .....	243
§ 983(c), H.R. Rep. 106-192 .....	278, 284, 287
§ 983(c), Holder's 7/21/99 Senate Testimony .....	353, 356
§ 983(c), Hyde's Statement During Blanton's 1996 Testimony .....	124
§ 983(c), Leahy's Statement During Senate Passage of HR 1658 .....	426
§ 983(c), Section Analysis from S.1931 (Hatch-Leahy Bill) .....	420
§ 983(c), Hyde's Floor Statement 2000 (House Passage of HR 1658) .....	450
<b>§ 983(d)</b>	
§ 983(d), Cassella 1996 Hearing on HR 1916 .....	114
§ 983(d), Cassella 1997 Hearing .....	205
§ 983(d), DOJ 1996 Forfeiture Act .....	33, 84
§ 983(d), D. Smith's 1997 Testimony .....	212
§ 983(d), Smith's 1997 Testimony .....	212
§ 983(d), H.R. Rep. 105-358(I) .....	221, 244
§ 983(d), Buffone's 7/21/99 Senate Testimony .....	383
§ 983(d), Conyers' 6/24/99 House Stmt .....	300
§ 983(d), Section analysis of DOJ 1999 Forfeiture Act .....	366
§ 983(d), H.R. Rep. 106-192 .....	279, 284, 287
§ 983(d), Holder's 7/21/99 Senate Testimony .....	353, 354
§ 983(d), S.1701 (Sessions-Schumer Bill) .....	389, 390
§ 983(d), Section Analysis from S.1931 (Hatch-Leahy Bill) .....	421
§ 983(d), Hyde's Statement During House Passage of HR 1658 .....	450
<b>§ 983(e)</b>	
§ 983(e), DOJ 1996 Forfeiture Act .....	27
§ 983(e), H.R. Rep. 105-358(I) .....	219, 250
§ 983(e), H.R. Rep. 106-192 .....	288
§ 983(e), from extract of 1999 DOJ Forfeiture Bill .....	370
§ 983(e), Section Analysis from S.1931 (Hatch-Leahy Bill) .....	421
<b>§ 983(f)</b>	
§ 983(f) .....	206
§ 983(f), H.R. Rep. 105-358(I) .....	223, 245
§ 983(f), Conyers' 6/24/99 House Testimony .....	300
§ 983(f), H.R. Rep. 106-192 .....	280, 285, 287
§ 983(f), Hatch's testimony from S.1931 (Hatch-Leahy Bill) .....	411
§ 983(f), Holder's 7/21/99 Senate Testimony .....	354
§ 983(f), Leahy's Statement During Senate Passage of HR 1658 .....	427
§ 983(f), Section Analysis from S.1931 (Hatch-Leahy Bill) .....	421, 423
§ 983(f), Hyde's Statement During House Passage of HR 1658 .....	450
<b>§ 983(g)</b>	
§ 983(g), H.R. Rep. 105-358(I) .....	222, 252

§ 983(g), Comments from House Passage of HR 1658 .....	457
§ 983(g), DOJ 1996 Forfeiture Act .....	32, 70
§ 983(g), from extract of 1999 DOJ Forfeiture Bill .....	373
§ 983(g), Section Analysis from S.1931 (Hatch-Leahy Bill) .....	421
<b>§ 983(h)</b>	
§ 983(h), Hyde's Statement During House Passage of HR 1658 .....	450
§ 983(h), Leahy's Statement During Senate Passage of HR 1658 .....	427
§ 983(h), Section Analysis from S.1931 (Hatch-Leahy Bill) .....	423
<b>§ 983(i)</b>	
§ 983(i), Blanton's 1997 Testimony .....	215
§ 983(i), DOJ 1996 Forfeiture Act .....	33
§ 983(i), H.R. Rep. 105-358(I) .....	247
§ 983(i), H.R. Rep. 106-192 .....	285
<b>§ 983(j)</b>	
§ 983(j), H.R. Rep. 105-358(I) .....	222, 252
§ 983(j), from extract of 1999 DOJ Forfeiture Bill .....	373
<b>18 U.S.C. § 984</b>	
DOJ 1996 Forfeiture Act .....	56, 100
from extract of 1999 DOJ Forfeiture Bill .....	375
<b>18 U.S.C. § 985</b>	
DOJ 1996 Forfeiture Act .....	28, 66
Section Analysis from S.1931 (Hatch-Leahy Bill) .....	421
<b>18 U.S.C. § 986(d)</b>	
DOJ 1996 Forfeiture Act .....	40, 79
from extract of 1999 DOJ Forfeiture Bill .....	373
H.R. Rep. 105-358(I) .....	227, 255
<b>18 U.S.C. § 2232</b> .....	233
H. Rep 105-358(I) .....	233
Comments from House Passage of HR 1658 .....	457
Analysis of 1999 DOJ Forfeiture Bill .....	374
H.R. Rep. 105-358(I) .....	261
Jackson-Lee's Comments from House Passage of HR 1658 .....	458
<b>18 U.S.C. § 3322</b> .....	208
DOJ 1996 Forfeiture Act .....	62, 109
Cassella 1997 Hearing .....	208
§ 3322(a), H.R. Rep. 105-358(I) .....	227
§ 3322(a), H.R. Rep. 105-358(I) .....	255
§ 3322(a), Holder's 7/21/99 Senate Testimony .....	357
§3322(a), analysis of 1999 DOJ Forfeiture Bill .....	374
<b>19 U.S.C. § 1621</b> .....	233
Comments from House Passage of HR 1658 .....	457
DOJ 1996 Forfeiture Act .....	58, 103
H.R. Rep. 105-358(I) .....	261
§ 1621, from extract of 1999 DOJ Forfeiture Bill .....	374
<b>21 U.S.C. § 881</b>	
DOJ 1996 Forfeiture Act .....	74
H.R. Rep. 105-358(I) .....	227
§ 881(i), from extract of 1999 DOJ Forfeiture Bill .....	369
<b>28 U.S.C. § 2461(a)</b>	
Cassella 1996 Hearing on HR 1916 .....	118
DOJ 1996 Forfeiture Act .....	49, 87
H.R. Rep. 105-358(I) .....	261
<b>28 U.S.C. § 2461(c)</b> .....	209, 233
Extract of 1999 DOJ Forfeiture Bill .....	378

H.R. Rep. 105-358(I) .....	247	
<b>28 U.S.C. § 2465</b>		
Leahy's Statement During Senate Passage of HR 1658 .....	426	
§ 2465(a), DOJ 1996 Forfeiture Act .....	60, 106	
§ 2465(a), extract of 1999 DOJ Forfeiture Bill .....	376	
§ 2465(a), H.R. Rep. 105-358(I) .....	231, 258	
§ 2465(b), Cassella 1996 Hearing on HR 1916 .....	116	
§ 2465(b), DOJ 1996 Forfeiture Act .....	29, 66	
§ 2465(b) .....	208	
§ 2465(b), Conyers' 6/24/99 House Testimony .....	300	
§ 2465(b), H.R. Rep. 105-358(I) .....	226, 246	
§ 2465(b), H.R. Rep. 106-192 .....	282, 286	
§ 2465(b), Hatch's testimony from S.1931 (Hatch-Leahy Bill) .....	412	
§ 2465(b), Hyde's Statement During House Passage of HR 1658 .....	450	
§ 2465(b), Leahy's Statement During Senate Passage of HR 1658 .....	427	
§ 2465(b), S.1701 (Sessions-Schumer Bill) .....	389, 390	
§ 2465(b), Section Analysis from S.1931 (Hatch-Leahy Bill) .....	421-423	
§ 2465(b), Smith's 1997 Testimony .....	211	
<b>28 U.S.C. § 2466</b> .....		208
Cassella 1996 Hearing on HR 1916 .....	118	
DOJ 1996 Forfeiture Act .....	61, 107	
extract of 1999 DOJ Forfeiture Bill .....	376	
Holder's 7/21/99 Senate Testimony .....	357	
Leahy's Statement During Senate Passage of HR 1658 .....	428	
<b>28 U.S.C. § 2467</b>		
DOJ 1996 Forfeiture Act .....	55, 98	
extract of 1999 DOJ Forfeiture Bill .....	377	
H.R. Rep. 105-358(I) .....	228, 256	
<b>28 U.S.C. § 2680</b>		
Cassella 1996 Hearing on HR 1916 .....	116	
DOJ 1996 Forfeiture Act .....	28	
H.R. Rep. 105-358(I) .....	246	
<b>28 U.S.C. § 2680(c)</b>		
Cassella 1996 Hearing on HR 1916 .....	116	
Conyers' 6/24/99 House Testimony .....	300	
DOJ 1996 Forfeiture Act .....	66	
H.R. Rep. 105-358(I) .....	225	
H.R. Rep. 106-192 .....	281, 286	
Hyde's 1996 Testimony for HR 1916 .....	130	
Hyde's Statement During House Passage of HR 1658 .....	450	
S.1701 (Sessions-Schumer Bill) .....	390	
Section Analysis from S.1931 (Hatch-Leahy Bill) .....	421	
<b>8 U.S.C. § 1324(b)</b>		
From extract of 1999 DOJ Forfeiture Bill .....	375	
Meek's 6/24/99 House Debate Testimony .....	329	
Barr .....	310	
Mentioned .....	341, 449	
Testimony .....	338, 459, 460, 462	
Blanton, Jan P. .....	121-123, 213, 214	
Brown, Johnny Mack .....	380	
Bryant, Ed .....	306	
Mentioned .....	307	
Buffone .....	382	
Mentioned .....	384	
CAFRA § 21 .....	230	
CAFRA § 21 .....	457	
Comments from House Passage of HR 1658 .....		

H.R. Rep. 106-192 .....	288
Section Analysis from S.1931 (Hatch-Leahy Bill) .....	421
Canady, Charles T. ....	339
Cassella, Stefan D.	
Cassella .....	216
Cited .....	267, 288, 382, 387, 388
Mentioned .....	216, 240, 274
Testimony .....	24, 110-121, 126, 128-130, 199, 200
Conyers, John .....	194
Mentioned .....	210, 240, 274, 295, 307, 334, 339, 425, 428, 449, 458, 462
Testimony .....	296, 299, 307, 460, 461
Delahunt, Bill .....	307
Mentioned .....	309
Testimony .....	342
Frank, Barney .....	314
Mentioned .....	334, 339
Testimony .....	317, 326, 327, 329, 332, 333, 336, 337, 340
Gallegos .....	378
Gilman, Benjamin A .....	330
Gekas, George W. ....	22, 125
Graham .....	308
Mentioned .....	311
Hatch, Orrin G .....	410
Mentioned .....	423, 425, 426, 428-430, 449
Testimony .....	424
Holder, Eric .....	351
Huthchinson .....	295
Mentioned .....	299, 331, 340, 341, 461
Substitute/Amendment .....	306, 307, 309, 310, 318, 325, 326, 329, 331, 333-335, 338, 339, 341, 343
Testimony .....	315, 317, 324, 336, 337, 344
Hyde, Henry J .....	193
CAFRA Report .....	218, 272
Cited .....	288, 383, 387, 455
Conducting Interview .....	9-12, 17-19, 22-23, 124-126, 128-131, 177-179, 240, 275
Mentioned .....	205, 210, 216, 291, 292, 295, 297, 331, 335, 337, 339, 341, 342, 384
Testimony .....	127, 247, 275, 297, 306, 313, 316, 317, 327, 328, 338, 345, 349, 431, 449, 460, 462
Jackson-Lee, Sheila .....	312
Testimony .....	313, 457
Jones, Walter B .....	240, 241, 275
Mentioned .....	276, 289, 340
Kappelhoff .....	178
Leahy, Patrick .....	
Mentioned .....	410, 424, 429, 449, 458
Testimony .....	421, 425
McCollum, Bill .....	342
McMahon, James .....	123-125, 216, 332
Meek, Carrie P .....	328
Testimony .....	329
Mica, John L .....	341
Moody, Booby D .....	23, 216
Munnerlyn, Billy .....	242, 276
Mentioned .....	388
Paul, Ron .....	335
Mentioned .....	340
Testimony .....	335
Pilon, Roger .....	384
Cited .....	386, 388
Pryce .....	290, 292, 297
Ramstad .....	337
Testimony .....	338
Reed, Jack .....	179
Sessions, Jeff .....	389
Mentioned .....	390, 424, 426, 450, 458

Testimony .....	424, 428
Slaughter, Louse .....	294
Smith, David B .....	210
Cited .....	211, 268, 289, 290, 303, 387
Mentioned .....	428, 450, 455
Sweeney, John E .....	333
Mentioned .....	295, 461
Testimony .....	460
Thurmond, Strom .....	389
Mentioned .....	429
Weiner, Anthony D .....	309
Mentioned .....	325, 460
Testimony .....	326-328, 333, 461