CIVIL ASSET FORFEITURE REFORM ACT

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTH CONGRESS

FIRST SESSION

ON

H.R. 1835

CIVIL ASSET FORFEITURE REFORM ACT

JUNE 11, 1997

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CIVIL ASSET FORFEITURE REFORM ACT

WEDNESDAY, JUNE 11, 1997

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

The committee met, pursuant to notice, at 10:20 a.m., in room 2141, Rayburn House Office Building, Hon. Henry J. Hyde (chairman of the committee) presiding.

Present: Representatives Henry J. Hyde, Bill McCollum, George W. Gekas, Howard Coble, Lamar Smith, Elton Gallegly, Charles T. Canady, Bob Inglis, Bob Goodlatte, Stephen Buyer, Sonny Bono, Ed Bryant, Steve Chabot, Bob Barr, William L. Jenkins, Asa Hutchinson, Edward A. Pease, John Conyers, Jr., Jerrold Nadler, Robert C. Scott, Melvin L. Watt, Zoe Lofgren, Sheila Jackson Lee, Martin T. Meehan, William D. Delahunt, and Steven R. Rothman.

Also present: Thomas E. Mooney, chief of staff/general counsel; Rick Filkins, counsel; Daniel M. Freeman, counsel/parliamentarian; Samuel F. Stratman, press secretary; Michelle H. Pelletier, executive assistant to staff director/counsel; George Fishman, counsel; and Cindy Blackston, clerk.

OPENING STATEMENT OF CHAIRMAN HYDE

Mr. HYDE. The committee will come to order. 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 proceedings of drug sales. This money is being plowed back into law enforcement. It is 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, and 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 an airplane ticket at an airport with cash. This behavior may cause the ticket agent to alert police that

you are a possible drug dealer. You will be searched. If you are carrying large amounts of cash, it will be confiscated. Unfortunately for you, you fit a drug profile.

But say you are not carrying 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 probable cause that it is intended to be used in a drug transaction. Don't worry, you probably won't be arrested. You will likely be courteously sent on your way, but sans your 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 had to be charged with any crime. In fact, even if you are acquitted by a jury of criminal charges, your property can be forfeited.

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 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 you are indigent. You must provide a 10-percent bond for the privilege of contesting the Government seizure. You have quite a short period of time to file a claim. Unlike 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 call 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 storage of your property. 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 can't 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's abusive, and it must be addressed.

The Civil Asset Forfeiture Reform Act proposes seven changes in current asset seizure laws. It puts the burden of proof where it belongs, with the Government. It allows for the appointment of counsel for indigents. 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. It eliminates the cost bond requirement. It gives a property owner a reasonable time period to file a claim contesting the forfeiture. It allows property owners to sue the Federal Government for negligence in its handling or storage of the property, and it allows the 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 hearings and to the compelling stories of forfeiture abuse we will hear.

I

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

---

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) TREASURY 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.

Mr. HYDE. I am now pleased to recognize the ranking minority member, Mr. Conyers, for an opening statement.

Mr. CONYERS. Good morning, Chairman Hyde and members. This is one of the kinds of hearings where we have so much cooperation it's staggering. I just want to caution F. Lee Bailey, it doesn't always go down like this. We can't agree on how to handle disaster relief. We've got a tax bill that goodness knows where it could take us. We are still trying to resolve the budget, which is several months overdue. But on civil asset forfeiture, there is a remarkable joining of minds in the Judiciary Committee on this subject.

I am not quite sure where the Department of Justice is yet, so we would invite all of you witnesses in the first panel to stay behind and hear it for yourself. It's an important subject. It is not the most earth-shaking. But again, it's an example of what justice is all about. I mean how we operate, those words found on the walls of justice, carved in granite out there. The great statements that tell us what America represents. Those words do not support the way we take people's property and then force them to prove that they are innocent, particularly if they cannot get a lawyer or if they don't happen to have the money, or if a lot of other things. We're happy to have you all here to inform our discretion.

I want to associate myself with Chairman Hyde's statement. This is about the third year we have been working on this together. We hope that we can have a meeting of the minds to get this law changed in the year 1997.

I want to make welcome F. Lee Bailey. Nobody knows how long he has been practicing law, it's that long. I just want to say that we are happy and privileged to have one of the most distinguished members of this Nation's bar with us this morning.

Thank you, Mr. Chairman. I will ask that my statement be put in the record.

Mr. HYDE. Without objection, so ordered.

[The prepared statement of Mr. Conyers follows:]

PREPARED STATEMENT OF HON. JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

I'm afraid the government's principal concern when it comes to seizing money and assets is best summed up in an expression from a recent popular movie: "Show Me the Money."

When Chairman Hyde and I complained that it should matter that the government is taking money from innocent persons, the government answered us, in part, that they were concerned about losing money—if they provided these safeguards. Is that the only line they know: "Show Me the Money."

When we told the government we wanted them to pay for counsel for the innocent owner who couldn't afford counsel, and to pay this out of their asset forfeiture funds, the government didn't want to hear it because, it appears, all the government can think of is: "Show Me the Money."

Well that's wrong and for years I have been speaking out about——

how wrong it is to seize property from innocent owners,

how wrong it is to force individuals to prove their innocence, and

how wrong it is for innocent persons to have to go through this to recover their own property.

Chairman Hyde and I have agreed and made our views known to the public and, more importantly, to the Department of Justice. But the Department doesn't seem to hear us. After all, you know what's on their mind.

So the abuses persist. We'll hear testimony about some of the abuses today. We introduced a Bill yesterday with 29 co-sponsors and whatever form the Bill takes from this point on, it must provide:

(1) reasonable notice to the property owners,

(2) an end to the government delays,
(3) appointment of counsel for those who can't afford it,
(4) a shift to and an increase in the burden of proof the government must shoulder,
(5) a definition of what it means for a property owner to be innocent of the misconduct that prompted seizure,
(6) a release of seized property pending civil asset forfeiture proceedings when, to do otherwise, would cause the claimant a "substantial hardship," and
(7) an award of damages and interest to claimants entitled to recover their seized property.

We want to give innocent owners a chance to get their property back. Despite what Justice may want, we want to show the innocent owners their money.

We feel this legislative reform is necessary because the Department of Justice hasn't done this on its own.

Let me say in conclusion, we are prepared to discuss revisions and modifications to this Bill with the Department of Justice and with anyone else. But we are not going to dress the Bill up with additional provisions the Justice Department wants that make matters worse.

Mr. HYDE. Are there any further opening statements? Mr. Coble.

Mr. COBLE. Mr. Chairman, I just want to extend a cordial welcome to our panelists today. I have no formal opening statement.

Mr. HYDE. I thank the gentleman. Ms. Lofgren. Mr. Meehan. Mr. Delahunt.

Mr. DELAHUNT. I just simply want to extend a very warm welcome to that preeminent defense attorney, and, I should add, a supporter of my candidacy for district attorney, as well as Congress, Lee Bailey. Lee, it's great to have you here.

Mr. HYDE. Thank you. Mr. Canady. Mr. Bryant.

Mr. BRYANT. Just very quickly, Mr. Chairman. I want to welcome my friend from Nashville, Mr. Bo Edwards, and all the other very distinguished members of this panel, but it's certainly good to have Bo up here, and I look forward to hearing his testimony. Thank you.

Mr. HYDE. Mr. Barr.

Mr. BARR. Thank you, Mr. Chairman. Mr. Chairman, I will be sort of in and out of the hearing this morning. We have some other matters in government reform. I will spend as much time as I can here, certainly. This is very important legislation for which I am a proud cosponsor on your bill, Mr. Chairman.

I do want to acknowledge the presence of Chief Moody from Marietta, which is in the Seventh District of Georgia with the International Association of Chiefs of Police. I certainly hope to be here to hear his testimony.

I commend you, Mr. Chairman, for putting together a bill as well as these hearings today to ensure that those deficiencies in our civil asset forfeiture laws, with which I am very familiar having been a former U.S. attorney, are rectified, but yet not at the expense of maintaining very strong asset forfeiture laws that are such an important tool for law enforcement at all levels of government. I look forward to these hearings and hopefully to enactment and signing into law this important legislation that I think does strike the proper balance between civil liberties and the needs of our law enforcement.

Mr. HYDE. Thank you very much, Mr. Barr. Mr. Hutchinson.

Mr. HUTCHINSON. Mr. Chairman, I want to greet the panel. I look forward to their testimony. In order to hear them, I will waive any further statement at this time.

Mr. HYDE. Thank you. Mr. Gekas, do you have an opening statement as you approach your place?

Mr. GEKAS. I join the chairman in welcoming the witnesses and look forward to a productive hearing.

Mr. HYDE. Thank you. That is one of your better statements. [Laughter.]

We begin our testimony with individuals who have had first hand experience with civil asset forfeiture. First, Billy Munnerlynn, the owner of a once successful air charter service, will talk about his struggle to recover one of his airplanes seized by the Drug Enforcement Administration. Next we will hear from E.E. "Bo" Edwards III, who represented Richard T. Lowe, M.D., in his suit to recover more than $2.8 million of his life savings that had been improperly, though innocently deposited in a bank account he had established to benefit a private academy in his hometown. We will then hear from F. Lee Bailey, who needs no introduction, who will testify about his representation of a Florida couple whose business has been effectively shut down by a civil asset forfeiture action.

Susan Davis, a certified public accountant from Fort Lauderdale, will next tell the committee how she as the administrator of the estate of George Gerhardt successfully sued the Government to beat the forfeiture of his house seized on the flimsiest of evidence.

Finally, we will hear from Gerald Lefcourt, president-elect of the National Association of Criminal Defense Lawyers, who represented a group of Hasidic Jews in a forfeiture action in New York. Mr. Lefcourt will be arriving later in the morning. I anticipate he will testify with the last panel.

Ladies and gentlemen, I request that you try and contain your oral presentations to 5 minutes. We won't be draconian in cutting you off, but we have several witnesses we would like to hear from. I assure you, the totality of your written statements will be inserted in the record in its entirety.

Mr. Munnerlynn.

STATEMENT OF WILLIAM MUNNERLYNN

Mr. MUNNERLYNN. Thank you, Chairman Hyde.

Mr. HYDE. Would you pull that mike a little closer to you?

Mr. MUNNERLYNN. Thank you, Chairman Hyde and members of the committee. Thanks for allowing me to tell my story here today. I operated my company's Lear jet operation for approximately 13 years in Las Vegas. My wife and I owned it. I was a pilot, airline transport pilot for over 25 years. We lived in Las Vegas 27 years. My wife and I were very active in our community activities. My wife earned a 5,000-hour certificate for volunteer work at the hospital. I have a lifetime membership with Angel Plane. I always made my airplanes, my jets, available to all the charities in Las Vegas. These facts are well known.

We worked very hard for what we had. It was devastating when they took my charter service and my way of life. We had many people come to Las Vegas. There were gamblers from foreign countries. A lot of times I couldn't even pronounce their names.

In this particular incident, my wife agreed to the charter. The charter was from Little Rock, AR, to California. I was ecstatic about the charter. Normally I wouldn't have been on that particu-

lar charter, but because it came from Little Rock, where my family lives, I handled it. The Lear jet was so expensive to operate, I never could fly it down and show it to my brothers and relatives. So I took this charter, not knowing this passenger from Adam.

When I got to the airport, I had to find someone to show me who the person was. I picked this person up, flew him to Ontario, CA, and dropped him off. Apparently, the DEA had been chasing this fellow for several weeks, I didn't know that. I am told the DEA waited until he got on my jet and before they would arrest him. I dropped him off and was ready to depart back to Las Vegas. I was unable to fuel the aircraft for about 45 minutes. I later found out the DEA had delayed the plane so it could not leave.

Anyway, I was arrested, taken to the Cucamonga Prison. This was the first time I had ever been in jail in my life, first time I had ever been arrested. After 71½ hours, I was released. They charged me under the RICO law, held me on $1 million bail, which I did not have the money. When I was released, I returned to Las Vegas to get my jet.

As I approached the airport, I saw the DEA agent in charge, and asked him what he was doing at the jet. I told him I had been released and this was all over. He told me, when I tried to recover my jet that I was trying to steal Government property, that the property belonged to the Government. With that, I called an attorney. That started 2½ years of litigation trying to get my Lear jet back.

While this Lear jet was in their possession, and I have documents to prove this, to add insult to injury because I hadn't broken any law, the DEA used my Lear jet. They flew it out of California to someplace in Texas. That is where I finally retrieved it at. The jet was quite noisy. I received citations because my jet broke the noise abatement laws while the DEA had the jet.

When I received the aircraft, the jet was trash. The maintenance was let go. The prosecuting attorney had tried to sell my jet before my first day in court, told the bank from the outset that the plane was wasting away. Yet I have heard statements before your committee, by the Government, that they maintained these aircrafts. That is simply not true. They said for $140,000 in repairs I could fly this Lear jet again. Not so.

I felt pretty confident that when I got to the civil trial this fellow, whoever he was, would testify on my behalf that he didn't know me. The truth was I didn't know him. We had no business affiliation whatsoever. I charged him the normal fee of $8,500 which is standard for that distance. I was appalled to find out from the district attorney that the person that was on my jet that day, was a known narcotic trafficker that was on parole, or probation, that he had broken all the laws in our land, was released for no reason, and that he had met with three associates while he was in Los Angeles.

After going to a civil trial, which is pretty tough, I used up most of my savings, I had to hire a criminal attorney in the early aspect. Once it went to civil, this first attorney couldn't handle it so I had to hire another attorney. It was a constant thing fighting them to keep my Lear jet and my property. I went to a jury trial, eight of my peers. They ruled in my favor twice, said I should get all my

money back. The Government had taken all my money and my Lear jet. The judge reversed this favorable verdict, and ordered me to another trial. I was afraid that I could not retrieve this witness, the passenger who I thought was going to be held incarcerated for the crimes he had committed. I believed I needed his help to get my Lear jet back.

After being convinced that I could not get this Lear jet back, at the last minute I settled with the Government in order to get the jet back. I can tell you that in Las Vegas, we fly many movie stars. I flew for the U.S. marshals. Back during the time the terrorists were active in this country, moving terrorists from one prison to another, very confidential flights. I can assure you that I was investigated more by them than I was by the DEA.

The DEA was bent on getting my Lear jet. It's one of the fastest Lear jets made in this country.

Mr. HYDE. Let me understand you. They let you go. They let the bad guys go, the drug dealers. The only thing they kept was your Lear jet?

Mr. MUNNERLYNN. No, sir. They kept the $3 million that I know nothing about.

Mr. HYDE. Well that wasn't yours?

Mr. MUNNERLYNN. No, sir.

Mr. HYDE. All right.

Mr. MUNNERLYNN. Anyway, I was forced to settle the thing. To even make it worse, later on I don't know why this all happened. You have to understand that in the years that I have been flying this airline, working as a transport pilot flying jets out of Salt Lake City, I flew for Majestic Airlines, for many airlines. All of a sudden I could not even get a job with these airlines. These airlines haul mail that's Federal. I was put on a list. I can't think of the name of it, but the DEA uses it to identify possible drug runners and gun runners and money launderers. I couldn't work anywhere. Basically, I was forced to sell the other prop airplanes that I had flying into the Grand Canyon. I had four prop planes, a Malibu a 210, and a training plane. I was forced to sell all these aircrafts to pay my attorney bills.

Now that all these things are gone, all the money is gone. I filed for bankruptcy. We lost our home. We lost all our aircraft. I lost my airline certificate. The Federal Government told me they would wait to see the outcome of the forfeiture hearings. It wouldn't be right for them to destroy my certificate, I spent over $200,000 getting that certificate. My pilot license and Mr. Bailey, I believe, can confirm this, cost well over $80,000. The Lear jet cost $500,000.

I can assure this committee I have never ever given thought to ever breaking the law, much less flying money launderers, drug people. I am far removed from that. I would never ever risk what I had for that.

Mr. HYDE. Thank you very much, Mr. Munnerlynn. We have a vote on, so we are going to have to temporarily recess. We'll run over and vote and come right back. So if you will stay in place, we'll be back.

[Recess.]

Mr. HYDE. The committee will come to order. We have a missing person case here. Mr. Edwards. Well, absent Mr. Edwards, Mr. Bailey, would you proceed?

STATEMENT OF F. LEE BAILEY, ESQ.

Mr. BAILEY. Thank you, Mr. Chairman. Thank you, members of the committee. The talk so far has been about remedies that were fashioned to try to stifle the drug trade and its progeny. I have a case where that unfortunately has lapped over into another much less critical area. I would like to relate what happened.

On May 9, of this year at 7:20 in the morning, a young couple aged 30 who were on a telemarketing business selling courses on how to find, buy, and sell at a profit distressed real estate, were awakened by a knock at the door. They saw more than 30 agents of various agencies with guns drawn and a battering ram at the ready, and were told that if the door didn't open immediately, it would be broken down.

The agents came in, they cleaned out the house of personal possessions, even taking the wedding ring of the wife which was 8 years old, while the business is 2 years old. They then went and closed down the operating company, all of this in greater Orlando. Put 380 employees on the street, many of them minorities. I arrived on the scene that day and tried to find out what was wrong. We had been working with the attorney general of Florida for 9 months, and it wasn't sufficient evidence to cause any restraint. I was told there was a sealed affidavit which obviously was hearsay, since the man involved had no personal knowledge, that we could not have access to it and that there wasn't any remedy.

We brought a motion for a hearing. The magistrate who issued these warrants, which seized every bank account, including bank accounts not subject to lawful seizure, trust funds that were due to be paid to those demanding refunds, those who had acquired the right to have financing provided for their real estate deals. The magistrate who signed the warrant decided to hear whether or not he had properly signed the warrant. For two days, we were forced to put on evidence without ever having seen what charges we were trying to meet.

The second day was yesterday. At the end of the 2 days, the magistrate says I'll give you another half day a month from now, but you haven't used your time productively. After promising us at least parts of the warrant, we have never seen it.

At the same time, the Government went to the Cayman Islands and restrained certain funds by filing a petition under a treaty. That treaty requires that within 7 days a lawsuit be filed, a forfeiture lawsuit in the United States. They have filed a lawsuit. They have placed it under seal. We don't know what's in it and we can't counter it. I don't think that that's what the treaty contemplated, was a sealed lawsuit which the party is not allowed to meet or to rebut.

Now, I was taught in law school, as were all of us here who went to law school, that this country is grounded upon two very important rights. One is notice, and the other is a right to a hearing. If you are charged with something that is going to cause you loss,

whether it's civil or criminal, you are entitled to know what you are accused of and have counsel if you can afford it and to be heard.

The Federal authorities are using this procedure to circumvent perfectly legitimate procedures such as bringing a restraining order. They are claiming that mail fraud and wire fraud was committed without letting us know how. Thus invoking 1956 and 1957, the money laundering statutes, and taking everything and closing the business.

When we'll get a notice and a hearing, they have suggested maybe within 2 years. These employees have no jobs. These people have no money. Their indebtedness will pile up. Their credit will go bad. They are ruined, and why? Because the United States of America sought successfully to attack people who have no involvement whatsoever with drugs, have never been involved with drugs, would be appalled at the thought of drugs, secretly with no notice and no hearing, they have won the case without ever going to bat.

Mr. Chairman, I suggest several things are fundamentally wrong. No. 1, I don't think a magistrate ought to sign a warrant in a nondrug case. I think it should be a district judge. I think the rule should be very stringent and the emergency apparent.

Second, I don't think the person who signs an ex parte warrant ought to be the person adjudicating whether or not he was correct in doing so. I think there needs to be some revision here. I think it needs to be made clear that whereas there may be emergencies that justify this kind of procedure in organized crime, it has nothing to do with combating disputes about the way a business is run. The Government takes it all without having to prove a single thing, and then says we'll get to you someday, and by their delay defeat due process as effectively as if they simply said you don't get a trial at all. Changes certainly are needed here.

Mr. HYDE. Thank you very much, Mr. Bailey.

Now, Mr. Edwards.

STATEMENT OF E.E. (BO) EDWARDS III, ESQ., ON BEHALF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Mr. EDWARDS. Chairman Hyde, Mr. Conyers, and members of the committee. It is gratifying to appear before this committee again. Perhaps the entire city should take notice of the bipartisan effort that has been made in the cause of civil forfeiture reform, and apply it in other areas. But it is wonderful to see that there are 30 sponsors on H.R. 1835 already. I hope that number will continue to grow.

I am here to tell you a little about the real world of civil forfeiture, an area in which I have practiced extensively for several years, and how things really work. Except for the amount involved in the case I am about to tell you about, there is much that is typical about the case of Dr. Richard Lowe.

Dr. Lowe is something of a throwback. He is a country doctor, a family physician in the small northwestern town of Haleyville, AL. When this began, this ordeal began, he was in his late 60's. He is now 72. He still practices medicine. He charges $5 for a routine office visit in 1997. He drives a used car, lives in a very mod-

est home. There are not too many doctors in America today that still work the way he does.

He can tell you to the penny when he was a 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 their savings when that bank collapsed. Because of that, I suppose, he has always hoarded cash. As long as he has practiced medicine, when he gets home in the evening, if he's got some cash in his pocket, he puts some of it in a box. When the box gets full, he puts it in the back of the closet and starts another box.

Well, this story began in 1988 when he consolidated his life savings in the First Bank of Roanoke, AL. The bank president of that bank was a long-time friend of his. Earlier in his life he had been a neighbor, when he practiced medicine near Roanoke. He had something in the neighborhood of $2.5 or $2.75 million, his life savings essentially, in First Bank. He had done that, Mr. Chairman, and this sort of lets the cat out of the bag—I was going to wait to tell you this last—but the reason he did that is because a small private school, kindergarten through 12th grade school, in his hometown was about to fail. Friends of his were on the board of the school. Two of his children had been educated there. In case you are curious, I'm sure the school was not multiracial when it was originally organized, but by the late 1980's, it was multiracial.

But at any rate, he created this account in 1988, put all his savings in it, and had all the interest off of this money go to the school. By the time this case began in June 1991, he had given the school $908,000 in change, and was still contributing to the school. He saved it from collapse.

Well, his wife in the fall of 1990 was nagging him to do something about those boxes in the back of their closet. So he said OK, you count it and we'll put it in the school's account. So his wife counted it and it was $316,911 in 1's, 5's, 10's, and 20's. Some of the bills were as much as 20 years old, a few 50's. He took this money, gave it to the bank president to put in, to add to his account. Now this is the first cash that had ever gone in this account. All the other money had been transferred by check from other banks when CD's mature.

The bank president knew that the doctor was obsessive about anonymity; he didn't want to be known as a rich doctor. He was afraid that people would sue him if they thought he was a rich doctor. So, the bank president, instead of depositing the money to the account, he just put the money in the bank vault. He gave the doctor a written receipt for the deposit, but he just put the money in the vault. Then with some of the money over a period of 6 weeks, the bank president went to neighboring banks in the vicinity of Roanoke AL, and bought $6,000, $7,000, $8,000 cashier checks, and then credited it to the doctor's account. That, as you all know can be termed "structuring." If you and I did that with even any amount over $10,000 in cash, that would be structuring.

Well, as you might guess, after a few weeks, some banks thought it was peculiar that the bank president from Roanoke was doing this and made a report. Some FBI agents came to call on the bank president. He told them exactly what he had done. He told them

that it was his idea, not the doctor's idea and that as he understood the law, he had done nothing wrong.

Well, the FBI and the local U.S. attorney didn't think so. So what did they do? Did they seize the $316,000 cash deposit? No. They seized the entire account, over $2.5 million. The bank president and his son, who was a vice president of the bank, were both indicted. The vice president had gotten one of these cashiers checks. The bank president later made a deal with the Government to plead guilty if they would drop the charge against his son.

Two years later, and the Government has all this money tied up now. I get in the case, and in 2 years after the June 1991 seizure, the doctor is indicted. I began researching the structuring laws and discovered, low and behold, it is not a crime for a bank to send cash to another domestic financial institution. That is outside the legal definition of structuring. In short, there was no structuring offense here. So I began to point out to the Government that not only did the doctor not know what the bank president had done, but there was no structuring violation, even though the bank president had pleaded guilty.

The Government should have withdrawn the criminal charge against the doctor. But instead, what they did, a week before trial, was to offer the doctor "pretrial diversion." So essentially the doctor had to do nothing except stay out of trouble for a year and the case was dismissed with prejudice, which is what happened.

Thinking that our problems are over, I called the assistant U.S. attorney in Montgomery handling the forfeiture case. The criminal charges had been in Birmingham. But no, the assistant U.S. attorney said the burden of proof is on you in the civil forfeiture case. We're going to proceed against the money, even though the criminal charges have effectively been dropped. But the Government suddenly had to come up with a new theory because it was plain, as I had pointed out to them, there was no structuring violation.

So they checked and found out that there had been no currency transaction report filed by the bank, a CTR, which was a violation by the bank, not by the doctor. But their theory became that the money should be forfeited because no CTR was filed. In 1994, the U.S. district judge in Montgomery entered a partial summary judgment ruling that there was nothing wrong whatsoever with the money that was in the account prior to this cash deposit being made, and ordered it returned to the doctor 3 years after its seizure. However, he denied the motion with respect to the cash deposit. We had a bench trial, a nonjury trial. The judge ruled against us. He ruled that the doctor must have exhorted the bank president, his words, not to file a CTR even though the government had not even noticed that a CTR hadn't been filed when the case was filed.

Well, we appealed to the 11th circuit. Last year, the 11th circuit reversed, holding that the proof from the record was clear above preponderance. The doctor did not know what the bank president was doing, something the bank president had said from the first day he was interviewed by the FBI. They reversed and as you probably know, it's very unusual for a court of appeals to reverse a case on the facts, but that's what they did in a nonpublished opinion, and ordered the money returned to the doctor. In the meantime,

the stress on this got to the doctor so seriously, that he had to be hospitalized for stress and high blood pressure.

Obviously, when Congress passed the currency reporting laws, you did not have in mind a doctor that was trying to save a small private school in his hometown. You had someone with some more notorious intent in mind. But nevertheless, I think you can see that when the laws are on the books that allow government officers to make seizures like this and they find money, they want it and they take it. That's what happens.

I think it is a valuable lesson to demonstrate the need for the burden of proof that is contained in the bill that has been introduced. If the burden of proof had been by clear and convincing evidence on the Government, I believe the district judge would have held in the doctor's favor a long time ago. The definition of innocent owner in the bill that is before you, is also very well thought out and well done. I noticed in the Government's response that they attacked that, especially with respect to allowing innocent owners who receive money by donation rather than by a bone fide commercial transaction. But that is in present law. The Government 2 years ago forfeited almost half a billion dollars using the provisions that this bill would not change. So I hope that you will resist the Justice Department's efforts to water that down.

Now if a transfer is a sham, if the person who receives the property can be shown to be a mere nominee, the Government can forfeit the property anyway. I have seen cases where that has happened. So I would submit that you don't need to water down the language in the bill in that respect.

There is such a strong tendency in the way that law enforcement agencies use civil forfeiture today, and the way they have been using it for a decade, to seize property when they find it and justify it later. That is especially true in cases where no criminal charges are brought against the owner of the property. Because of that, it is so important that you not follow suggestions from the Justice Department to water down this bill with respect to the requirement that the Government should still be required, as 19 U.S.C., section 1615 now requires, that the Government have probable cause at the initiation of the case.

In other words, in the doctor's example, when they began their lawsuit, they were claiming there had been a structuring. That was why the money was forfeitable. They decided that wouldn't work, that was not legally viable, so they changed their theories in midstream and began the theory of causing the bank to fail to file a CTR. Well, what the Government seeks is to seize money and then use the costly discovery provisions, the deposition provisions of civil procedure, to get evidence after the seizure to win their case, evidence that they didn't have or even know about when it began. I hope you will hold the line and not allow those provisions to be watered down.

H.R. 1835 is a wonderful bill. I urge you to pass it as it's written. I thank you for allowing me to be here.

[The prepared statement of Mr. Edwards follows:]

PREPARED STATEMENT OF E.E. (BO), EDWARDS III, ON BEHALF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Mr. Chairman, Mr. Conyers, Other Distinguished Members of the Committee, I am pleased to speak to you again on behalf of all the innocent property owners of our nation in urging favorable action of this important bi-partisan Civil Forfeiture Reform Act. I am here to urge you to hold the line and resist attempts by the Department of Justice ant the Department of Treasury to render the significant and much-needed reform provisions in this bill a mirage, an illusion promising protection to owners of private property, but not delivering. And I submit to you that all of truly meaningful reforms contained in this bill are sorely needed not just to afford a proper measure of protection to the concept of private ownership of property, which has contributed so much to the growth and strength of our nation throughout history, but also to help restore faith and respect in the government itself, and in its law enforcement institutions. To be sure, long-time abuse of innocent citizens and their rights to private property ownership through the forfeiture laws has engendered grave mistrust and disrespect for our system of justice. This should be of vital concern to us all.

At your hearing last July, you also heard from innocent victims of the broad-sweeping and unjust forfeiture statutes, including Willie Jones, a former client of mine, who was a victim of a so-called "interdiction" program at the Nashville International Airport. He simply fit the government's "profile." That case is an example of the abusive application of forfeiture laws to citizens traveling through our airports and highways.

Today, I want to tell you of another prime example of asset forfeiture injustice, this time involving the abuse of Treasury's "currency transaction violation-forfeiture statute." 18 U.S.C. sec. 981. The victim is an elderly family doctor in a small town in Northwest Alabama, who almost lost his life savings due to the pressure placed on later enforcement to seize and forfeit property, and because current law affords too little protection to innocent property owners.

THE CASE OF UNITED STATES V. ACCOUNT NO. 50–2830–2, LOCATED AT FIRST BANK, ROANOKE, ALABAMA (857 F. SUPP. 1534 (M.D. ALA 1994)) (UNPUBLISHED OPINION, NO. 95–6262 (11TH CIR. 1996))

1. Events Preceding Filing of Complaint

Richard Lowe is an elderly medical doctor (now age 70) who graduated from medical school in 1955 and has mostly practiced medicine in rural Alabama towns since then. For almost 20 years he has maintained a family practice in the remote Northwest Alabama town of Haleyville. His dedication to his medical practice for the sake of healing is underscored by his office rates. In 1994 he still charged $5.00 for a routine office visit. The administrator of the small hospital in Haleyville described Dr. Lowe's practice this way: "[He] typically works seven days a week and tends to see a very high volume of patients at his clinic. He has many elderly and indigent patients. In fact, many of his patients would undoubtedly not receive regular physician services but Dr. Lowe. . . . [F]or many years he delivered many babies, probably more during that time than any other doctor in the county, and many of those deliveries were without compensation. Overall, I would estimate that Dr. Lowe has performed at least three or four million dollars' worth of charity medical services since he came to Haleyville."

As his wife describes it, about fifteen years ago Dr. Lowe contracted cancer and was given less than one year to live. After several surgeries, be survived. His response was to return to work "seven days a week, virtually fifty-two weeks a year." A second response was to examine ways in which he could do something for his hometown, Lafayette, Alabama.

In late 1987 Dr. Lowe settled on a plan. He learned from his lifelong friend in Lafayette, Alexander Walton, that Chambers Academy, a kindergarten through twelfth grade private school in Lafayette, was in serious financial trouble. Dr. Lowe had long been interested in education. His mother had been a teacher, and two of his stepchildren had attended Chambers Academy before he moved to Haleyville. He decided to do what he could to save the school.

In February 1988 he contacted Joseph Lett, an old friend and former neighbor who was, in 1988, president of First Bank, a bank with offices in Roanoke and Wadley, Alabama, both towns only a short distance from Lafayette. Dr. Lowe had Mr. Lett create an account in the Name of CCEF (Chambers County Educational Foundation, the non-profit organization which owned and operated the school), and he placed the proceeds of several certificates of deposit (CD's) in it. His initial deposit was roughly $1.3 million, but by 1990 Dr. Lowe had placed approximately $2.5 million on deposit in the CCEF account at First Bank. From the start, he had all

interest earned by the account paid monthly to Chambers Academy. And from the start, Dr. Lowe expressed his wish that his name not be placed on the account in any way because he wished to remain anonymous.

From the account's inception to its seizure in June 1991, Dr. Lowe was responsible for $452,500 in interest being paid to Chambers Academy. In addition, in late 1990 and early 1991, Dr. Lowe began an effort to help the school retire its debt and, so the doctor hoped, become self-sustaining. With that aim in mind, Dr. Lowe contributed $456,000 of the principal from the account to the school in 1991. Thus, from February 1988 until June 1991, the school received a total of $908,539 in principal and interest. School officials agree that the school would not have survived without Dr. Lowe's benevolence.

Dr. Lowe claimed no charitable contribution deductions on his income tax returns from 1988 through 1991. Tax benefits had nothing to do with his motivation. His purpose is clearly revealed in a letter which Dr. Lowe wrote to the CCEF Board in April 1990, many months before the events central to this case:

> Without Chambers Academy being in the county, I fear that the future would look very bleak for Lafayette and the surrounding area. The children are the most important commodity that the community has, and it is so important that we do all we can to help them get off to a good start in life. . . .
>
> * * * * *
>
> Most everyone I think would like to do something in life to help others, and I would like to be a part of what you are doing to help our children and our people.

2. The Currency Transaction

When Dr. Lowe was a child during the Greet Depression, a bank in Lafayette failed, and his parents lost their life savings. As a result, Dr. Lowe always harbored a mistrust of banks. From his very first job and throughout his years of medical practice, he regularly saved cash, keeping currency in boxes in his home. In 1992, Mrs. Lowe became concerned about the accumulation of cash in their home, due to the possibility of theft or fire. Although she did not know how much cash was stored in the boxes, she knew it was substantial. She began to urge her husband to move it to a safe place. Her prodding coincided with Dr. Lowe's efforts to extinguish the school's debt. So Dr. Lowe decided to deposit the cash in the CCEF account at First Bank.

At her husbands request, Mrs. Lowe counted the money over a period of several days. Counting was a slow process because most of the currency was in denominations of $1, $5, and $10. Eventually, Mrs. Lowe came up with a total of $315,291. Meanwhile, Dr. Lowe called Joseph Lett and told him he had some cash to add to the account, first estimating the amount to be about $60,000. In a later call Dr. Lowe told Mr. Lett it was a hundred thousand or more. After the counting, the Lowes realized it was actually over $300,000.

Dr. Lowe invited Joseph Lett and his wife to visit them in Haleyville and pick up the cash deposit, but Mr. Lett's schedule prevented the trip. Finally, Dr. Lowe called Mr. Lett to say that he (Dr. Lowe) and his wife were going to be driving to Lafayette and they would bring the money to First Bank. On November 14, 1990, Dr. Lowe, his wife and daughter loaded the trunk of their car with the boxes of money and started out for Lafayette and Roanoke (about 20 miles further down the road). They developed car trouble and were after dark getting to Roanoke. Since the bank was closed, they obtained directions and drove to Joseph Letts home, arriving about 8:00 p.m. As the district court found, Dr. Lowe transferred the cash to Mr. Lett for deposit to the CCEF account, and Mr. Lett issued Dr. Lowe a typewritten receipt for the deposit. The receipt stated: November 14, 1990. Received of R.T. Lowe $315,291.00 for deposit for the benefit of Chambers County Education Foundation. /s/ Joseph C. Lett, First Bank.

The Lowes then borrowed a car from the Letts and drove back to Haleyville that night.

3. First Bank's Handling of the Funds

This cash transaction was the only time Dr. Lowe ever deposited currency in any First Bank amount. All other deposits were by bank or cashier's check. When he transferred the currency to First Bank president Joseph Lett on November 14, 1990, he fully "expected that it would be deposited in the CCEF account."

Joseph Lett sat up with the money for most of the night after the Lowes departed. He considered that the currency was the property of First Bank once he received

it and issued the deposit receipt, and he was responsible for it. The next morning when the time lock opened the vault, he put the currency in the bank vault.

Over the ensuing six weeks or so, Mr. Lett took $205,300 of the total $316,911, went to area banks, and purchased various bank and cashier's checks payable to CCEF in amounts of less than $10,000. He then credited the checks to the CCEF account. The balance of the cash deposit was credited to the CCEF account through internal First Bank transactions and one $40,000 transaction when another bank was running short of currency.

Before this forfeiture action was commenced and throughout its history. Joseph Lett repeatedly and consistently insisted that he decided, independently ant without Richard Lowe's counsel or even his knowledge, to undertake the piecemeal internal and interbank transactions rather than crediting the CCEF account with the entire deposit at once. His first statement was to federal agents on March 6, 1991, roughly three months before the complaint was filed. Mr. Lett told the agents that Dr. Lowe "never directed him to purchase cashiers checks with the cash he gave him." Mr. Lett also told the agents that "he [Lett] made the decision to try to buy cashiers checks in order to retain Lowe's anonymity."

In his deposition, Mr. Lett explained when he decided to buy cashiers checks:

> Q. Did you say anything to Richard Lowe about what you planned to do with the money in terms of . . . going any place and . . . changing money into cashiers checks?
>
> A. No.
>
> Q. When did you decide to do that?
>
> A. Either sometime during the night when I was babysitting the money or the next day.
>
> Q. Did you tell Dr. Lowe what you were doing during the ensuing weeks while you were doing it?
>
> A. No. I didn't talk to him during those weeks.

Mr. Lett explained that he was trying to maintain Dr. Lowe's confidentiality. In a supplemental affidavit he elaborated:

> 7. After I received the currency and the Lowes had returned to Haleyville, I decided that I would credit the funds to the CCEF account piecemeal, through a series of small transactions within First Bank and with other banks and that First Bank would not file a CTR on the full amount of currency received. In determining to use this procedure, I thought at the time that no statute or regulation would be violated and no CTR would be required. I did not discuss this decision with Dr. Lowe or anyone else. I was not pressured, threatened, or coerced to follow this procedure and not file a CTR by Dr. Lowe or anyone. I decided on this procedure voluntarily and independently.
>
> 8. At the time I determined that the bank would follow this procedure of crediting the CCEF account in small increments through a intra-bank and inter-bank transactions, and thereby not be required to file a CTR, I considered Dr. Lowe's desire to remain anonymous. He had emphasized that desire to me from the time in late 1987 or early 1988 when he first discussed establishing a fund to aid the school. I believe then and still believe that Dr. Lowe was sincere in his wish for anonymity and that he had no ulterior motive other than a desire for privacy. I had asked him about any tax problem relating to the money. He had said there was none, and I believed him. I had known Dr. Lowe for many years, and he had been a good customer at whatever bank I was with for years. I simply wanted to do what I could to maintain his anonymity. At the time I convinced myself that I could handled the money as I did and in so doing, there would be no requirement of filing a CTR. I recognize now that a CTR should have been filed for the initial transaction when I received the currency for deposit on November 14, 1990. At the time, however no one else caused First Bank not to file a CTR. The procedure I used simply resulted in my belief that a CTR was not necessary.

Mr. Lett explained that his concern was that several employees in the bank would have seen the documents relating to the transaction, and despite cautioning employees about confidentiality, in a small town, someone would have discussed it. "[C]ertainly a transaction of that size, yes, sir, it would have gotten out at the beauty shop or somewhere else."

4. The Government's Charge of Structuring

On June 20, 1991, the government filed its complaint for forfeiture *in rem,* and on the next day, armed with a Warrant of Seizure, seized the entire CCEF account, then containing $2,381,356.92. The complaint alleged a theory of forfeiture based upon the structuring of currency transactions in violation of 31 U.S.C. § 5324(a)(3). It alleged that "at least $308,300.00" in currency was given by Dr. Lowe to Joseph Lett for deposit into the CCEF account. And it alleged that Joseph Lett, as First Bank President, and his son, Michael Lett, as First Bank Vice President, purchased 38 checks of less than $10,000 from various banks using the funds from Dr. Lowe's deposit. This, the government contended, constituted structuring.

The government further pursued a theory that there was "probable cause to believe that *all* monies in [the defendant] Account were 'structured' to avoid financial reporting requirements" because over $300,000 in "structured" cash had been placed is the account. Thus, the government sought forfeiture of the entire $2.38 million account In granting partial summary judgment, the district court rejected this latter theory.

3. Criminal Charges

In August 1991 a stay was orderer by the district court. A year and a half later, in December 1992, Joseph Lett and his son Michael were indicted on structuring charges. Mr. Lett entered a guilty plea and was placed on two years probation.

In August 1993 Dr. Lowe was also indicted but the government opted not to go to trial, and in November 1993 notified the court that it had entered into a Pre-Trial diversion Agreement with Dr. Lowe. One year later, the indictment was dismissed with prejudice on the government's motion. (Order of Dismissal. *United States* v. *Lowe,* No. 93–H–217-J (N.D. Ala, Nov. 21, 1994).)

6. Partial Summary Judgment

Dr. Lowe moved for judgment on the pleadings and for summary judgment in April 1994. He contended (1) that the facts alleged in the complaint did not state a basis for any forfeiture because, by definition, transactions between banks such as described in the complaint are exempt front the Currency Transaction Report [CTR] requirement, 31 C.F.R. § 103.22(b)(1)(ii), and Dr. Lowe's one-time transfer of his cash to a bank official for deposit was perfectly legal and gave rise to a reporting duty on the bank, not the depositor. 31 C.F.R. § 103.22; (2) that no structuring occurred as a matter of law, and, therefore, no forfeiture would lie under 18 U.S.C. § 981; and (3) that the funds in the defendant account not related to a cash transaction were not forfeitable under any legal theory.

On June 23, 1994, the district court granted summary judgment as to all funds in the CCEF account with the exception of $316,911 plus accrued interest (*United States* v. *Account No. 50–2830–2,* 857 F.Supp. 1534 (M.D. Ala. 1994). The court found that "there is no evidence in the present case that the money was obtained through illegal means," *Id.* at 1540, and "because structuring is the only legal violation upon which forfeiture of the entire account was sought," the bulk of the account, which was not part of any alleged structuring, could not be forfeited. *Id.*

The court denied summary judgment as to the $316,911 not based on any conclusion that the actions of Joseph Lett in buying cashier checks constituted illegal structuring as alleged in the complaint, but based on a new theory raised by the court. The court reasoned that Dr. Lowe's concern about anonymity and his queries to Mr. Lett about the bank's reporting requirements constituted "sufficient facts from which a jury could find that because of his desire to remain anonymous, Dr. Lowe influenced Mr. Lett not to file a CTR on the $316,911 cash deposit and in doing so, possibly violated § 5324(a)(1) . . . ." *Id.* at 1539.

The district court acknowledged, but never directly addressed Dr. Lowe's contention that Mr. Lett's purchasing cashier's checks were interbank transactions not required CTR's. *Id.* at 1538. The court did recognize, however, that Dr. Lowe's transfer of the $316,911 in cash was a deposit "trigger[ing] a duty for the bank to file a CTR." *Id.* Implicitly, therefore, the court necessarily concluded that the subsequent handling of the currency was a combination of internal First Bank transactions and interbank transactions, neither of which gave rise to a duty to file a CTR. 31 C.F.R. § 103.22(b)(1)(ii). Had the court's reasoning been otherwise, for example, it would have granted summary judgment with respect to an additional $65,000 because two transaction using the cash from Dr. Lowe involved $40,000 and $25,000 respectively, and thus by definition do not constitute structuring.

7. The Bench Trial

The case visas tried without a jury on September 19, 1994. The evidence generally consisted of relevant documents plus depositions and affidavits of Dr. Lowe, Mr.

Lett, school officials, ant other witnesses. The court suggested, and the government agreed, that the government was contending that the cash deposit "was actually a contraband."

> The Court: What you are saying in effect is the currency is the contraband itself.
> AUSA Harmon: It's the contraband per se at this point

The government also contended at trial that Dr. Lowe had an "ulterior motive" in regard to the currency transaction, namely to evade the payment of taxes. Dr. Lowe contented that his motivation regarding the First Bank account in all respects, including his cash deposit, was purely eleemosynary—*i.e.*, to benefit Chambers Academy and its students.

To establish that the tax issue was entirely fallacious, Dr. Lowe called Grant McDonald, a Birmingham C.P.A., who represented Dr. Lowe when the I.R.S. audited his tax returns for the period 1987 through 1991. McDonald explained that a closing agreement had been reached between Dr. Lowe and the I.R.S. for that period, and the I.R.S. had agreed that there was a *net over-reporting* of his professional income by Dr. Lowe for that five years of "about 23 thousand dollars." Thus, there was no "valid claim that Dr. Lowe owed any tax on the $316,911 for the years '87 through '91." I.R.S. group manager David Warren also conceded in his testimony that the I.R.S. does not contend that any tax was owed on the $316,911 for '87 through '91.

Mr. McDonald described Dr. Lowe's tax circumstances at the time he made the cash deposit in November 1990. In 1989 the I.R.S. had completed an audit of Dr. Lowe's returns for 1983 through 1986. Dr. Lowe had met with I.R.S. officials without any professional assistance, either legal or accounting. According to I.R.S. work papers, the I.R.S. found that Dr. Lowe was not knowledgeable on tax matter and kept poor records. Using its own estimation, the I.R.S. determined that Dr. Lowe owed an additional $57,000 in taxes for the four years. In addition, the I.R.S. assessed $59,000 in penalties and interest. Dr. Lowe paid the full amount immediately without question. Mr. McDonald expressed the opinion that much of the penalty could have been avoided with proper professional assistance. For example, in the 1987 through 1991 audit with Mr. McDonald, no penalty was assessed for 1988, 1989, 1990 or 1991.

In 1989 an accountant, Alexander Walton, Jr. of Lafayette, prepared both Dr. Lowe's tax return and that for Chambers Academy (or CCEF). The accountant reported all interest paid on the defendant account by First Bank as income to the school and included it on the school's return. He did not include the income on Dr. Lowe's return or claim any charitable contribution deduction. The 1989 tax return was the last one filed prior to the cash deposit at First Bank. Thus, with the accountant's treatment of the interest and the I.R.S. paid in full for its audit a year earlier, there was no reason in November 1990 for Dr. Lowe to believe the I.R.S. would ever claim that any tax was due on the $316,911 which Dr. Lowe deposited.

To further discredit the government's effort to find some tax motive, Mr. McDonald explained that, in early 1991 when Dr. Lowe was making contributions to Chambers Academy of $296,000 in principal from the First Bank account (plus the interest payments) in order to retire the school's debt, the school asked for an additional contribution to be used to pay the income tax which the school anticipated owing. Dr. Lowe responded by sending the school an additional $160,000. The school then paid $125,000 of that to the I.R.S. as an estimated tax payment. Later, the I.R.S. notified the school that it did not owe the tax, the $125,000 was refunded, but the school then used it internally. Dr. Lowe never received any of it back.

The claimant contended that the government could not properly rely on any tax-related issue to establish probable cause that the defendant account was subject to forfeiture. In this respect, Mr. McDonald testified that, from his review of I.R.S. work papers and statements to him by I.R.S. agents, the U.S. Attorney's Office in Montgomery had no information regarding Dr. Lowe's tax states until July 1991 (a month or so after this case was commenced), and the I.R.S. knew nothing of tile pending forfeiture case until then. Counsel for the government conceded that evidence concerning tax matter "has no effect at all on the probable cause question."

8. The District Court's Opinion

On February 28, 1995, the district court issued a memorandum opinion and order holding that (1) The government had probable cause to seize "the defendant currency" because the "claimant requested to remain anonymous and First Bank failed to file the requisite CTR,"; (2) the innocent owner defense of 18 U.S.C. §981 (a)(2) was not applicable to the claimant because "Dr. Lowe was cognizant of the CTR requirement" and by inference, "the failure to file the required CTR was induced by Claimant's exhortation,"; and (3) the Excessive Fines Clause of the Eighth Amend-

ment does not apply to a forfeiture under § 981 when a CTR is not filed "so long as the amount forfeited is no more than the defendant currency." According, the court held $316,911, plus accrued interest thereon, forfeit.

9. Where The District Court Went Wrong

The government did not establish probable cause for to forfeiture. The record is insufficient in three significant ways. First, the government's complaint alleged but one basis for forfeiture under § 981, *i.e.,* that the defendant property was involved in structuring violations by First Bank president Joseph Lett and his son, bank vice president Michael Lett. But the defendant $316,911 was deposited in a single, lump sum deposit which did not violate federal law, and the Treasury regulations applicable here expressly exempt transactions between domestic banks from reporting requirements. Thus, no CTR was required for the several less than $10,000 cashier's checks obtained by the Letts, and no structuring occurred.

Second, the district court did not find probable cause based on structuring, but on the bank's failure to file a CTR, a basis for forfeiture not alleged by the government in its complaint. Additionally, the government was not aware of the evidence relating to the bank's failure to file until after the case had been instituted. 19 U.S.C. § 1615 requires probable cause to be shown for the institution of the action which many courts, including district courts in this circuit, have held to limit probable cause to facts known as of the filing of the complaint. Thus, the district court's finding of probable cause does not satisfy the standard of § 1615.

Third, the district court based its finding of probable cause upon the claimant's having requested anonymity in establishing the defendant account to aide Chambers Academy, a small private school in his hometown. The court found that the banker was influenced by that request. But the duty to file a CTR is on the bank, not the depositor. The cash deposit is not contraband, and the offense is the withholding of the information by the institution bearing the duty to report, not the possession of currency or legally depositing it. Claimant's desire for anonymity was made long before the cash deposit in reference to his eleemosynary activities. There is nothing actionable about such a request. A request for anonymity, or an inquiry about requirements, cannot be said to "cause" a bank to fail a CTR. Causation includes an element of foreseeability, and Dr. Lowe could not reasonably foresee that Mr. Lett would decide, after the cash deposit, not to file a CTR.

The forfeiture should also have been dismissed because the innocent owner defense of § 981(a)(2) is applicable. Dr. Lowe did not know that the bank would not file a CTR. The record is clear that Mr. Lett did not tell him what the bank was doing—or omitting. Indeed, Lett did not decide to omit the CTR until after the deposit was made. And the district court did not find that Dr. Lowe knew, but instead used a factual basis for rejecting the defense not provided in § 981.

The Excessive Fines Clause of the Eighth Amendment also bars a forfeiture in this case. Although the district court did not apply this court's holding in *United States* v. *One Single Family Residence Located at 18755 North Bay Road,* 13 F.3d 1493 (11th Cir. 1994), that case is controlling. It requires a proportionality analysis which strongly favors the claimants position. The claimant did nothing illegal. He used untainted funds for a highly laudatory purpose, saving a small school from financial ruin. Although the claimant was indicted, the government placed him on pretrial diversion, and the charge has now been dismissed. Cash was deposited only once, and although the bank did not file a CTR, the purpose of 31 U.S.C. § 5313 and 5324 is to identify money laundering activities of organized crime and drug lords, not rural doctors using life savings to save a small school. The cash itself was involved only indirectly, in that it triggered a reporting duty on the bank.

10. The Court of Appeals' Opinion

On July 31, 1996, in an unpublished opinion, the United States Court of Appeals for the Eleventh Circuit reversed to forfeiture judgment and remanded the case for the entry of judgment in favor of Dr. Richard Lowe. The court held that the proof in the case had not demonstrated "any substantial connection between anything [Dr.] Lowe knew and the bank's failure to file a CTR on the cash deposit." In what is an excellent example of how a standard of proof higher than a preponderance affords a needed additional layer of protection to innocent property owners, the Court of Appeals stated: "[W]e are left with the definite and firm conviction that a mistake was committed when the district court found that a *preponderance* of the evidence did not support the conclusion that Lowe lacked knowledge that [bank president] Lett would break up the cash deposit in an attempt to avoid federal currency reporting requirements." The court concluded that the proof established that Dr. Lowe did not have actual knowledge that the bank would not file a CTR, and therefore, Dr. Lowe was an "innocent owner" under 18 U.S.C. § 981(a)(2).

In the end, Dr. Lowe regained all of his savings, but the battle for the restoration of his assets ran from June 1991 until the last of the funds were returned earlier this year (February 1997). This case offers many valuable lessons regarding the reform of forfeiture laws.

TEACHINGS FROM THE LOWE CASE

1. The Burden of Proof

From the standpoint of a private citizen undertaking a project which is not only innocent in itself, but is worthy of considerable praise, it is shocking to learn that the government has the authority and the desire to seize and forfeit your assets. But it is more than shocking—it is contemptible—that such a citizen stands to lose the case on the merit's once all the facts are revealed. The district court was able to find a basis in these laudable facts to grant judgment, albeit erroneously, for the government. The citizen then suffers great expense and untold anxiety (at one point in the pendency of his case, Dr. Lowe was hospitalized due to the stress of the litigation) in having to further endure an appeal.

Almost certainly, with the facts as they were in this case, Dr. Lowe would have prevailed in district court had the government the burden of proof by clear and convincing evidence. Any less burden will inevitably result in factually close cases being decided against the property owner.

Ultimately the choice must be made between affording meaningful protection to the innocent property owner against wrongful takings by the government and the possibility that the government will not succeed in some cases it has heretofore won. It is submitted that such a price is small indeed in a free society which should strive to foster a belief among its people that their government will be fair and just. The present forfeiture laws are sending a powerful message to the contrary to all who look and listen.

2. Seize Now, Justify Later

Current law allows—indeed, promotes—law enforcement agencies to seize property without cause, and then undertake an investigation, including the use of discovery and depositions from claimants, to locate evidence which can be used to forfeit the property. So long as the burden of proof remains on the property owner, such a greedy, strong-armed approach is encouraged. A sizable portion of civil forfeitures occur against property owners who are never charged with any criminal offense. In Dr. Lowe's case, he was charged, but then the charge was effectively withdrawn.

Revising the burden of proof is critically important in this reform bill, but it alone will not cure the problem of seizures without probable cause, essentially because law enforcement officers want the property. Institutional greed is inevitable when the law allows the initial seizure with so few safeguards.

19 U.S.C. § 1615, which applies to all drug (§ 881) and currency violation (§ 981) forfeitures, provides that "probable cause shall be first shown *for the institution* of such suit or action. . . ." Some courts have read this language to mean what it says. That is, the government must demonstrate on the day the forfeiture case is filed in district court that it possessed proof establishing probable cause to believe the property in question is subject to forfeiture. (*See, e.g., United States* v. *$91,960.00,* 897 F.2d 1457, 1462 (8th Cir. 1990); *United States* v. *Monkey,* 725 F.2d 1007, 1011 (5th Cir. 1984)). The government should not be allowed to use depositions and discovery to make a case when it had no case at the outset.

In Dr. Lowe's case, the investigating agents and the prosecuting attorney did not learn that no CTR had been filed until months after the case was began. When they became convinced that their theory of "structuring" violations was legally without merit, they simply changed theories in mid-stream.

In addition, some courts have correctly asserted that the Federal Rules of Evidence is applicable to the governments effort to establish probable cause for the case to go forward (and therefore, in cases of personal property, for the government to maintain possession of the property). I urge you to resist any attempt to weaken this bill by adding an exemption from the Rules of Evidence. No exemption is now in the law. That should not change.

It is reasonable to require the government to have an actual case based on competent evidence showing probable cause before it is justified in holding private property under its control while it undertakes to forfeit it. To allow otherwise is to encourage seizure-spawned witch hunts such as both the Willie Jones case and the case of Dr. Richard Lowe are shameful examples.

3. The Definition of Innocent Owner

The provisions of the reform bill contain a carefully crafted definition of "innocent owner" which has been long needed to resolve the disparate interpretations of innocent owner among courts across the country. The proposed definition is well thought out and simple to apply. We urge the committee to hold firm to this definition and resist any efforts either to weaken it or to load it down with complexity.

One of the serious problems with present forfeiture is that its procedures are so complex and arcane that many lawyers are intimidated by them. It might even be suggested that some courts are uneasy with its unique process. The reform bill makes significant strides at providing procedures and legal standards which are simpler to apply and have more in common with standard civil cases. This goal should be kept in mind throughout the making up of the bill.

Thank you, Mr. Chairman, for hearing me. And thank you to all the members from both sides of the aisle who have joined in this effort to bring fairness and justice to forfeiture.

Mr. HYDE. Thank you very much, Mr. Edwards.

Ms. Davis.

STATEMENT OF SUSAN DAVIS, C.P.A., McMILLAN, UNRUH & DAVIS, P.A., FORT LAUDERDALE, FL

Ms. DAVIS. Chairman Hyde, Ranking Member Conyers, and other distinguished members of the committee, my name is Susan Davis. I am a partner in a small C.P.A. firm in Fort Lauderdale, FL. I thank you for inviting me to testify today. I have never done this before and I am not an attorney or used to public speaking, but I appreciate being invited here to tell you about my experience with these unfair asset forfeiture laws.

I am here because in June 1990, I was named personal representative for the estate of one of our clients who had died of cancer. The estate had a value of approximately $900,000, with the main assets being securities and two pieces of real estate, a house in New York State, and a house in Fort Lauderdale.

Several months later, in the fall of 1990, I received a call from one of the beneficiaries who had been staying at the house. He had returned home to find that the house had been seized by Federal marshals. Upon inquiry, we were informed that some confidential informant who was in prison, had stated that the decedent had told him that he had received $10,000 for allowing a boat to unload drugs at the Fort Lauderdale property in 1988. In short, an unnamed person in prison told an unnamed government agent that an unnamed vessel used by unnamed persons to offload cocaine at the home of the decedent, George Gerhardt, on an unspecified date in December 1988. It was also claimed he had received $10,000 from an unnamed person for the use of his property. Based on these facts alone, the house had been seized.

We were at that time referred to Marc Gold, a local attorney who is now a judge, who had prior experience with this type of case. He explained to us that we could choose to forfeit the house or to file and pursue a case against the Government. But he explained that under the unusual laws in this area of asset forfeiture, the cards had always been stacked in favor of the Government, no matter how innocent the claimant. Accordingly, he counseled that if we chose to file and pursue a case, we and not the Government, would have to prove that the Government's charge was wrong. He warned that our chances of doing this would be slim.

Since none of us could see just abandoning a $300,000 house, when we felt the Government had no good grounds whatsoever for taking it, we proceeded with the case. We found ourselves being required to prove a negative. That the now deceased Mr. Gerhardt had not known anything about drugs being offloaded at his property. The Government on the other hand, did not have to prove anything. Not that their unnamed informant had in fact been told what he said he had been told, nor that any drugs had ever been off-loaded on the property.

The case took close to 3 years before it went to court. During this time, the Government possessed the property and collected rent on the property. When the case finally went to court, after a 1-day nonjury trial, U.S. District Court Judge James C. Paine agreed that there was no reason to think that Mr. Gerhardt knew of any crime being committed on his property.

More specifically, as discovery went forward, we found the Government refusing to provide any relevant information to us until they were finally placed under threat of judicial sanctions by the court. It did not matter to the Government that Mr. Gerhardt was dead and obviously could not defend himself. It did not matter that he was out of the country on vacation during a time when an acquaintance, unbeknownst to him, illegally used the property. It did not matter that every testifying witness listed by the Government said that Mr. Gerhardt in fact had no knowledge of the incident. In fact, that any information regarding it was specifically and deliberately kept from him. Finally, it did not matter that all of his heirs were indisputably innocent and without any knowledge of the wrongdoing.

All this wrongful havoc wreaked by the Government was on what basis? At the trial, the Government did not present one speck of hard evidence in support of the allegations contained in the complaint. Yet as the judge said on the record after our long awaited 1-day nonjury trial, the law is slanted very heavy in favor of the Government in forfeiture cases. It seems to me that the people against whom their property is being forfeited are at a tremendous disadvantage.

I wonder about the constitutionality of these laws. They have been held to be constitutional by appellate courts. I must say I find it very hard to find for the Government in this case on the character of the evidence that has been put before us here. On the other hand, the statute is so strong for the Government, it is hard not to find for them as well.

Fortunately, Judge Paine found the Government seized the property of the estate on such a lack of cause that he could rule in our favor, even under the current law as so tremendously disadvantaging to the property owner and of doubtful constitutionality.

Had Mr. Gerhardt been alive, he would have been evicted from his house, as his beneficiary later was. He would have been forced to face costs of new housing and litigation just in order to fight the battle against the Government to get his home back unless he simply gave up and gave the house to the Government. Few people can afford to do this. I have discovered that very few actually have done it.

In this case, we were lucky enough to have the cash available backed by the estate to engage in the necessary long unfair fight against the Government's unsubstantiated claim. This fight eventually cost the estate more than $40,000 in legal fees and costs. In addition, we had to hold back distributions from the beneficiaries to pay other costs associated with the trial, pay several years back real estate taxes plus penalties and interest, as the Government had not paid any of these. In addition, we had to pay insurance for the time the Government held the house as the Government would not insure it.

Finally, when we won our case in court and the house was returned to the estate, the person to whom the Government had rented the house for $2,000 a month refused to leave and refused to pay us any rent. We then had to hire another attorney and use additional time and money to have the Government's wrongful worthless tenant evicted.

I feel we were very fortunate to get the property back in this case and fortunate to have the means to withstand the fight to get it back. But it does not seem right to me that the Government should have the right to confiscate an innocent person's property based on nothing more than the hearsay claim of an unnamed person in prison on criminal charges. Sure in the knowledge that laws, time and money advantages are almost always so in the Government's favor, that most people will be unable to even start contesting the taking, let alone do it successfully.

I am not a lawyer, but after reading this bill, I can see that the reform bill would make several important improvements to these laws. It would put the burden of proof on the Government, where I think it should be. It would make the Government prove its burden by a clear and convincing legal standard. The bill says it would ensure an innocent owner's interest in property can not be forfeited by the Government under any forfeiture law. It also states there would be important court supervision of the property during a contest with the Government. That a property owner could not be left homeless or rendered unable to make a living with his or her business during the time the Government has seized the property.

Mr. HYDE. Ms. Davis, your time has expired. Could you wind it up by any chance?

Ms. DAVIS. Yes. I think that's basically it.

[The prepared statement of Ms. Davis follows:]

PREPARED STATEMENT OF SUSAN DAVIS, C.P.A., MCMILLAN, UNRUH & DAVIS, P.A., FORT LAUDERDALE, FL

Chairman Hyde, Ranking Member Conyers, other distinguished members of the committee, my name is Susan Davis. I'm a partner in a small CPA firm in Fort Lauderdale, Florida.

Thank you for inviting me to testify today. I have never done this before. I am not a lawyer, or used to public speaking. But I very much appreciate being invited here today to tell you about my unexpected experience with these unfair asset forfeiture laws you do need to reform.

I. WHY ME?

In June of 1990, I was named personal representative for the estate of one of our clients who had died of cancer. The estate had a value of approximately $900,000, the main assets being securities and two pieces of real estate—a house in New York state and one in Fort Lauderdale.

In the Fall of 1990, I received a call from one of the beneficiaries who was staying at the house in Florida. He said he had returned home to find that the house had been seized by Federal Marshals.

Upon inquiry, we were informed that some "confidential informant" who was in prison, had stated that the decedent had told him that he had received $10,000 for allowing a boat to unload drugs at the Fort Lauderdale property in 1988. In short, an unnamed person in prison told an unnamed government agent that an unnamed vessel was used by unnamed persons to offload cocaine at the home of the decedent, George Gerhardt, on an unspecified date in December 1988. It was also claimed that he had received $10,000 from an unnamed person for the use of his property. On these vaguest of "facts" alone the house had been "seized."

II. MEETING ASSET FORFEITURE

We were referred to Marc Gold, a local attorney (now a judge) who had prior experience with this type of case. He explained to me and the beneficiaries that we could choose to forfeit the house or to file and pursue a case against the government. But he explained that under the unusual laws in this area known as "asset forfeiture": "the cards have always been stacked in favor of the government, no matter how innocent the claimant." Accordingly he counseled us that if we chose to file and pursue a case, *we—not the government*—would have to prove that the government's charge was wrong. And our chances of doing so would be slim.

But none of us could see just abandoning a $300,000 house when we knew the government had no good grounds whatsoever for taking it. Indeed, George Gerhardt was very much anti-drugs. He hated drugs. So, we decided to try to get the house back.

III. WILL AND ABILITY TO FIGHT BACK?

We found ourselves being required to *prove the negative,* that the now-dead Mr. Gerhardt had not known anything about drugs being off-loaded at his property. The government, on the other hand, did not have to prove anything: not that their unnamed informant had in fact been told what he said he had been told; not that any drugs had ever been off-loaded at the property.

It took close to three years—during which the government possesses and collected rent on the property it had taken—before the case went to court. When it finally did, after a one-day non-jury trial, U.S. District Court Judge James C. Paine agreed that there was no reason to think that Mr. Gerhardt knew of any crime being committed on his property.

IV. THROUGH THE LOOKING GLASS

More specific, as discovery went forward, we found the government refusing to provide any relevant information until they were finally placed under threat judicial sanctions by the court. It did not matter to the government that Mr. Gerhardt was dead and, obviously, could not defend himself. It did not matter that he was out of the country on vacation during a time when an acquaintance, unbeknownst to him, illegally used the property. It did not matter that *every testifying witness listed by the government* said that Mr. Gerhardt in fact had no knowledge of the incident; indeed, that any information regarding it was specifically and deliberately *kept* from him. Finally, it did not matter that all of his heirs were indisputably innocent and without knowledge of any wrongdoing.

It is impossible for me to adequately describe the full magnitude of government arrogance in this matter. But I want to at least note some of the low-lights of out three year travail with the government, left so unrestrained under existing laws:

Our case was filed in September 1990 and was finally resolved in a court in August 1993. During this time, in addition to the costs and energies expended in waging the uphill, unfair legal fight against the government, a beneficiary of Mr. Gerhardt's will had been thrown out of the house by the Marshal Service Seizors, and the government collected thousands upon thousands of dollars in rent from various tenants obtained by the government.

Even after the entry of the Final Judgment by U.S. District Court Judge Paine, the conduct of the government remained abusive. It took us an unreasonably long time to actually get the house back from the government. Indeed, the Court had to take the unusual step of imposing *sanctions* against the government in the amount of $5,690,000.

V. WHY AND WHAT FOR?

All of this wrongful havoc wreaked by the government, and on what basis? At trial, the government did not present one speck of hard evidence in support of the allegations contained in the complaint. And yet, as the Judge said on the record after our long-awaited one-day, non-jury trial:

> The law is slanted very heavy in favor of the Government [in forfeiture cases], ant it seems to me that the people against whom their property is being forfeited are at a tremendous disadvantage. I wonder about the constitutionality of these laws. They have been held to be constitutional by appellate Courts. I must say that I find it very hard to find for the Government in this case on the character of the evidence that has been put before us here. On the other hand, the statute is so strong for the Government, it is hard *not* to find for them as well. [1]

Fortunately, Judge Paine found the government seizes the property of the Estate on such a lack of cause that he could rule in our favor, even under the current laws so "tremendously disadvantaging" the proper owner, and of doubtful constitutionality.

VI. . . . BUT FOR THE GRACE OF GOD . . . .

Had Mr. Gerhardt been alive, he would have been evicted from his home, as his beneficiary later was. He would have been forced to face the costs of new housing and litigation just in order to fight the disadvantaged battle against the government to get his home back (that is, unless he simply bent to the arbitrary will and power of the government). Few people can afford to do this. And I have since discovered very few actually *have* done it.

In this case, we were lucky enough to have the cash available, backed by the Estate, to engage in the necessary long, unfair fight against the government's unsubstantiated claim. This protracted fight eventually cost the Estate more than $40,000 in legal fees. In addition, we had to: hold back distributions from the beneficiaries; pay other costs associated with the trial; pay several years back real estate taxes—left unpaid for three years by the government seizors—once we did get the house back; as well as pay insurance for the time that the government held the house, as the government had not insured it. Further, when we finally won our case in court and the house was resumed to the Estate, the person to whom the government had rented the house for $2,000 per month refused to leave and refused to pay rent. We had to hire still another attorney and use additional time and money to have the government's wrongful, worthless tenant evicted.

VII. CONCLUSION: VERY IMPORTANT REFORM BILL

I feel that we were very fortunate to get the property back in this case and fortunate to have the means and the intestinal fortitude to withstand the long hard fight to get it back But it does not seem right to me that the government should have the right to confiscate an innocent person's property based on nothing more than the hearsay claim of some unnamed person in prison on criminal charges, sure in the knowledge that the laws, time and money advantages are almost always so in the government's favor that most people will be unable to even start contesting the taking, let alone do so successfully.

I am not a lawyer. But I got a quick education in the abuses of these current laws as an unsuspecting CPA entrusted by a deceased client to take care of his Estate.

With that experience and with a CPA's training in reading the technical, I can see that the reform bill before this Committee would make several important improvements to the laws:

It would put the burden of proof on the government, where I think Americans rightly expect it to be, and where it *should* be.

It would make the government prove its burden by a "clear and convincing" legal standard—a standard that certainly strikes me as appropriately commensurate with the gravity of the government's action, the taking of a citizen's property, even one's home or life savings.

The bill says it would ensure that an innocent owner's interest in property cannot be forfeited by the government under any forfeiture law. This is important, so that in all cases (no matter *which* specific forfeiture law is invoked by the government), as in our case, a property owner who did not know of alleged

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[1] Trial Transcript, *United States* v. *One Parcel of Real Estate at 3241 N.W. 40th Court, Fort Lauderdale, Florida*, CIV-Paine, Case No. 90–6761 (S.D. Fla. Oct. 26, 1992), at page 32.

conduct that would make a property subject to forfeiture will be protected under the law.

This bill states that there would be important court supervision of the property during a contest with the government, so that a property owner would not be left homeless or rendered unable to make a living with his or her business, during the time tile government has seized the property for whatever period of time before a final decision may be rendered by a court. Had Mr. Gerhardt been alive at the time of the government's actions in our case, he would have been left without his home (as his beneficiary actually was), *for three years.*

The time it took for our battle raises another point. I understand this bill would ensure that courts make the government adhere to a reasonable timetable for commencing its litigation over seized property. That way, the government would no longer be allowed to drag these cases out for many months, or years—all the while holding the house or other critical property of the individual so as to cripple the person's ability to live, let alone contest the government's perhaps wrongful actions.

Finally—and I think this is *extremely* important—I understand the bill to provide for the appointment of an attorney for those who would otherwise not have the financial ability to hire one to help them in the complex fight against the government in one of these cases. We were extremely fortunate to have had the cash available to fight the long, unfair legal fight against the government in our case.

Thank you again Mr. Chairman for allowing me to speak to you and the Committee today. And I thank you and the other co-sponsors of this import bill. I do hope you get it passed into law as soon an possible.

Mr. HYDE. If I may suggest, your difficulty is that you have never lived in the Soviet Union. You would be used to these things if you lived over there. [Laughter.]

All right. Thank you, Ms. Davis. Now we will have questions.

The Chair recognizes Mr. Conyers, the ranking Democrat.

Mr. CONYERS. Thank you, Chairman Hyde. I thank the witnesses.

We have got a couple of problems here that we would like to get comments from everybody on. One is the problem about the need of the Government to subpoena documents and witnesses before there is a case. There is a procedure in here, Mr. Bailey and Mr. Edwards, that blows my mind, this so-called civil investigative demand. Then we have the fugitive provision, I think you lose all your property rights, under "fugitive disentitlement."

We have got to be nice to the Department of Justice today. We are trying to work this thing out. So no beating up on them, guys. The negotiations, and this have been going on for some time. I had hearings in Government Operations, what, 3 or 4 years ago on this. This is taking an awfully long time. We can't go to the Attorney General every time we stub our toe in Judiciary. But these two provisions seem to be the hangup. What I am trying to do is get the bill through this year, you know, 1997. This has gone on long enough. I don't even want to call for a review of all the asset forfeiture cases that have gone on in the Government if we can get this through. In other words, I am being nice. This is real nice nice stuff here.

So tell me, if you will, gentlemen, how we may be able to work out these provisions? Mr. Edwards, why don't you start it off?

Mr. EDWARDS. I'll be very pleased to, Mr. Conyers. However, you have sort of pushed one of my buttons with respect to civil investigative demands. It is hard to talk about that and not beat up on the Justice Department. It's my feeling that the Justice Department should be ashamed of itself for even asking the Congress to

consider what they propose for civil investigative demands, much less fighting to get it.

What they would propose to do is to make every U.S. attorney's office in this country a star chamber, and make every assistant U.S. attorney in this country a grand inquisitor. Sure, there will be many assistant U.S. attorneys who find that kind of power alarming and even scary and wouldn't use it. But there will be many who, if it's on the books, they will see that they should use whatever power Congress gives them. The idea that a Federal prosecutor in our Nation can demand the appearance of any citizen of our country in their office to answer their questions and to produce papers and documents at their request when there is no pending litigation between the Government and the target of their demand is—I mean, that reminds me of people in the 1930's and 1940's in another continent. It does not remind me of American traditions, and it's scary. I mean it's scary just because Justice would ask for it.

On page 33 of the Justice Department's submission, I was reading last night, they don't mention the phrase "civil investigative demand," but they say they want to allow their attorneys to issue subpoenas for evidence in civil forfeiture cases in the same way that they are issued in health care cases, antitrust cases. But wait a minute. We're not talking about commercial regulation. This is not the FTC and it's not the SEC regulating securities. We are talking about allowing the U.S. attorney to get any person in this country into his office to question him without any judicial supervision. I mean it makes my skin crawl. I'm sorry I have run on about that.

Now the disentitlement doctrine is really not that big a matter. The Supreme Court ruled I believe a year ago in a case that when a person is a fugitive from justice, you can't automatically forfeit their property just because they are gone. Now that doesn't mean—just let me give you an example.

Suppose somebody is indicted for a crime today and tomorrow some of his property is seized in a civil forfeiture case. The Government still has all the rights that they have always had to take depositions, to get discovery, to prepare that civil forfeiture case for trial. If it's set for trial and the person has absconded from the criminal case, then he can't be there to offer testimony. He is going to lose that case. So it's no great blow to the Government that just the fact that he has become AWOL the criminal charge shouldn't be a default in the civil case. The Government can continue to prosecute the civil case and ultimately win if he doesn't come back and defend his property. So I just don't think that should be a serious problem at all.

I would mention one other thing. The Government is proposing to water down the time limits that are proposed in this bill: the 60 days to file a notice, to send the property owner a notice; and the 90 days after a claim has been filed to get the case into court. Well, let me suggest as every trial lawyer in this room knows, if you have got a deadline, you are going to get the job done a lot faster than if you don't have a deadline. The proposed bill allows for a government attorney to go to court and get an extension. Any time my back gets to the wall and I can't get something done on time,

I ask for an extension and I invariably get one because most of the judges who have seen me know that I am conscientious and I wouldn't ask for it if I didn't need it.

This bill allows for justice or for local Federal prosecutors to get extensions. There is no need to water down the bill as the Justice Department wants to. Basically what they want to do is say well, if we don't meet our deadlines, we'll give the property back without prejudice. Then we can go ahead and do what we want to do and reseize it. In other words, we can give you the property back this morning and reseize it this afternoon and the clock starts running again. That's no requirement at all.

So I would urge you to keep it the way you have it written, because you got it right the first time.

Mr. HYDE. Mr. Coble.

Mr. COBLE. Thank you, Mr. Chairman. Mr. Chairman, until today I have not cosponsored your bill, but I will sign on. This legislation just evaded me. I have heard some of these stories today. If I had any questions about this bill, I think they have been answered. I believe your bill addresses the innocent owner and inserts some sort of fairness of equity into this process. The shifting of the burden of proof is a good idea.

My friend from Michigan said let's not beat up too badly on the Justice Department. I don't intend to do that. Mr. Edwards, I can see that you felt very strongly about your testimony, as did my friend from Nevada. I am not bashing law enforcement, folks, but I get fed up when I hear about the FBI, DEA, OSHA, and EPA. They come onto your property, they heavyhandedly throw their weight around, and it annoys the devil out of me. I suspect it annoys you all.

I don't mean for these agencies to not do their jobs. If they are out there arresting a no-good thug, that would be one thing. But when you are out here talking to someone who is not a known thug, I think he deserves a little better standard of care.

Having said all that, Mr. Munnerlynn, I take it from the tenor of your testimony that the DEA may well have been heavyhanded. Were they in the handling of your Lear jet?

Mr. MUNNERLYNN. Well, sir, I have never been arrested before but I have a brother that's been on a sheriff's department for many years. Several of my relatives are in police work. I explained to him what had happened and he couldn't believe it. The first thing I knew was I am sitting in the waiting room trying to get my fuel to go back home and the next thing I know, I am laying on the ground with a number nine boot on top of my head.

Mr. COBLE. You did nothing to provoke this response?

Mr. MUNNERLYNN. No, sir. Absolutely not. I am not that big of a fellow.

Mr. COBLE. Mr. Chairman and Mr. Conyers, this is the sort of thing that bothers me. I think that maybe we can direct attention to that sort of conduct through your bill, Mr. Chairman. I am happy to be a cosponsor.

Good to have you all with us today, folks.

Mr. HYDE. Thank you, Mr. Coble. The gentleman from New York, Mr. Nadler.

Mr. NADLER. Thank you. I'm not sure I have a question for the panel. Let me say I want to commend the chairman and the ranking member. I have long been wondering about the constitutionality—never mind the constitutionality—the civilized aspect of civil forfeiture law. The fact that we turn everything on its head, that the burden of proof is on the person in the dock instead of on the Government, that you are presumed guilty, that you have to prove nonguilt. You have to prove a negative, which I was always taught in logic courses was an impossibility. That the Government can seize your assets and prevent your use of your assets to hire the lawyer to defend yourself, that except for in the most rudimentary way that the courts have imposed, there's no proportionality requirement. That the victim can be victimized if someone misused his property, even upon specific instructions not to and he had no way of stopping that. And the total lack of due process in this whole thing.

Frankly, I think this is a fine example of the way, in the name of the war on drugs especially, we have been surrendering our civil liberties wholesale. So I hope that this bill will go someway toward remedying that.

The civil investigative demand being in a sense an extrajudicial way for a prosecutor to take the roll of a judge in issuing subpoenas is—the fact that we can even talk about it as part of a quid pro quo for remedying some of these obviously improper, I won't say unconstitutional because they haven't been ruled unconstitutional, though I would think them unconstitutional. But certainly improper practices that have been used to victimize our citizens the fact that that can be advanced to quid pro quo is a symptom of how far we have come from a proper understanding of civil liberties. The Justice Department, whose main job should be to protect citizens both from criminals and from unconstitutional actions infringing their liberties, should do some rethinking. They should not ask for such powers.

Mr. HYDE. I thank the gentleman.

The gentleman from Virginia, Mr. Goodlatte. The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman. I want to thank the witnesses for their testimony and just ask a couple of questions kind of more procedural kind of questions. I guess this is for Mr. Edwards and Mr. Bailey.

If someone were to come into your office and say that their assets had been seized, how do you charge to handle the case? Is it like any other normal criminal case, that they would have to come up with some money to be able to get their own property back?

Mr. BAILEY. If it were not a longstanding client, most lawyers would require some money to be paid before they got involved. In my case, I had represented the people for some time, so I didn't have to go looking for a retainer before flying to the scene. But the average person is left out in the cold.

The very purpose that the Government has in seizing assets in these cases is to disable the target from being able to hire adequate legal counsel, and then if he does, to disable that counsel from getting due process, a word for which many of us went out and fought.

Mr. SCOTT. Are you suggesting that often they will seize the cash assets to totally or essentially make the target insolvent so that they can not hire attorneys?

Mr. BAILEY. In my case, they did exactly that, and restrained accounts that would have otherwise been available for the payment of legal fees, and warned the attorneys that if they took any fees they would come and get it back, which would discourage many otherwise able attorneys from taking the risk.

Mr. SCOTT. The retainer would be an asset that could be seized?

Mr. BAILEY. The Government handed me a certificate of probable cause saying that a magistrate based on a secret warrant and secret evidence had determined that the property might be forfeitable and I would take it at my risk. Many lawyers, not this one, wouldn't take that risk.

Mr. EDWARDS. Mr. Scott, where a property owner is also a criminal defendant, that is, has been charged with a crime rather than just having property seized only, then I would probably handle the case much as any routine criminal case and I would require a fee paid in advance, or at least part of the fee paid in advance.

However, in many civil forfeiture cases I have handled, there were no criminal charges. Very often the amount involved, the value of the property involved, unlike Dr. Lowe or Mr. Bailey's case, is not millions of dollars. In fact, one DEA study indicated that in only 17 percent of all forfeiture cases was the property valued at more than $50,000. So what very often happens, if the client is able to pay a small retainer up front, I ask for it, but most often I take forfeiture cases on a contingency, a percentage of the property, the value of the property we get back.

Mr. SCOTT. After the Government takes their property and it's ascertained that it was wrongfully taken, are the attorney's fees collectable from the Government?

Mr. EDWARDS. No. If you will remember the *Willie Jones* case, the former client of mine from Nashville, the African–American landscaper who had $9,000 seized from him at the National Airport and testified before this committee last year, 2 years later we were successful in getting the money returned, but that's all he got back. And, for some legal quirks, the Justice Department wouldn't waive the cost bond, so we had to wind up suing the Justice Department to get into court.

Effectively, I would have been working pro bono because he couldn't afford to pay me. That was all right because Willie Jones is a good person and shouldn't have had his money taken. I was willing to do that. But as it turned out, the court awarded attorney's fees. The court could not have done that in the normal civil forfeiture case. In any civil forfeiture case under present law, the property owner has to pay his own counsel fees unless the court can find that there is "no substantial justification" for the seizure. Most courts interpret that to mean if there was no probable cause, and they almost never find that.

Mr. SCOTT. Is there any interest? Did he get any interest on his money?

Mr. EDWARDS. No, sir.

Mr. HYDE. The gentleman's time is about to expire.

Mr. SCOTT. Let me get in another real quick question, if I could.

Mr. HYDE. All right.

Mr. SCOTT. If an innocent person has his property taken and does not have an alibi and can't prove his innocence and the Government can't prove his guilt either, does the Government get to keep his property?

Mr. EDWARDS. Under present law, he loses.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. HYDE. Thank you. The gentleman from Tennessee, Mr. Bryant.

Mr. BRYANT. Thank you, Mr. Chairman. I very much appreciate your stepping forward to bring this issue to the forefront.

While I agree with Mr. Conyers this is not earth-shaking in the big picture, it is very important to those involved in the process. As Mr. Conyers very well points out, it's very significant when we talk about the rights of people that we discuss this situation.

A moment ago, we had Mr. Barr here and Mr. Hutchinson. The three of us are former U.S. attorneys and we have had, while not direct dealings, some discussions about the *Jones* case, and certainly we have different perspectives on that. I have found that many of the examples, and there are examples out there, of bad cases come from the State system, not the Federal system. But certainly each of you point out difficult situations from the Federal jurisdiction also, things that I think can be addressed.

I do again commend the chairman for this bill. But in reviewing the Department of Justice's comments on this, I can't say that I don't disagree with them. I think while this bill does make efforts to bring this system maybe into a little better balance, I am concerned that perhaps it does go too far in terms of just the realities of the forfeiture law.

I don't think there is any question that the forfeiture law is in theory a good law. We need that. We need to take the contraband, the profits out of crime. We can convert these over to help catch more criminals and to use them for good projects. I know the Department of Justice is here today and will talk about a number or at least certainly site a number of examples in their report of the good things that they have done with these converted funds. It serves as an effective deterrent to people.

Again, I very strongly support the concept of forfeiture of assets. At this point, I agree with what the Department of Justice says in terms of these efforts to change the law, and I feel like we can reach a compromise at some point on these issues. But I think again, they point out the realities of having to deal with people, innocent owners, when they give their property to their children or their family and so forth. To me that's just skirting the law.

On the other issue of returning property to people, if you start returning cash to drug dealers, you are never going to see that again. I agree that perhaps the burden of proof can be shifted, but to hold the Government to a higher standard, I mean it's a civil case and civil cases are generally preponderance of the evidence. To make them go beyond that to clear and convincing proof I would not like to see. But again, these are issues that I think we can work on together and come to a resolution.

I certainly have sympathy for the victims of these matters and certainly for Mr. Edwards, who is a long-time friend of mine, who

is out there working and leading the charge. Again, there are times when we disagree on things, but I am honored to be a part of this committee, and again thank the chairman for moving this bill along so that we can begin to resolve these kinds of issues.

With that, I will yield back my time.

Mr. HYDE. I thank the gentleman. I am trying to not intrude into the questioning, but I just want to say to my friend, Mr. Bryant, who is one of the most valuable members of this committee, and I say that not pro forma, that I earnestly—I am going to have some earnest talks with you.

I think the burden of proof on the victim who is not charged, not convicted, does not belong in our jurisprudence. It just doesn't. To have to prove a negative with respect to property the Government has seized—for you to prove you're innocent and it's innocent—is just turning justice—fundamental justice—on its head. I think you need notice. I think you need an adequate time to file a claim. I don't think you should have to post a bond if it works a hardship. I think the Government ought to take care of your property when it's in its custody. These are elementary. I absolutely believe in the forfeiture laws. I believe that the ill-gotten gains should not go to drug dealers. But we are not talking about drug dealers. We are talking about people who mistakenly meet a profile. People who have been released, people who have not been charged, people who have not been found guilty. They have this enormous burden to protect and preserve their own property. It just violates my sense of justice. I should think we could work with the people in the Justice Department—they are decent people. Nobody is a more decent person then you are, Mr. Bryant, but I hope we can come to some understanding on this because I just think, I am embarrassed for my country that this process exists on the books. Yes, it won't shake the world, but it will be one little battle for justice and due process which I think is important.

Mr. NADLER. Will the gentleman yield?

Mr. HYDE. Yes.

Mr. NADLER. Thank you, Mr. Chairman. Let me simply say that I agree whole-heartedly with everything you have just said. I want to ask you a question. I don't know if this is the appropriate time to ask it. Maybe you will ask or someone will ask the members of the panel. Do you think that anything should be done in remedial legislation of this type to change or to increase the threshold requirement, not the burden of proof to keep the property, but the threshold requirement of what the Government must show in order to seize property in the first place?

Mr. HYDE. I have no problem with a probable cause standard, provided it's vigorously adhered to. If the Government illegally seizes property—that is, if it lacks probable cause—it should be sanctioned. I wouldn't want to hold my breath for that to happen.

Mr. NADLER. Do you think, Mr. Chairman, we have heard testimony that probable cause has been established in some of these cases by an anonymous informant in jail telling a second anonymous informant who tells the Government that on an unspecified date, an unspecified party landed an unspecified amount of drugs at a property. Do you think that kind of probable cause is sufficient?

Mr. HYDE. Well that's the standard to arrest somebody. We have to rely on the sagacity and the integrity of judges to scrutinize seizure warrants before they are issued—to try and identify deficient or fraudulent evidence in support of the warrants. But sometimes, defective warrants will issue.

But one step at a time. I just want the burden of proof to be on the Government, not on the victim. I want an attorney assigned to that person if he doesn't have funds. I want a decent notice and a decent time to file your claim. I want the Government to take care of the property when it has custody of it. I don't want horror stories that ruin people's lives when they are innocent. That shouldn't happen in America.

Mr. Munnerlynn's life has been ruined. He forgot to tell you a divorce came out of this too. I don't know what more they could do—they could demand a quart of blood every night I suppose, and you've done nothing wrong—you're innocent. Well, anyway this has turned into an informal seminar, and I didn't want to do that.

Mr. Watt, the gentleman from North Carolina.

Mr. WATT. Thank you, Mr. Chairman. I don't have any questions of the witnesses, but I do want to thank the chairman for having this hearing and for being the mover, one of the movers on the bill which I am a cosponsor of.

I think we underestimate quite often the value of the public's perception of fairness in our criminal justice system to the rule of law. It has always been my perception that if there are people who do not perceive that what is being done is fair, regardless of how many there are or how few there are, we have to some extent diminished the public's confidence in the process and diminished the rule of law.

This is one of those areas, this probably is the biggest area where people just simply feel like the Government is out of control. Conspiracy is another one of those areas, but I won't go there. But clearly, this is an area where I mean if people don't understand it they kind of shrug their shoulders and say well I'm never going to get involved in it. But if nobody is ever involved in it at any stage of the process, it undermines public confidence in the rule of law.

So I am just happy that we are having the hearing. I hope that we are able to satisfy people like Mr. Bryant, who I agree with the chairman, is an important member of this committee because he brings that perspective of real life experiences. But this is not about whether you support forfeitures or not. It's about process and fairness and equity and at the very basis about people's confidence in the rule of law of our country. I hope we can move this bill this year and try to snatch the balance back more toward some public perception of fairness. Thank you, Mr. Chairman.

Mr. HYDE. Thank you, Mr. Watt.

The distinguished gentleman from Tennessee, Mr. Jenkins.

Mr. JENKINS. Thank you, Mr. Chairman. I am sorry I missed the testimony. I was in an Agriculture Committee hearing, but I certainly would like to extend a welcome to Mr. Edwards, whom I have known for many years. I know him well. He is a very capable, able member of the National Bar Association. Of course we all know Mr. Bailey by reputation. I would like to welcome all the members of this panel.

I think it's significant that this legislation and this discussion brings people with very divergent viewpoints together. You only need to look at H.R. 1835 and look at the sponsors there, people who often have different points of view, people who often have opposing points of view. I think you only have to look at the list of those sponsors and listen to this testimony to understand that some adjustments are needed.

When you get people on the right side of the spectrum and people on the left side of the spectrum who come together in a fashion that they have come together in support of this legislation, then it means that I think that there is a consensus. It deals with a very basic constitutional provision. I think we ought to look long and hard at taking action to see that that consensus is upheld.

I agree, Mr. Bryant, with the chairman. Certainly in those cases where there is a judicial determination, that's one thing. But often times you are dealing with people who are not guilty and have not been found to be guilty. I would submit we need to take a long, hard look, listen to these witnesses who have been out there on the front lines.

Mr. Chairman, thank you for bringing this matter to our attention.

Mr. HYDE. Thank you, Mr. Jenkins.

And the distinguished gentlelady from Houston, Ms. Jackson Lee.

Ms. JACKSON LEE. Mr. Chairman, I thank you very much, and to the ranking member, Mr. Conyers, let me join both in the vision of this legislation, but the recognition that maybe this term in Congress we can move this quickly along.

Mr. Chairman, I would ask unanimous consent to submit my opening statement into the record in its entirety.

Mr. HYDE. Without objection, so ordered.

[The prepared statement of Ms. Jackson Lee follows:]

PREPARED STATEMENT OF HON. SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. Chairman, I am in full support of H.R. 1835, the Hyde-Conyers-Barr-Frank Civil Asset Forfeiture Reform Act. H.R. 1835 addresses current problems rising out of the present Civil Asset Act by requiring reasonable notice to interested individuals who may be subject to having their property seized by the government; it reduces government delays in resolving conflicts between the government and individuals who are attempting to get their property returned to them; it permits the appointment of counsel for indigent claimants in civil matters; it shifts and increases the burden of proof the government must shoulder to seize property; it defines what it means for a property owner to be innocent of the misconduct that prompts seizure; it provides a release of seized property pending civil asset forfeiture proceedings when, to do otherwise, would cause the claimant a "substantial hardship," and it awards damages an interest to claimants who are entitled to recover their seized property.

Mr. Chairman, property seizure by the government was a tool used by the British in the mid to late 1700's, before the American revolution. Because of the government abuses by the British in seizing property from Americans, the revolutionary war ensued. My fellow colleagues, this nation fought the British government to protect itself from the tyrannical abuses of government against its citizens. In fact, the founders of this great nation, made sure that its citizens would never fall victim to the abusive powers of government by the enactment of the United States Constitution and similar laws. We must not regress back to the time when individual rights and liberty were seen as expendable. My colleagues we must honor the spirit of our founding founder. The Hyde-Conyers-Barr-Frank Civil Asset Forfeiture Reform Act

will ensure that our citizens rights are protected and that the spirit of our forefathers lives on.

Mr. Chairman, reform of the civil forfeiture laws is long overdue. One of the most important provisions of this bill is the establishment of a "Burden of Proof" clause, for the government before it can confiscate someone's property.

Stefan D. Cassella, the Assistant Chief of the Asset Forfeiture and Money Laundering Section, Criminal Division, Justice Department, in his written statement to the Judiciary Committee for the purposes of this hearing cites a number of cases where seizure of property under the current act has worked in combating crime. However, these cases are minimum when viewed against the majority of cases, where innocent individual citizens rights are abused under the present asset forfeiture standard. Furthermore, a number of courts have gone on record as criticizing the current standard.

In *United States* v. *Leasehold Interest in 121 Nostrand Ave.,* 760 F. Supp. 1015, 1032 (E.D.N.Y. 1991) (the government should be required to prove case under §881 (a)(7) by clear and convincing evidence); *United States* v. *$191,910.00 U.S. Currency,* 16 F.3d 1051, 1069 (9th Cir. 1994) (disparity between the 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 the 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."); and *State* v. *Spooner,* 520 So.2d 336 (La. 1988) (state constitutional guarantee of due process requires that the government prove its forfeiture case by at least a preponderance of evidence as the property owner is entitled to a presumption of innocence similar to that in a criminal case; some members of the Court would require clear and convincing evidence or proof beyond a reasonable doubt).

H.R. 1835 also addresses innocent owners who are caught up in the web of the present asset forfeiture laws. While the Department of Justice is in favor in providing a uniform innocent owner defense to individuals, they have articulated that they want a defense that is much narrower than the one currently provided under the two main federal civil forfeiture statutes. This is hypocritical double talk in its rarest form. Innocent owners must be afforded adequate protections under the law. Recently, in Justice Thomas's concurring opinion in the unfortunate 5–4 Supreme Court decision in *Bennis* v. *Michigan,* 5516 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 (without being unduly activist), for protecting innocent property owners. My fellow colleagues, Justice Thomas was right, Congress must not send the message to the police that it is alright to prey and plunder on innocent victims.

Another important provision in this bill is the "Enforcement Time Limitations for Notice and Commencement of Forfeiture Suit." This measure is important to provide individuals with the opportunity to seek other modes of housing or transportation if their home are transportation vehicle is to be seized or to allow the individual legal recourse to fight the seizure. Under the present act, police can swoop down like storm troopers and seize a persons home, leaving a person and his or her family homeless, with no where to go.

Mr. Chairman, Ranking Member Conyers, fellow colleagues, the time of abusive government actions against American citizens, in seizing their property under the color of law ended with the close of the Revolutionary War. This country was founded and gained its independence because it would not tolerate such abusive government actions. Our founding fathers sought to ensure that such actions would never be revisited in this country through the United States Constitution. Let us not discard this country's heritage. I support H.R. 1835 and urge my colleagues to support this bill as well.

Ms. JACKSON LEE. I thank you. Just allow me to offer a few brief remarks. Let me thank the panelists, some who have suffered clearly in light of this legislation, Mr. Edwards, for your persistence. And since this is the first time that I can say this to Mr. Bailey, let me thank him for his unending courage in the courtroom. Many of us watched you bring out the details of which many would like to deny. A lesser attorney might have tried to be more appro-

priate. I thank you for your inappropriateness. And I think that is sometimes extremely necessary.

Let me offer two broad questions in the context of my background. Even though as a lawyer I served as a member of the city council, and I'm sure testimony, Mr. Hyde and Mr. Conyers, will come to haunt me, as I clamored after civil forfeiture dollars for my parks and my neighborhood, because they came by way of different dollars, even though I know the criminal dollars are a different format. And that's why I'd like to make the distinguishing feature. Criminal forfeiture dollars come from a convicted criminal who has been convicted by a jury, a court. Then those assets are then subject to an accommodation. In this civil instance, I think we are now at a point where we must confront the question. And I raise two points for you. I'm attempting to find some language that I'd like to read from and bring to your attention.

First of all, obviously, the Justice Department raises the valid point—and if all of you all would just take your hand at it, because maybe we can encourage some of our colleagues to support this legislation unanimously. And that is the Justice Department's perspective, or the law enforcement's perspective, of the fact that this is a deterrent and that you take this opportunity away from the perspective of reducing government delays or shifting and increasing burden of proof; then you let criminals run free. I know, Mr. Munnerlynn, you had to file bankruptcy and you may want to comment on that.

And then this point that I think should raise its head and make us all very frightened: because the property itself is the defendant, guilt or innocence of the property owner is said to be irrelevant and ordinarily treated as irrelevant. It is hard for me to go up against property. It sits there; it's idle; it's either cash, it's cars, it's a house, and I have the innocent or the alleged person standing over on this side of the table, but I'm fighting the property. It can't speak, but yet I'm fighting it and I'm taking it.

And so I'd like to get your response. Does the civil forfeiture process unfairly separate the person from the property and therefore puts the person at a disadvantage? And does anyone think that we have deterred mass amounts of crime?

Let me conclude by simply saying that where you have a viable, vicious, alleged, known drug dealer, I know our criminal laws will certainly find their way to that person's front door or back door. I'd like to separate out those kinds of culprits from who is attacked with the civil assets. So I have a two-pronged—the question on philosophy, deterring crime, and the other question about where we're dealing with the property which is the defendant. I thank all of the—and we can start with whoever will start first, but, Mr. Chairman, I'd like to hear from all four of the witnesses. Thank you.

Mr. HYDE. I would just remind the gentlelady that her time is up, but we will accommodate her.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman. Mr. Bailey.

Mr. BAILEY. Some years ago, Chief Justice Paul Liacos of the Massachusetts Supreme Court, just-retired, was then my evidence professor; in 1960, after a moot court debate, asked Dean Roscoe Pound, is it a rule of the common law that for every wrong there

must be a remedy? And Dean Pound responded, "It's not a rule of the common law, but it's a principle of the common law."

Ms. Lee, we have drifted so far to the right of that, that we have adopted the philosophy of the Queen of Hearts, "punishment now, trial later." We'll take what you have and if you can get us into court, you might or might not get a hearing. The pendulum has simply swung too far. This is not what due process means and I think that your perspective is very astute. Please, we're sitting here with four people, two of whom were wrongly suspected of affiliation with drugs and two of whom who had nothing to do with drugs. And this drug law, which was given strong teeth to combat a villainous substance, is now lapping over the people that it was never intended to target and they are being deprived of due process.

And I'm sorry to say, because I respect, for 30 years, my friend Congressman Conyers, and therefore I will not beat up on the Justice Department or its gentle and kind head. But I must say in 43 years of trying cases, I have seen no improvement in attitudes among the many that are insensitive, sometimes arrogant, and always conscious of the fact that there is no punishment, should they step over the line. That, I think, is a fundamental defect.

Ms. JACKSON LEE. Mr. Edwards.

Mr. EDWARDS. With respect to the excuse, legal fiction, that it's the property that has done some wrong, I think it is worthwhile to look at the historical derivation of that notion. That really came from Renaissance Europe, Renaissance England, when it was necessary for the King of England to seize a ship or to seize its contents because the owner of the shop was a Dutchman or a Spanishman, or what have you. And they couldn't get the owner of the property into court. This was the only way they could effectively enforce the navigation acts that essentially said that English commerce is a monopoly of English people and we don't want any foreign vessels in our ports, unless they jump through our hoops—that's where that legal fiction came from.

When our Republic was an infant, it was necessary for us to use that legal fiction because most of the income that the foundling Federal Government in the late 18th century and early 19th century had came from customs duties. And the America of 1800 couldn't force a European businessman, shipowner, to come into an American court. So the legal fiction was necessary in order to enforce American laws. But that's no longer true. We ought to recognize that we're punishing people by civil forfeiture and abolish the notion of in rem actions.

Mr. HYDE. The gentlelady's time has expired.

Ms. JACKSON LEE. Mr. Chairman, would you indulge me so that Ms. Davis and Mr. Munnerlynn can answer the question briefly?

Mr. HYDE. Well, we have one, two other gentlemen, three other gentlemen. It is 12:15 p.m. I'm being entreated to have a lunch break.

Ms. JACKSON LEE. If you——

Mr. HYDE. It is an imposition, but why should we shatter precedent? Go ahead. [Laughter.]

Ms. JACKSON LEE. Thank you for your kindness.

Mr. Munnerlynn.

Mr. MUNNERLYNN. Ms. Lee, I don't understand a lot of the laws in our country and I was very surprised when I got the paperwork that my aircraft had been arrested. To me that was so absurd that I just couldn't understand it. You have to keep in mind, before it ever gets to a civil matter, and what the DOJ doesn't tell you is that the criminal aspect of this thing has run its course. It did in my case. I was investigated, and told I was investigated by 15 officers. I told them I didn't care; they could send 20. The problem was that after they saw that there is no criminal aspect whatsoever, then they arrest the aircraft.

Now, if that aircraft doesn't have someone to step forward and fight for it, then basically it's the same as criminal because if in the civil situation there is any criminal aspect that is found, then it goes by to the criminal aspect. How a piece of property can be charged like that, I don't know. I can say this: in the course of the action in Los Angeles, I never did know for sure if there ever were $3 million on my jet. I was naive. I really don't care. I fly a lot of movie stars, people that win a lot of money in Las Vegas. I don't ask them what's in their bags. My only primary object is to know what the weight of that aircraft is, so I can fly him safely from A to B.

So it was never proven if the money was ever on my aircraft. The problem arose because, in the Justice Department's anxiety to get this Lear jet, they asked if we would stipulate the fact that this money was on the airplane. Well, I really didn't care. Again, I was naive. I don't know if it was on the plane or not. Ask the passenger. Of course, the passenger had already been released. He was gone. So I think it's really unfair.

Ms. JACKSON LEE. Ms. Davis.

Ms. DAVIS. I can understand criminal forfeiture, but I don't understand the idea of civil forfeiture in a situation like this, especially where, in my case, these unknown people in prison had supposedly given this information to the Government while the decedent was alive and yet they wait until 3 months after he's dead and can't testify before doing anything about it.

Ms. JACKSON LEE. Thank you.

Mr. HYDE. Thank you.

Mr. Hutchinson.

Mr. HUTCHINSON. Thank you, Mr. Chairman.

I appreciate the testimony of the panelists and I certainly identify with those who see a need to reform the asset forfeiture laws, but I do hope that we can put this in perspective. I've been a Federal prosecutor, but I've also been a defense attorney, so I've been on both sides of that and I wanted to ask Mr. Edwards a question.

You've shared your own, and there's been some terrible stories that have been told today of abuses. I join in that cry, but I think we ought to put in perspective the fact that seizure of assets in serious drug importation cases, drug cartels and drug offenders, is a useful tool of law enforcement. Do you agree, Mr. Edwards, that we need to reform and improve and correct the system, but not destroy the system and destroy this tool of law enforcement in fighting a serious war against drugs?

Mr. EDWARDS. I certainly do, sir. I recall a conversation I had with an assistant U.S. attorney in Little Rock a few years back. I

was talking to him about a plane that had been seized by Customs, and I won't go into the details, but I thought it was rather frivolous, and after he looked into it he agreed. And he said, "You know, though, if we don't use these laws more reasonably, we're going to lose them."

And there are certainly cases where the Government can prove that the property or money that's being seized is connected with illegal drug activity, especially with the cartel-type activity; it ought to be forfeited. And I——

Mr. HUTCHINSON. Would you agree that——

Mr. EDWARDS [continuing]. And a lot of money's been forfeited that way.

Mr. HUTCHINSON [continuing]. The innocent victims are in the extreme minority in seizure cases?

Mr. EDWARDS. No, sir. I really could not agree with that because such a—the Justice Department doesn't even know in truth. We're looking at the same picture and seeing two different things. They say, well, there are so many cases where no claim is ever filed, and that's proof that all these people that didn't file claims were guilty. I see that same picture and I say that's proof that they either couldn't afford a lawyer or they were afraid of the Government. I don't know how many times people have called me and said "What do I do? I don't want to get the Government down on my back. I didn't do anything."

Mr. HUTCHINSON. Mr. Edwards, I need to ask a question of Mr. Bailey here before my time expires. I want to tell everyone in Arkansas——

Mr. HYDE. Oh, you'll have all the time you want. And Mr. Pease won't get to ask any questions, and Mr. Delahunt, who was here through all the testimony, won't get to ask any questions. I'm not picking on you, but you just take your time because I'm not going to cut you off. [Laugher.]

Mr. HUTCHINSON. Mr. Chairman, my time is not expired. I don't——

Mr. HYDE. No. I thought you said your time was running out, and you were trying to shortcircuit an answer. I wanted to reassure the gentleman that you will be treated as Ms. Jackson Lee was. You will have indefinite time.

Mr. HUTCHINSON. Thank you, Mr. Chairman.

Mr. Bailey, and I'm concerned about the "preponderance of evidence" standard versus "clear and convincing evidence" standard that the Government would have to meet. If a private citizen filed a lawsuit against someone else for the wrongful taking of property, they would have to prove their case by the preponderance of the evidence?

Mr. BAILEY. Correct, in most jurisdictions.

Mr. HUTCHINSON. And so we'd be setting a higher standard for the Government in the civil case, and maybe there's some rational basis for that, but it would be a higher standard we're giving the Government in this civil case by making it a clear and convincing standard?

Mr. BAILEY. Respectfully, it would not. The standard for seizing property before you prove your case on an ex parte basis is usually

a much higher standard than a mere preponderance. I can't get a judge to seize your bank account unless I've really got the goods.

Mr. HUTCHINSON. That's true. Of course, we're looking at the final case in the proposed bill——

Mr. BAILEY. I'm looking at the initial grab. There ought to be some limits on that. It's far too easy now.

Mr. HUTCHINSON. What should initially be in order for the Government to take possession?

Mr. BAILEY. The Government ought to convince a Federal judge of the need to grab the property before any litigation notice is so great, because the evidence is so strong that nothing less will do. And then he can issue an injunction and take it all and give the fellow a chance to get it back. That's not what you're doing now.

Mr. HUTCHINSON. Thank you very much, Mr. Bailey. Thank you, Mr. Chairman.

Mr. HYDE. The gentleman from Massachusetts. We did get around to you, Mr. Delahunt.

Mr. DELAHUNT. Well, I want to ask a brief question, so my colleague from Indiana, Mr. Pease, will have a chance. And I'll be very brief, Mr. Chairman.

I would direct this to Mr. Edwards. Do you have data—and I know there are members of, representatives of the Department of Justice here—on those cases that are filed in terms of a civil proceeding that have no concomitant criminal prosecution, do you know what percentage those might be?

Mr. EDWARDS. No, sir, I really don't and I don't—other than through the Justice Department, I don't know how you would obtain that kind of information. I know it happens a lot, from my own experience and from going around the country speaking to legal groups.

Mr. DELAHUNT. But you've never heard a breakdown?

Mr. EDWARDS. No, sir.

Mr. DELAHUNT. Because at the State level my experience was that most civil forfeiture proceedings are brought in conjunction and contemporaneously with criminal prosecution. And very rarely—I can't even think of a case that my office instituted without a criminal prosecution.

Mr. EDWARDS. Well, I can assure you that in many States in all parts of the country that is not true. In Florida, in Louisiana, and also in Oregon——

Mr. DELAHUNT. Well it's good to be from Massachusetts. Is that true, Mr. Bailey?

Mr. EDWARDS. There is an enormous volume of civil seizures where no drugs are found and no criminal charge ever brought. It happens a great deal.

Mr. HYDE. Can I impose on you, Mr. Delahunt, to terminate and let Mr. Pease ask some questions. Thank you. We appreciate your courtesy.

Mr. Pease.

Mr. PEASE. Thank you, Mr. Chairman. I am sensitive to the vote coming up—more sensitive to the fact that I'm all that stands between us and lunch. What I'd like to do is just make an observation. I'll waive my questions because most of them have been asked. And that is that the work that is being done here today, I

cannot state more strongly, I believe it is so important, not just because of what we are going to be doing, I hope, at the Federal level, but because of the fact that most of the States take their guidance in this area from what the Federal Government does. As one who chaired a State senate judiciary committee, there is incredible pressure on State legislatures, sometimes for the wrong reasons, usually because law enforcement needs more money, and secondly, because there's the perception that if you don't do it at least as much as the Federal Government, you're soft on crime—that what we do here today, I hope do here today, or shortly, will not only make this a more fair law, but will provide the guidance to the State legislatures, or if you will, some cover to State legislatures to do what many of them would like to do as well.

Thank you , Mr. Chairman.

Mr. HYDE. I thank the gentleman.

The Chair announces that at 1:30 p.m. I would like the Members to be here for a markup of a very important private bill having to do with immigration. And we will stand in recess until—I hate to impose on our second panel, but we have to go vote, get lunch, and then get back here. So we'll stand in recess until 1:30 p.m. This panel may be dismissed and with our deepest thanks for a very instructive testimony. And happy birthday, Mr. Bailey, to you, as of yesterday.

And the committee is in recess until 1:30 p.m.

[Whereupon, at 12:28 p.m., the committee recessed to reconvene at 1:30 p.m. the same day.]

[AFTERNOON SESSION]

Mr. HYDE. The committee will come to order, and I express my profound apologies for the disaster today. I won't explain what happened, but disaster is an understatement. We had 8.322 million votes, all of them recorded. We were voting so frequently the machine broke down at one point. So you are marvelous for staying, you really are. You're great government witnesses. You incline me to be kinder toward you than my instincts permit. [Laughter.]

Mr. WATT. Mr. Chairman.

Mr. HYDE. Who's seeking recognition—yes, Mr. Watt?

Mr. WATT. I have to take offense at the chairman calling democracy a disaster. It was just democracy at work.

Mr. HYDE. Oh, today?

Mr. WATT. Yes.

Mr. HYDE. No, you've heard of obstruction. You've heard of motions that are designed to delay proceedings.

Mr. WATT. It was democracy, Mr. Chairman.

Mr. HYDE. No, it was an abuse of democracy, in my judgment. Dilatory tactics are frowned upon by Robert's Rules of Order and I believe they're incorporated in our rules, but—onward and upward. [Laughter.]

It was democracy, but it was obstructionism, too, in my judgment. We have a difference of opinion. When the shoe is on your foot, it's democracy, and when it's on my foot, it's obstructionism. And never the twain shall meet.

In any event, Stefan Cassella, Deputy Chief, Asset Forfeiture and Money Laundering Division of the Criminal Division of the

U.S. Department of Justice; Mr. Cassella. Jan P. Blanton, Director of the Executive Office for Asset Forfeiture, Department of the Treasury, Washington, DC; Bobby Moody, chief of police and first vice president of the International Association of Chiefs of Police, Marietta, GA; and Mr. Lefcourt, Esq., New York, NY. Who is Mr. Lefcourt?

Mr. LEFCOURT. I am.

Mr. HYDE. All right. Mr. Moody will be more formally introduced by Congressman Barr of Marietta, GA, and then we will start out off with Mr. Lefcourt because he has a plane to catch.

The Chair is pleased to recognize Mr. Barr, the gentleman from Georgia for an introduction.

Mr. BARR. Thank you, Mr. Chairman. I appreciate the Chair's indulgence, and I certainly want to welcome all members of this panel, as well as the other panels that we've had today, but I want to extend a very special and warm welcome to Chief Moody who I've known for many years and worked with very closely in law enforcement matters, particularly during the time that I had the honor of serving as the U.S. attorney for the Northern District of Georgia. Mr. Moody, in the last several months, has moved over into the Seventh District where he is chief of police for Marietta, GA, which is right in the heart of the Seventh District of Georgia, and I'm very happy to have him here today.

He has a very distinguished career in law enforcement, both within the State of Georgia and now at the national level as the first vice chair of the International Association of Chiefs of Police, and I have every confidence will continue to distinguish himself as one of the top law enforcement officials in our country. And I look forward to his testimony today. We've already discussed this. He's been very helpful on this and other matters and I look forward to working with him throughout our work on this and other important legislation.

Chief Moody, we're very happy to have you here today.

Mr. HYDE. Thank you, Mr. Barr. And the Chair is pleased to recognize, for whatever he wishes to tell us, Mr. Gerald Lefcourt, Esq., of New York.

STATEMENT OF GERALD B. LEFCOURT, ESQ., PRESIDENT-ELECT, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Mr. LEFCOURT. Thank you, very much. I guess the record should also reflect that I am also president-elect of the National Association of Criminal Defense Lawyers and appear here in support of their position which has been submitted. But I am also here to bring to the attention of the Judiciary Committee an interesting case from New York, actually in Congressman Schumer's district, involving a religious member of the Hasidic community in Brooklyn who was approached pursuant to a sting operation by an undercover agent and introduced to the undercover agent by somebody who was laundering money with the undercover agent. And because the Jewish community in the Williamsburg section of Brooklyn deals a great deal in cash, as is true in other communities, such as Latin communities and Asian communities, for cultural reasons, they were easy prey to a request by the agent to exchange

a check for cash. And this was done on three occasions. And all of the contact between this member of the religious community and the undercover agent was tape-recorded. So, fortunately, all of it was preserved and at each contact this Orthodox Jewish man asked the undercover agent, "Is this OK? Is this kosher?"—words to that effect, and in each instance the undercover agent said it was until after the third transaction.

And, most importantly, the money, the checks provided to the undercover agent for the cash, were from the religious institution that this particular Orthodox Jew was from in the Williamsburg section of Brooklyn. And after the third transaction, $40, $50, and $60,000 transactions, the agent, after it was over, said, "You know, George"—his name was George Kaufman, the *United States* v. *Kaufman*—"you asked the source of the money. Well, we're not always sure. It could be gambling; it could be drug money; it could be anything."

And when the fourth transaction was arranged, George Kaufman was arrested, the religious institution's bank account was seized pursuant to a civil forfeiture complaint, and we're in a situation where these draconian laws put the entire community, this religious community, in a situation that if they did not settle, their religious institution was at stake and going under.

And Mr. Kaufman, who was facing money laundering charges, was facing not only forfeiture, but also a substantial jail sentence under the Federal sentencing guidelines. So we made a motion to Chief Judge Jack Weinstein of the Eastern District of New York to dismiss the case as a matter of law because of the egregious and outrageous conduct of the undercover sting operation, and while he didn't do that, he said on the record if this is all that is shown in the trial—and again, everything that occurred was tape-recorded, so this was the entirety of the contacts—then he would consider dismissing the case on a motion at the end of the Government's case.

But this illustrates the problem of civil forfeiture laws which have the effect of forcing a defendant in that type of situation to seek a settlement, which he did, because then the prosecution offered, essentially, a "sweetheart" deal which allowed probation for Mr. Kaufman and "only" forfeiture of some of the religious institution's assets.

And in reviewing the submission by the Department of Justice, I couldn't help but note their objections to the innocent owner problems which they claim would end up with transfers to children rather than to widows. As we all know, under the civil forfeiture statutes, the money goes to local law enforcement, that is, shared with local law enforcement. And their were hearings some time ago on the little town of Compton, RI, wherein it was learned, because of their involvement in a forfeiture, they received so much money that could only be used for law enforcement—it doesn't go to widows; it goes to law enforcement—that they built a new police station, had all new police cars, et cetera.

And also in the Government's submission, they said that there's been a drop in forfeitures and that somehow militates against a better forfeiture situation. But in reality, the drop, the committee should know, is caused by the uncertainty that there would be dou-

ble-jeopardy if there was civil forfeiture following a criminal case, or civil forfeiture first and then a criminal case. That is the reason for the drop in the amount of forfeitures and not what I think the Department of Justice has submitted.

The ordinary case—and it's the final thing I want to say—is of the average person, not the big fancy Rolls Royce dealer. Those people are subject to a search where agents of a search warrant go through the house. The agents take everything of value, as goes on in the Southern and Eastern District of New York, where I've practiced for 30 years, and they administratively try to forfeit watches, silver, anything they find. And because of the poor notice provisions, because of the requirement of the claim-and-cost bond, and because of the inability to obtain counsel to fight the seizure of the wedding band, watch, or the silver in the home, the average case results in uncontested administrative forfeitures. I think in the Department of Justice submission they say 80 to 85 percent are administratively forfeited and perhaps all of forfeitures are civil in nature, approximately 80 percent. So 80 percent is civil and 80 or 85 percent of that is "administrative forfeitures" where the average person is totally unable, because of lack of counsel and resources, to contest it and also problems caused by the notice provisions.

[The prepared statement of Mr. Lefcourt follows:]

PREPARED STATEMENT OF GERALD B. LEFCOURT, PRESIDENT-ELECT, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Mr. Chairman, Mr. Conyers, Other Distinguished Members of the Committee, thank you for providing me this opportunity to speak about a case of mine which exemplifies especially well the great need for this bi-partisan bill.

I. CANE STUDY: KAUFMAN

The specific case I want to tell you about is especially egregious in terms of the target victims, but quite typical in terms of the operation. The case is *United States* v. *Kaufman*. Cr. 92–134 (S–1) (JBW), Eastern District of New York. In this case, the government filed forfeiture actions against bank accounts and real property of the religious institutions allegedly involved in a "money laundering" transaction. The illicit activity, however, was actually created and implemented by the government, as a "sting" operation run amok. This travesty was compounded by the government's separate, parallel forfeiture action in which it seized the religious institution's bank account. The substantial assets of several religious institutions were in fact threatened as direct and innocent victims of the government-generated crimes asserted by the government.

In short, the government's thirst for high-profile "sting" operations and forfeited assets was so extreme in this case that it motivated the government to entrap unsuspecting religious persons—in this case, Orthodox Jewish persons in the Williamsburg section of Brooklyn, New York.

Without any indication that my client George Kaufman was involved, or intended to become involved, in any money laundering or other illegal activity, the government lured him into its "sting" operation by affirmatively misleading him into believing that the money an undercover agent and the agent's target-contact brought him for transactions was from *legitimate* sources.[1] This "sting operation" was in clear violation of the Attorney General's Guidelines.

My client was in fact so unduly disadvantaged that he was left with no real choice but to accept the government's coercion of him into a plea for a crime he did not commit—in order to free the bank account of his religious institution and go on with his life.

[1] Mr. Kaufman was lured into exchanging the undercover agent's cash for checks provided by Mr. Kaufman. Mr. Kaufman was selected because, as part of the Orthodox Jewish community, "everything [he] do[es] is with cash." Transcript 1, at p. 53. *I.e.*, because their religious institutions had legitimate sources for their money—coming in large part from cash contributions from their congregants—and legitimate bases for their excellent relationships with their banks (enabling them to certify checks for large amounts).

Mr. Kaufman's case points up the dangers of the current asset forfeitures laws, capable of being used as a crippling tool with which to coerce a person into a plea—even in the most innocent circumstances. Let me explain specifically.

II. LESSONS FROM KAUFMAN

A. In Rem Forfeiture Is Oppressive

In 1992, Judge George Pratt of the United States Court of Appeals for the Second Circuit well-expressed the rightful concern about the seemingly ever-expanding use of federal forfeiture statutes;

> We continue to be enormously troubled by the governments increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes.

United Stages v. *All Assets of Statewide Auto Parts,* 971 F.2d 896 (2d Cir. 1992). Subsequently, Judge Pratt equally well-articulated the fundamental problems with the civil forfeiture laws.

> The machinery of our civil forfeiture laws permits the government to seize property without probable cause, institute a civil forfeiture proceeding, and then use civil discovery as a means of accessing information necessary to effect a forfeiture. Because the final probable-cause determination rests on information presented in the forfeiture action, the risk to claimants of being deprived of their property is extremely high. Despite this apparent unfairness, the precedents of this court and the Supreme Court, as well as the relevant statutes and rules, seem to require this result.

United States v. *Daccarett,* 6 F.3d 37 (Ed Cir. 1993). I could not say it better. But I might add that it is high-time for the statutes and rules to be changed by Congress.

B. In Rem Forfeiture Turns Cherished American Principles of Due Process on Their Head

Consider this: as Americans, we are inbred with the notion that before we may be deprived by the government of our life, liberty or property, we are entitled to our fair day in court—to confront witnesses against us; to remain silent or testify in our own behalf if we choose; and to hold the government to a burden of proof beyond a reasonable doubt.

But under *in rem* federal forfeiture law, many of these protections do not apply. It is a citizen's nightmare. where warrants of seizure are issued by the clerks of the Court; the property owner has the burden of proof; the innocence of the owner alone is often not a defense;[2] rank hearsay is admissible in favor of the government (contrary to the rules of evidence), but is not admissible from the property owner; and the governments right to forfeit property vests at the time it is simply alleged to have been used illegally, rather than at the time of an actual Judgment. In fact, the government can allege alternative, *inconsistent* theories of forfeiture in its complaint and still prevail.

C. In Rem Forfeiture has Exploded and Become a Seizing Agency Cash Cow that Victimizes Innocent People

There are now more than 100 forfeiture statutes in place on the state and federal level. Since 1985, the total value of federal asset seizures has increased approximately 1,500 percent—to over $2.4 billion, including over $643 million for the Department of Justice in fiscal year 1991 alone. Of the $1.5 billion that was forfeited between 1986 and 1990, for example, $474 million in cash and $70 million in property was shared with state and local law enforcement agencies.[3] In just four years, this sharing with State and local law enforcement rose from $22.5 million in cash and property, in 1986, to over $200 million by 1990.

These figures are often cited by prosecutors as evidence that forfeiture is one of the single greatest weapons in the war on crime. High-profile cases where organized crime figures have been prosecuted and their assets seized are splashed across the newspapers to further make the point. But such selective case-cites ignore the cold facts. All across this country, people who have not been charged with a crime, and

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[2] *See e.g., Bennis* v. *Michigan,* 516 U.S. ———, 116 S.CT. 994 (1996) (5–4).

[3] 21 U.S.C. sec. 881(e)(1)(A) authorizes the Attorney General to transfer part or all of forfeited personal property to "any State or local law enforcement agency which participated directly in the seizure or forfeiture of the property." Up to 85% of property forfeited may be returned to the State.

who are in fact innocent of any wrongdoing, have had their cars, boats, money and homes unfairly taken away by the government.

In fact, a study done by the *Pittsburgh Press* has revealed that as many as 80% of the people who lost property to the federal government through forfeiture were never charged with any crime. And most of the forfeited items were not the luxurious playthings of drug barons, but modest homes, simple cars and hard-earned savings of ordinary people The Drug Enforcement Administration's own database shows that big-ticket items—those valued at more than $50,000—made up just 17% of the 25,297 items seized in one sample 18 month period.

D. Applicable Procedural Rules are Patently Unfair: Bi-Partisan Bill Would Bring Fairness and Uniformity to Law

Congress has never before enacted procedural rules specifically designed to govern forfeiture actions under 21 U.S.C. §881 or 18 U.S.C. §981(a)(1)(A). Instead, it "borrowed" the forfeiture rules codified in the Customs Laws, 19 U.S.C. secs. 1602, *et seq.*, and the Supplemental Rules for Certain Admiralty and Maritime Claims (the "Supplemental Rules"), as the rules to govern judicial forfeiture proceedings and pleading requirements. *See* 21 U.S.C. sec. 881(d); 18 U.S.C. sec. 981(d); 28 U.S.C. sec. 2461(b); 7A J. Moore & A. Pelaez, *Moore's Federal Practice and Procedure,* ¶ C.11 at 669 (2d ed. 1983). The Supplemental Rules are part of the Federal Rules of Civil Procedure, *see* Fed.R.Civ.P. A–F, which apply to actions *in rem* (*see* Fed.R.Civ.P. A(2)), such as civil forfeitures.

But these rules and administrative agency regulations provide a complex maze of procedures governing the forfeiture action, almost all of which are stacked against the property owner. For instance, under DEA regulations, property valued at less than $500,000 can be forfeited "administratively;" that is, summarily and without effective court oversight. It is estimated that 80% of all forfeitures proceed in this fashion. There is no right to judicial review of an administrative forfeiture absent a showing that the agency failed to undertake any review at all. *See e.g., United States* v. *One 1987 Jeep Wrangler Automobile,* 972 F.2d 472 (2d Cir. 1992).

This very good bill would go a long way toward finally providing uniformity and fairness to the forfeiture rules. Following are some key aspects of the bill's reforms.

1 . Regarding Claim and Cost Bond

For forfeitures under $500,000, a Claim and Cost Bond is the mechanism for transferring jurisdiction over the matter from the agency to the federal district court. The procedure for filing a claim and cost bond is authorized by Title 19 U.S.C. sec. 1608. That statute provides that a claimant must file a claim and cost bond within 20 days after the first date of publication of the notice of seizure in a newspaper of general circulation. The bond required is 10% of the value of the property seized or $5,000.00, whichever is less. This access-to-justice-tax would rightly be eliminated by this bill.

2. Regarding Burden of Proof (Now On the Claimant)

Currently, the burden of proof is perversely placed upon the claimant, to demonstrate by a preponderance of the evidence that the factual predicates necessary to show probable cause for forfeiture have not been met, or to show the claimant's lack of knowledge or consent to illegal activities.

This is a remarkable requirement considering it is the government that has instituted the lawsuit. It also presents a constitutional anomaly, in view of the quasi-criminal nature and important private interests at stake in forfeiture proceedings.

This bill puts the burden where it belongs, on the government, and by a standard appropriate to the gravity of the interests at stake, "clear and convincing evidence."

3. Regarding Innocent Owner Defense—Achieving Uniform Fairness

Both 21 U.S.C. sec. 881(a)(4) & (6), and 18 U.S.C. sec. 981(a)(2) provide an "innocent owner" defense. Under Section 881, "no property shall be forfeited . . . to the extent of an interest of the owner, by reason of any act or commission established by that owner to have been committed or omitted without the knowledge or consent of that owner." *Id.* at §§881(a)(6), (7). *See also* Section 881(a)(4)(C) ("no conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner"). Section 981's innocent owner defense is nearly identical but unduly stricter: the claimant must prove he did not have knowledge of the illegal use of the property; consent is irrelevant. Under both sections, the burden is on the claimant to establish the defense.

But myriad other forfeiture statutes do not even contain an innocent owner defense provision. The bill would make the innocent owner defense uniform, applicable

to all civil forfeiture cases; and fair, according to the guidelines provided in Section 881. This too is a crucial reform.

III. CONCLUSION

Thank you again for affording me this opportunity to comment on this highly commendable reform measure. Each and every one of its provisions is very much needed. I am especially pleased to see that it already enjoys much strong bi-partisan support, and hope this is a harbinger of prompt passage.

Mr. HYDE. Thank you, Mr. Lefcourt. I gather from what you're saying that the person is not able to even go to the pawn shop because they have nothing to pawn; it's been confiscated.

Mr. LEFCOURT. Absolutely. In order to litigate—I mean, just think about litigating a forfeiture matter, as complicated as it is to us, to some lay person, perhaps high school-educated, to figure out (a) the notice, (b) to somehow file a claim-and-cost bond on their own if they don't have the money for counsel. I think it is impossible for the average Joe, so to speak, to deal with a civil forfeiture——

Mr. HYDE. How widespread is this? Is this a rare occasion or does this happen more frequently?

Mr. LEFCOURT. Congressman Hyde, this is day-to-day standard practice. The Department of Justice brings 30,000 of these a year; this is common. It is rounding up whatever they see of value and sending out notices for administrative forfeiture, and, as you know, that could be up to $500,000 worth of materials. So if the son of the family deals drugs from the house, in theory the house could be taken administratively, the car that was used to go to a sale, and everything involved. And anything they find in the house they claim could be administratively forfeited.

Mr. HYDE. All right. Thank you. I'm going to have to interrupt this hearing for a very quick markup of a bill that we have to pass today. This will not take long. Be patient. You've been patient. You're already candidates for sainthood.

[Whereupon, at 5:34 p.m., the committee proceeded to other business.]

[Whereupon, at 5:37 p.m., the committee resumed.]

Mr. HYDE. Now, we will proceed. Mr. Cassella.

STATEMENT OF STEFAN D. CASSELLA, ASSISTANT CHIEF, ASSET FORFEITURE AND MONEY LAUNDERING SECTION, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. CASSELLA. Thank you, Mr. Chairman. Mr. Chairman, last year when I appeared before the committee, I talked about how forfeiture lets us take the profit out of crime, provide funding for the police, and restore property to crime victims. In our written testimony today we list several pages of cases where we've used forfeiture to do good things for good people—cases where we've turned a drug dealer's property into a shelter for battered women or a retreat for kids in drug rehabilitation, or recovered property in a telemarketing scam and returned it to the elderly victims. We're proud of what we've accomplished in these and thousands of other cases. I say most emphatically this is a program that works.

It's true that forfeiture has been controversial. When you take laws that were designed centuries ago to forfeit pirate ships and you use them to forfeit houses, cars, businesses, and bank accounts,

there are a lot of things to sort out. How do we protect innocent owners? What due process must be afforded? When does forfeiture go too far or take too much?

The Federal courts have begun to answer those questions. There have been ten forfeiture cases in the Supreme Court in the last 5 years—an extraordinary amount of attention to be paid by the High Court to one subject. But we have done our part, too, by tightening the regulations and guidelines, training prosecutors and agents.

Today half of all contested forfeitures are criminal forfeitures. Eighty percent of all forfeitures, including the administrative forfeitures, involve a related criminal prosecution or arrest. Indeed, some would say that the courts have gone too far in limiting what we can do with the forfeiture program. There has been a 40-percent drop in forfeiture activity since 1994 and there was a $53 million decrease—that's 25 percent—in the amount distributed to local police last year. We need to remember this as we consider what changes to make in the forfeiture laws. Which brings me to your bill, Mr. Chairman, H.R. 1835.

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 program—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. And so we have supported, and we continue to support, reasonable changes to the forfeiture laws to guarantee that the laws are fair, and that they are perceived as fair.

I said before and I say again that the burden of proof in forfeiture cases should be on the Government, that there should be a uniform innocent owner defense, that the time limits for filing claims should be extended to ensure that everyone has his day in court, and that there should be relief for those whose property is damaged while in government custody.

Both H.R. 1835 and H.R. 1745, the bill that law enforcement drafted and that Congressman Schumer introduced, address these issues. In fact, Mr. Chairman, if I may, I would like our section analysis of the Schumer bill to be included in the record.

Mr. HYDE. Without objection, so ordered.

[The information follows:]

Section-by-Section Analysis of H.R. 1745 Forfeiture Act of 1997

Title I: Administrative Forfeitures

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(l)(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. *See United States v. Evans*, 92 F.3d 540 (7th Cir. 1996) (waiver of cost bond is mandatory if claimant is a pauper; if pauper status is denied, claimant can either post bond or challenge the denial as arbitrary or capricious under the APA). 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 section 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 section 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 the 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 section 1607, and if not, to allow the claimant to file a claim in accordance with section 1608 notwithstanding the expiration of the claims period. *See United States v. Woodall*, 12 F.3d 791, 793 (8th Cir. 1993).

Under current law, however, it is unclear what statute gives the district courts jurisdiction to review due process challenges to administrative forfeiture: indeed, plaintiffs have attempted to base claims on a variety of provisions including the Tucker Act, 28 U.S.C. § 1346(a)(2); the Federal Tort Claims Act, 28 U.S.C. § 1346(b); the Administrative Procedures Act, 5 U.S.C. § 702; Rule 41(e) of the Federal Rules of Criminal Procedure; 28 U.S.C. § 1356; and the Fourth and Fifth Amendments to the Constitution. *See Wright v. United States*, 902 F. Supp. 486 (S.D.N.Y. 1995). This has led to widespread confusion as different procedures are applied in different cases, including different statutes of limitations depending on the statute employed. *See Williams v. DEA*, 51 F.3d 732 (7th Cir. 1995) (applying two-year statute of limitations but noting that the contours of the exercise of the court's equitable jurisdiction are "largely undefined"); *Demma v. United States*, 1995 WL 642831 (N.D. Ill. Oct. 31, 1995) (applying six-year statute of limitations to Tucker Act theory).

This amendment establishes a uniform procedure for litigating due process issues in accordance with the leading cases. 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. *See Barrera-Montenegro v. United States*, 74 F.3d 657 (5th Cir. 1996) (remanding for renewed administrative proceeding unless claim and cost bond are filed); *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); *United States v. Woodall*, 12 F.3d 791, 795 (8th Cir. 1993) (same); *United States v. Giraldo*, 45 F.3d 509, 512 (1st Cir. 1995) (same); *but see United States v. Boero*, ___ F.3d ___, 1997 WL 175099 (2d 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).

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 v. United States*, 24 F.3d 444, 446 (2d Cir. 1994). The claimant would not be entitled to use this section to seek review of the administrative forfeiture decree on the merits; nor could the claimant seek relief under this section if, notwithstanding the defect in the Government's compliance with the notice provision, the claimant had actual notice of the seizure from some other source, or was actually present when the property was seized and knew that it would be forfeited. *See United States v. Giovanelli*, 807 F. Supp. 351 (S.D.N.Y. 1992) (claimant who had actual knowledge of the forfeiture cannot sit on his claim and then argue that the Government's efforts to provide notice were inadequate), rev'd 998 F.2d 116 (2d Cir. 1993); *United States v. One 1987 Jeep Wrangler*, 972 F.2d 472 (2d Cir. 1992) (lack of publication did not amount to violation of due process where claimant had actual knowledge of the seizure); *Lopes v. United States*, 862 F. Supp. 1178, 1188 (S.D.N.Y. 1994) (where there is actual notice of an impending forfeiture, there is no violation of due process); *U-Series International Service v. United States*, 1995 WL 649932 (S.D.N.Y. Nov. 6, 1995) (same).

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

Section 104—Judicial Forfeiture of Real Property

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

Section 105—Preservation of Arrested Real Property

Rule E(4)(b) of the Supplemental Rules for Certain Admiralty and Maritime Claims governs the service of arrest warrants *in rem* in most civil forfeiture cases. The Rule provides that certain tangible property, including real property, may be arrested without seizing the property and displacing the owners or occupants. Commonly in such cases, the marshal or other person executing the warrant posts the warrant in a conspicuous place and leaves a copy of the forfeiture complaint with the person in possession or his agent. The Government may also file a *lis pendens* to apprise all interested persons of the pendency of the forfeiture action. *See United States v. James Daniel Good Real Property*, 114 S. Ct. 492 (1993); *United States v. Twp. 17 R 4*, 970 F.2d 984 (1st Cir. 1992).

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

In general, an order authorized by this amendment to the Rule could be obtained *ex parte*. However, where the order would interfere with the owner's use or enjoyment of the property and was not made necessary by exigent circumstances, the order could not be entered without prior notice and an opportunity to be heard, as required by *Good*. For example, an order authorizing videotaping could be issue *ex parte*, but an order directing a landlord to escrow rents received from tenants could not.

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 section 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 section 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*, 69 F.3d 1491 (9th Cir. 1995); *County of Oakland v. VISTA Disposal, Inc.*, 900 F. Supp. 879 (E.D. Mich. 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.

Section 108—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 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. *See* Rule 54(b)(5).

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. *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 section 881(b)(4) upheld where plain view exception applies). 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.

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 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 section 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 section 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 retrained 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 section 888(d) in judicial forfeiture cases).

Paragraph (6) of the redrafted section 981(b) generalizes this provision to all property seized for forfeiture under section 981, and, because

section 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 section 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 section 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.

Title II: Judicial Procedures

Section 201—Trial Procedure for Civil Forfeiture

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

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

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

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

Subsection (b) deals with situations in which a law enforcement agency has previously seized property for forfeiture but the forfeiture must be handled judicially instead of administratively either because the claimant has filed a claim and cost bond under the customs laws, *see* 19 U.S.C. § 1608, or because the customs laws do not permit an administrative forfeiture of the particular property, *see* 19 U.S.C. § 1607 (limiting administrative forfeitures generally to personal property valued at less than $500,000). The statute provides that in such cases, the Attorney General must determine whether to file a forfeiture action as soon as practicable.

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

Subsection (c) provides for the filing of a claim and answer by the claimant in the manner prescribed in Rule C of the Admiralty Rules. In addition, the statute sets forth certain requirements regarding the description of the claimant's ownership interest in the property that must be included in the claim. These are the same criteria currently required of a claimant in a criminal forfeiture case. *See* 18 U.S.C. § 1963(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(l)(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 statute also creates a mechanism for litigating standing issues pretrial. In the pretrial 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 pretrial hearing is intended only to resolve the standing issues, and is not intended to be a mini-trial in which the Government's case-in-chief and the claimant's affirmative defenses are litigated.

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

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

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

Many courts have criticized this latter aspect of forfeiture procedure, and have insisted on a presentation of evidence by the Government at trial that effectively places the burden on the Government to establish the forfeitability of the property. *See United States v. $30,600*, 39 F.3d 1039 (9th Cir. 1994); *United States v. $31,990 in U.S. Currency*,

982 F.2d 851 (2d Cir. 1993). Accordingly, subsection (e) changes current law to provide that the Government, not the claimant, bears the burden of proof regarding the forfeitability of the property, while the claimant retains the burden of proof regarding any affirmative defenses. *See United States v. One Parcel . . . 194 Quaker Farms Road*, 85 F.3d 985 (2d Cir. 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 pretrial.

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 pretrial. Pretrial 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 pretrial 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 pretrial hearings in criminal forfeiture cases. The statute also codifies *McCray v. Illinois*, 386 U.S. 300 (1967) (in pretrial motion to suppress, informer's identity need not be revealed in a pretrial 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 pretrial hearings in civil forfeiture cases. The term "hearing" means either an oral hearing or a determination on written papers, as provided in Rule 43(e), Federal Rules of Civil Procedure. Hearsay will not be admissible at trial except as provided in the Federal Rules of Evidence.

Subsection (i) gives the Government the benefit of certain adverse inferences when the claimant invokes the Fifth Amendment at trial or during the discovery phase of a forfeiture case. This is consistent with current case law regarding adverse inferences, *see Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976); *United States v. Ianniello*, 824 F.2d 203, 208 (2d Cir. 1987); *United States v. A Single Family Residence*, 803 F.2d 625, 629 n.4 (11th Cir. 1986); *United States v. $75,040.00 in U.S. Currency*, 785 F. Supp. 1423, 1429 (D. Or. 1991); *but see United States v. Real Property (Box 137-B)*, 24 F.3d 845 (6th Cir. 1994), and is necessary, given the Government's burden of proof, to prevent claimants from defeating forfeiture by refusing to reveal the source of property or its nexus to a criminal offense. *See United States v. Certain Real Property . . . 4003-4005 5th Avenue*, 55 F.3d 78 (2d Cir. 1995) ("If it appears that a litigant has sought to use the Fifth Amendment to abuse or obstruct the discovery process, trial courts, to prevent prejudice to opposing parties, may adopt remedial procedures or impose sanctions."). Also consistent with current law, the provision precludes the Government from relying solely on the adverse inference to establish its burden of proof. *LaSalle Bank Lake View v. 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* section 15(f). It authorizes the court to make a pretrial 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 pretrial 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 pretrial 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 pretrial 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.[1] Eighth Amendment determinations, by contrast, are made by the court alone,[2] 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.[3]

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. This codifies recent cases holding that the Supreme Court's decision in *United States v. Ursery* disposes of any notion that a civil forfeiture is punitive and therefore abates on the death of the property owner. *See United States v. $120,751.00*, ___ F.3d ___, 1996 WL 699761 (8th Cir. Dec. 9, 1996) (reversing judgment of district court dismissing forfeiture of drug proceeds after drug dealer was murdered); *United States v. U.S. Currency in the Amount of $551,527.00*, 1996 WL 612700 (9th Cir. 1996) (Table Case) (reversing judgment of district court dismissing civil forfeiture under 18 U.S.C. § 1955(d)).

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 202—Uniform Innocent Owner Defense

The Constitution does not require any protection for innocent owners in civil forfeiture statutes. *Bennis v. Michigan*, 116 S. Ct. 994 (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, section 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 section 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 section 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.[4] 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 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 is cases involving the acquisition of drug dollars on the black market in South America. In such cases, wealthy persons assist in the laundering of the drug money by purchasing U.S. dollars, or dollar-denominated instruments and send the money to the United States while maintaining ignorance of its source. *See United States v. All Monies*, 754 F. Supp. 1467 (D. Haw. 1991); *United States v. Funds Seized From Account Number 20548408 at Baybank, N.A.*, 1995 WL 381659 (D. Mass. Jun. 16, 1995) (unpublished). The new statute would put the burden on such individuals to show that they took all reasonable steps to ensure that they were not acquiring drug proceeds.

Limiting the innocent owner defense to "purchasers" in this circumstance tracks the language of the criminal innocent owner defense, 21 U.S.C. § 853(n)(6)(B), and eliminates the problem identified by Justice Kennedy in *92 Buena Vista.*

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

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

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 203—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 section 881(i) or section 981(g) even if the claimant in the civil case was not one of persons under indictment in the criminal case. *See United States v. A Parcel of Realty Commonly Known as 4808 South Winchester*, No. 88-C-1312, 1988 WL 107346 (N.D.Ill. Oct. 11, 1988); *United States v. All Monies ($3,258,694.54)*, No. 89-00382 ACK (D. Hawaii June 6, 1990).

The amendment also gives the claimant an equal opportunity to seek a stay of the civil case in the appropriate circumstances. As mentioned, under current law, only the Government may seek a stay of the forfeiture proceeding. Under the amendment, however, a claimant may obtain a stay if the claimant is able to establish that he or she is the subject of an actual, ongoing criminal investigation or prosecution, and that denial of a stay of the civil forfeiture proceeding would infringe upon the claimant's Fifth Amendment rights in the criminal proceeding. This provision protects defendants and individuals under

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

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

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

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

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

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

The revised statute would also provide that the Court should enter any order necessary to preserve the

value of the property while the stay was in effect. This would include an order requiring that mortgage payments should continue to be made in order to protect the rights of third party lienholders, tenants, and other innocent persons. *Id.*

Section 204—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 pretrial seizure, disbursement of forfeited property, extended venue and pretrial 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 sections 981 and 982.

Moreover, there are many older civil forfeiture procedures scattered throughout Title 18 that contain no procedural provisions at all or that incorporate the customs laws but not the procedures in Chapter 46. *See, e.g.*, 18 U.S.C. §§ 492, 512, 544-45, 548, 962-69, 981, 1165, 1762, 1955, 2274 and 2513.[5] 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.

Section 205—Civil Investigative Demands

This provision passed both the Senate and the House in the 102d Congress in slightly different form. *See* section 943 of S.543; section 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.[6] 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 206—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 207—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 208—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 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.

Section 209—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*, 80 F.3d 317 (8th Cir. 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 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 Fifth

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.

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.[7] This point is important. In the absence of 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. *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*, ___ F.3d ___, 1996 WL 692128 (4th Cir. Dec. 4, 1996) (section 853(a) authorizes forfeiture of gross proceeds).

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.

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 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. Moveover, section 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 section 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.

Finally, subsection (e) clarifies an ambiguity in the present statute relating to the 120-day period in which a forfeiture action must be filed. Presently, the statute says that a forfeiture proceeding must be filed within 120 days of the seizure of the property. This was intended to force the Government to initiate a forfeiture action promptly. In one case, however, where the Government did initiate an administrative forfeiture action within the 120-day period, the claimant filed a claim and cost bond which required the Government to begin the forfeiture action over again by filing a formal civil judicial proceeding in federal court. The claimant then moved to dismiss the judicial proceeding because the complaint was filed outside the 120-day period.

The court granted the motion to dismiss because the literal wording of section 924(d) requires *any* forfeiture action against the firearm to be filed within 120 days of the seizure. *United States v. Fourteen Various Firearms*, 889 F. Supp. 875 (E.D. Va. 1995). This interpretation, however, leads to unjust results in cases where the Government promptly commences an administrative forfeiture action but the claimant waits the full time allotted to him to file a claim. (Under Section 101 of this Act, the claimant would have 30 days from the date of publication of notice of the administrative forfeiture action to file a claim, which is likely to be several months after the seizure even if the Government initiated the administrative forfeiture almost immediately after the seizure.) In such cases, Congress could not have intended the 120-day period for filing a *judicial* complaint to count from the date of the seizure; indeed, it is often the case that the claimant doesn't even file the claim until more than 120 days have passed. Thus, the amendment clarifies the statute to make clear that the Government must initiate its *administrative forfeiture* proceeding within 120 days of the seizure and then will have 120 days from the filing of a claim, if one is filed, to file the case in federal court. The amendment also tolls the 120-day period during the time a related criminal indictment or information is pending.

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, section 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 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.

Section 305—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. In addition, the statute is re-designated as paragraph (7) of 18 U.S.C. § 982(a) because another paragraph (6) was previously enacted.

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 306—Forfeiture of Proceeds of Certain Foreign Crimes

This provision authorizes the forfeiture of the proceeds of any foreign crime that has been 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.

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 Sections 6050I and 1960

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 and 18 U.S.C. § 1960 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 1960 was enacted in 1992 to address money laundering through illegal currency transmitting businesses. A cross-reference to the statute was added to section 982 to provide for criminal forfeiture, but not to section 981(a)(1)(A) to provide for civil forfeiture. The amendment corrects that omission.

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 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.

Section 310—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.

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

The amendment to 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.

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. § 311 (civil forfeiture) and section 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. *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—Forfeiture for Food Stamp Fraud

This amendment to the Food Stamp Act clarifies an ambiguity in the food stamp fraud forfeiture provision enacted as part of the 1996 welfare reform legislation, Pub. L. 104-193. As enacted, the forfeiture provision for violations of Section 15 of the Food Stamp Act (7 U.S.C. § 2024) contains both criminal and civil forfeiture components. On the one hand, it is drafted as a criminal forfeiture provision, which limits the forfeiture to the property of the convicted defendant. On the other hand, it contains an innocent owner defense, which implies that Congress intended to make property other than the property of the defendant subject to forfeiture. (There is no need for an innocent owner defense otherwise because there is no such thing as an innocent convicted defendant.)

Civil forfeiture is necessary, of course, to forfeit property if the defendant is deceased or is a fugitive, if he is convicted of an offense other than the one that generated the property subject to forfeiture, or if he committed the offense in such a way that the proceeds were realized by a third party and not by the defendant. The amendment resolves the ambiguity in the statute and closes any possible loophole by authorizing civil forfeiture in food stamp fraud cases.

Section 316—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 vehicles and other property used to commit the offense subject to forfeiture as well.

Title IV: Miscellaneous Forfeiture Amendments

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

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 section 981(a)(1)(C) and (D), most of which involve financial institution fraud.[8] In contrast, the criminal statute, section 982, permits forfeited funds to be restored to victims in virtually all instances. *See* 21 U.S.C. § 853(i) incorporated by reference in section 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.[9] These amendments negate that implication by making it clear that the Attorney General make use the forfeiture laws to restore property to victims in all cases.

First, subsection (e)(6), which presently authorizes the payment of restitution to victims of any crime

listed in 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). *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 subsection (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.

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). 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 a drug trafficking or money laundering offense in a foreign country and an order of forfeiture is entered against him, the foreign country, as the Party requesting assistance under the Vienna Convention, would file a civil action as a plaintiff in federal court seeking enforcement of the judgment against assets that may be found in the United States. The Requesting Party, however, would not be allowed to file for enforcement without approval from the United States Department of Justice, thereby permitting the United States to screen out requests that are factually deficient or based on unacceptable foreign proceedings.

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

Act provides, in pertinent part:

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

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

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

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

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

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

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

The clarifying changes are necessary to make sure that the provisions of section 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 section 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 section 984 applied when property traceable to a money laundering offense was forfeited under section 981.

The amendments also make clear that section 984 does not abrogate any other applicable theory of forfeiture. *See American Express Bank* which suggested, in *dicta*, that section 984 was intended to abrogate the case law authorizing the forfeiture of facilitating property under § 981(a)(1)(A). Under section 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 section 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 section 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 section 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 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.

Subsection (d) 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 section 1956 action does not dissipate the assets that would be needed to satisfy a judgment under that section.

Subsection (e) adds bail bondsmen to the list of entities that appear in the definition of "financial institution" in 31 U.S.C. § 5312. This definition, which already includes such non-bank institutions as jewelry and precious metals dealers, pawnbrokers, money exchangers and other high-cash business that are frequently exploited by money launderers, serves to identify those entities that are required to file Currency Transaction Reports on transactions involving more than $10,000 in currency.

Subsection (f) is a purely technical amendment.

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 section 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 section 524(c)(1) and other statutes, in this Act and in previous legislation. Subsection (a)(5) 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 section 524(c)(7) (dealing with reports and audits) but failed to repeal section 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 section 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 section 524(c)(1) to add authority to indemnify foreign governments held liable in connection with assistance rendered to the United States in a forfeiture action.

Under current U.S. law, there is no provision allowing the return of forfeited property to a foreign country or other entity, such as a foreign bank, that suffers foreign legal liability as the result of assisting a United States forfeiture action. This amendment authorizes the Attorney General to return the forfeited property plus any earned interest in such circumstances. Without assurances that the property plus interest can be returned, a number of foreign jurisdictions have been unwilling to seize or repatriate property on behalf of the United States.

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

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

This proposal is meant primarily to satisfy foreign

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

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

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

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

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

Section 877 of 21 U.S.C. provides that "(a)ll final determinations, findings, and conclusions of the Attorney General under this subchapter shall be final... except that any person aggrieved by a final decision of the Attorney General may obtain review of the decision in the United States Court of Appeals for the District of Columbia or the circuit in which his principal place of business is located upon petition filed with the court. . . ." One court has found that the "express and unambiguous terms" of Section 877 provided the court of appeals with jurisdiction to review on direct appeal a denial of a petition for remission or mitigation of the forfeiture of property by an agency. *Scarabin v. DEA*, 925 F.2d 100, 100-01 (5th Cir. 1991). This decision was recently upheld in *Clubb v. FBI*, No. 93-4912 (5th Cir. Feb. 28, 1994) (unpublished).

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

Section 412—Certificate of Reasonable Cause

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

Section 413—Conforming Treasury and Justice Funds

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

Section 414—Disposition of Property Forfeited Under Customs Laws

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

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

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

Section 416—Fugitive Disentitlement

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

Eng and similar cases in other circuits applied a judicially created rule intended to protect the integrity of the judicial process from abuse by a fugitive in a criminal case. But in *Degen v. United States*, 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. 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 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—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 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.

Title V: Criminal Forfeiture

Section 501—Uniform Procedures for Criminal Forfeiture

In 1970, Congress enacted a set of procedures to govern criminal forfeiture proceedings. These procedural statutes, which were substantially revised in 1984 and have been amended on numerous occasions since that time, set forth the procedures dealing with restraining orders, seizure warrants, third-party rights, disposal of property, the forfeiture of substitute assets, and all other aspects of a criminal forfeiture case.

The two original statutes were codified at 18 U.S.C. § 1963 (for RICO offenses) and 21 U.S.C. § 853 (for Continuing Criminal Enterprise offenses in drug cases). At the time, those were the only two criminal offenses for which criminal forfeiture was provided under federal law. Since 1984, however, Congress has enacted numerous other criminal forfeiture statutes. In some cases, *e.g.* in the cases of criminal forfeiture provisions relating to obscenity (18 U.S.C. § 1467), and child pornography (18 U.S.C. § 2253), Congress enacted separate sets of procedures modeled on sections 1963 and 853. In other cases, *e.g.* in cases involving espionage (18 U.S.C. § 794), money laundering (18 U.S.C. § 982(a)(1)), bank fraud and counterfeiting (18 U.S.C. § 982(a)(2), and health care fraud (18 U.S.C. § 982(a)(6)), Congress simply cross-referenced particular provisions in section 853. And in other instances, *e.g.* in cases involving food stamp fraud (7 U.S.C. § 2024(h)), fraud against government regulatory agencies (18 U.S.C. § 982(a)(3)) and car-jacking (18 U.S.C. § 982(a)(5)), Congress neglected to enact any criminal forfeiture procedures at all.

The multiplication of criminal forfeiture statutes, each with its own set of procedures, has led to obvious problems. As mentioned, some statutes contain no procedures at all, which makes those statutes ineffective. Also, some procedural statutes have been updated from time to time while others have not, leaving the procedures in some statutes out of date. Most important, the cross-references to section 853 differ from statute to statute, making the criminal forfeiture procedures inconsistent with each other. For example, the seizure warrant provision in the drug statute, 21 U.S.C. § 853(f), is incorporated for money laundering and health care offenses under 18 U.S.C. § 982(a)(1) and (6), but not for RICO offenses under 18 U.S.C. § 1963, while the definition of "property" in section 853(b) is incorporated for bank fraud, counterfeiting, explosives and other forfeitures under section 982(a)(2) but not for money laundering under section 982(a)(1).

This convoluted system no longer makes any sense and should be abandoned in favor of a single procedural statute that governs all criminal forfeitures. Accordingly, the amendment repeals all of the criminal forfeiture provisions except for section 853, and replaces them with language that incorporates section 853, as it may be amended from time to time. 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 of the context of narcotics violations.

Section 502—Availability of Criminal 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 section 2461(a) to authorize criminal forfeiture whenever any form of forfeiture is otherwise authorized by statute.

Section 503—Federal Rules of Criminal Procedure

Rule 32.2 brings together in one place a single set of procedural rules governing the forfeiture of assets in a criminal case. Existing Rules 7(c)(2), 31(e) and 32(d)(2) are repealed and replaced by the new Rule. In addition, the forfeiture-related provisions of Rule 38(e) are stricken.

Subsection (a) is derived from Rule 7(c)(2) which provides that notwithstanding statutory authority for the forfeiture of property following a criminal conviction, no forfeiture order may be entered unless the defendant was given notice of the forfeiture in the indictment or information. As courts have held, subsection (a) is not intended to require that an itemized list of the property to be forfeited appear in the indictment or information itself; instead, such an itemization may be set forth in one or more bills of particulars. *See United States v. Moffitt, Zwerling & Kemler, P.C.*, 83 F.3d 660, 665 (4th Cir. 1996), aff'g 846 F. Supp. 463 (E.D. Va. 1994) (*Moffitt I*) (indictment need not list each asset subject to forfeiture; under Rule 7(c), this can be done with bill of particulars). The same applies with respect to property to be forfeited only as "substitute assets." *See United States v. Voight*, 89 F.3d 1050 (3rd Cir. 1996) (court may amend order of forfeiture at any time to include substitute assets).

Subsection (b) replaces Rule 31(e) which provides that the jury in a criminal case must return a special verdict "as to the extent of the interest or property subject to forfeiture." This Rule has proven problematic in light of changes in the law that have occurred since the Rule was promulgated in 1972.

The first problem concerns the role of the jury. When the Rule was promulgated, it was assumed that criminal forfeiture was akin to a separate criminal offense on which evidence would be presented and the jury would have to return a verdict. In *Libretti* v. *United States*, 116 S. Ct. 356 (1995), however, the Supreme Court held that criminal forfeiture constitutes an aspect of the sentence imposed in a criminal case, and that accordingly the defendant has no constitutional right to have the jury determine any part of the forfeiture. The special verdict requirement in Rule 31(e), the Court said, is in the nature of a statutory right that can be modified or repealed at any time.

Even before *Libretti*, lower courts had determined that criminal forfeiture is a sentencing matter and

concluded that criminal trials therefore should be bifurcated so that the jury first returns a verdict on guilt or innocence and then returns to hear evidence regarding the forfeiture. In the second part of the bifurcated proceeding, the jury is instructed that the Government must establish the forfeitability of the property by a preponderance of the evidence. *See United States v. Myers*, 21 F.3d 826 (8th Cir. 1994) (preponderance standard applies because criminal forfeiture is part of the sentence in money laundering cases); *United States v. Voight*, 89 F.3d 1050 (3rd Cir. 1996) (following *Myers*); *United States v. Smith*, 966 F.2d 1045, 1050-53 (6th Cir. 1992) (same for drug cases); *United States v. Bieri*, 21 F.3d 819 (8th Cir. 1994) (same).

In light of *Libretti*, it is questionable whether the jury should have any role in the forfeiture process. Traditionally, juries do not have a role in sentencing other than in capital cases, and elimination of that role in criminal forfeiture cases would streamline criminal trials. Undoubtedly, it is confusing for a jury to be instructed regarding a different standard of proof in the second phase of the trial, and it is burdensome to have to return to hear additional evidence after what may have been a contentious and exhausting period of deliberation regarding the defendant's guilt or innocence.

For these reasons, the proposal replaces Rule 31(e) with a provision that requires the court alone, at any time within 10 days after the verdict in the criminal case, to hold a hearing to determine if the property was subject to forfeiture, and to enter a preliminary order of forfeiture accordingly.

The second problem with the present rule concerns the scope of the determination that must be made prior to entering an order of forfeiture. This issue is the same whether the determination is made by the court or by the jury.

As mentioned, the current Rule requires the jury to return a special verdict "as to the extent of the interest or property subject to forfeiture." Some courts interpret this to mean only that the jury must answer "yes" or "no" when asked if the property named in the indictment is subject to forfeiture under the terms of the forfeiture statute—*e.g.* was the property used to facilitate a drug offense? Other courts also ask the jury if the defendant has a legal interest in the forfeited property. Still other courts, including the Fourth Circuit, require the jury to determine the *extent* of the defendant's interest in the property vis a vis third parties. *See United States v. Ham*, 58 F.3d 78 (4th Cir. 1995) (case remanded to the district court to empanel a jury to determine, in the first instance, the extent of the defendant's forfeitable interest in the subject property).

The notion that the "extent" of the defendant's interest must be established as part of the criminal trial is related to the fact that criminal forfeiture is an *in personam* action in which only the defendant's interest in the property may be forfeited. *United States v. Riley*, 78 F.3d 367 (8th Cir. 1996). When the criminal forfeiture statutes were first enacted in the 1970's, it was clear that a forfeiture of property other than the defendant's could not occur in a criminal case, but there was no mechanism designed to limit the forfeiture to the defendant's interest. Accordingly, Rule 31(e) was drafted to make a determination of the "extent" of the defendant's interest part of the verdict.

The problem, of course, is that third parties who might have an interest in the forfeited property are not parties to the criminal case. At the same time, a defendant who has no interest in property has no incentive, at trial, to dispute the Government's forfeiture allegations. Thus, it was apparent by the 1980's that Rule 31(e) was an inadequate safeguard against the inadvertent forfeiture of property in which the defendant held no interest.

In 1984, Congress addressed this problem when it enacted a statutory scheme whereby third party interests in criminally forfeited property are litigated by the court in an ancillary proceeding following the conclusion of the criminal case and the entry of a preliminary order of forfeiture. *See* 21 U.S.C. § 853(n); 18 U.S.C. § 1963(l). Under this scheme, the court orders the forfeiture of the defendant's interest in the property—whatever that interest may be—in the criminal case. At that point, the court conducts a separate proceeding in which all potential third party claimants are given an opportunity to challenge the forfeiture by asserting a superior interest in the property. This proceeding does not involve relitigation of the forfeitability of the property; its only purpose is to determine whether any third party has a legal interest in the property such that the forfeiture of the property from the defendant would be invalid.

The notice provisions regarding the ancillary proceeding are equivalent to the notice provisions that govern civil forfeitures. *Compare* 21 U.S.C. § 853(n)(1) *with* 19 U.S.C. § 1607(a); *see United States v. Boulder*, 927 F. Supp. 911 (W.D.N.C. 1996)

(civil notice rules apply to ancillary criminal proceedings). Notice is published and sent to third parties who have a potential interest. *See United States v. BCCI Holdings (Luxembourg) S.A. (In re Petition of Indosuez Bank)*, 916 F. Supp. 1276 (D.D.C. 1996) (discussing steps taken by Government to provide notice of criminal forfeiture to third parties). If no one files a claim, or if all claims are denied following a hearing, the forfeiture becomes final and the United States is deemed to have clear title to the property. 21 U.S.C. § 853(n)(7); *United States v. Hentz*, 1996 WL 355327 (E.D. Pa. 1996) (once third party fails to file a claim in the ancillary proceeding, Government has clear title under section 853(n)(7) and can market the property notwithstanding third party's name on the deed).

Thus, the ancillary proceeding has become the forum for determining the extent of the defendant's forfeitable interest in the property. It allows the court to conduct a proceeding in which all parties can participate that ensures that the property forfeited actually belongs to the defendant.

Since the enactment of the ancillary proceeding statutes, the requirement in Rule 31(e) that the court (or jury) determine the extent of the defendant's interest in the property as part of the criminal trial has become an unnecessary anachronism that leads more often than not to duplication and a waste of judicial resources. There is no longer any reason to delay the conclusion of the criminal trial with a lengthy hearing over the extent of the defendant's interest in property when the same issues will have to be litigated a second time in the ancillary proceeding if someone files a claim challenging the forfeiture. For example, in *United States v. Messino*, 921 F. Supp. 1231 (N.D. Ill. 1996), the court allowed the defendant to call witnesses to attempt to establish that they, not he, were the true owners of the property. After the jury rejected this evidence and the property was forfeited, the court conducted an ancillary proceeding in which the same witnesses litigated their claims to the same property.

A more sensible procedure would be for the court, once it determines that property was involved in the criminal offense for which the defendant has been convicted, to order the forfeiture of whatever interest a defendant may have in the property without having to determine exactly what that interest is. If third parties assert that they have an interest in all or part of the property, those interests can be adjudicated at one time in the ancillary proceeding.

This approach would also address confusion that occurs in multi-defendant cases where it is clear that each defendant should forfeit whatever interest he may have in the property used to commit the offense, but it is not at all clear which defendant is the actual owner of the property. For example, suppose A and B are co-defendants in a drug and money laundering case in which the Government seeks to forfeit property involved in the scheme that is held in B's name but of which A may be the true owner. It makes no sense to invest the court's time in determining which of the two defendants holds the interest that should be forfeited. Both defendants should forfeit whatever interest they may have. Moreover, to the extent that the current rule forces the court to find that A is the true owner of the property, it gives B the right to file a claim in the ancillary proceeding where he may attempt to recover the property despite his criminal conviction. *United States v. Real Property in Waterboro*, 64 F.3d 752 (1st Cir. 1995) (co-defendant in drug/money laundering case who is *not* alleged to be the owner of the property is considered a third party for the purpose of challenging the forfeiture of the other co-defendant's interest).

The revised Rule resolves these difficulties by postponing the determination of the extent of the defendant's interest until the ancillary proceeding. Under this procedure, the court, at any time within 10 days after the verdict in the criminal case, would determine if the property was subject to forfeiture in accordance with the applicable statute—*e.g.*, whether the property represented the proceeds of the offense, was used to facilitate the offense, or was involved in the offense in some other way. The determination could be made by the court alone based on the evidence in the record from the criminal trial or the facts set forth in a written plea agreement submitted to the court at the time of the defendant's guilty plea, or the court could hold a hearing to determine if the requisite relationship existed between the property and the offense. It would not be necessary to determine at this stage what interest any defendant might have in the property. Instead, the court would order the forfeiture of whatever interest each defendant might have in the property and conduct the ancillary proceeding. If someone files a claim, the court would determine the respective interests of the defendants versus the third party claimants and amend the order of forfeiture accordingly. On the other hand, if no one files a claim in the ancillary proceeding, the court

would enter a final order forfeiting the property in its entirety.

Subsection (c) replaces Rule 32(d)(2) (effective December 1, 1996). It provides that once the court enters a preliminary order of forfeiture directing the forfeiture of whatever interest each defendant may have in the forfeited property, the Government may seize the property and commence an ancillary proceeding to determine the interests of any third party. Again, if no third party files a claim, the court, at the time of sentencing, will enter a final order forfeiting the property in its entirety. If a third party files a claim, the order of forfeiture will become final as to the defendant at the time of sentencing but will be subject to amendment in favor of a third party pending the conclusion of the ancillary proceeding.

Because it is not uncommon for sentencing to be postponed for an extended period to allow a defendant to cooperate with the Government in an ongoing investigation, the Rule would allow the order of forfeiture to become final as to the defendant before sentencing, if the defendant agrees to that procedure. Otherwise, the Government would be unable to dispose of the property until the sentencing took place.

Subsection (d) sets forth a set of rules governing the conduct of the ancillary proceeding. 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. (In re Petitions of General Creditors)*, 919 F. Supp. 31 (D.D.C. 1996) ("If a third party fails to allege in its petition all elements necessary for recovery, including those relating to standing, the court may dismiss the petition without providing a hearing"); *United States v. BCCI (Holdings) Luxembourg S.A. (In re Petition of Department of Private Affairs)*, 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).

Subsection (e) replaces the forfeiture provisions of Rule 38(e) which provide that the court may stay an order of forfeiture pending appeal. The purpose of the provision is to ensure that the property remains intact and unencumbered so that it may be returned to the defendant in the event his appeal is successful. Subsection (e) makes clear, however, 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. *See United States v. Messino*, 907 F. Supp. 1231 (N.D. Ill. 1995) (the district court retains jurisdiction over forfeiture matters while an appeal is pending).

Finally, subsection (e) provides a rule to govern what happens if the court determines that a third-party claim should be granted but the defendant's appeal is still pending. The defendant, of course, is barred from filing a claim in the ancillary proceeding. *See* 18 U.S.C. § 1963(l)(2); 21 U.S.C. § 853(n)(2). Thus, the court's determination, in the ancillary proceeding, that

a third party has an interest in the property superior to that of the defendant cannot be binding on the defendant. So, in the event that the court finds in favor of the third party, that determination is final only with respect to the Government's alleged interest. If the defendant prevails on appeal, he recovers the property as if no conviction or forfeiture ever took place. But if the order of forfeiture is affirmed, the amendment to the order of forfeiture in favor of the third party becomes effective.

Subsection (f) makes clear, as courts have found, that the court retains jurisdiction to amend the order of forfeiture to include substitute assets at any time. *See United States v. Hurley*, 63 F.3d 1 (1st Cir. 1995) (court retains authority to order forfeiture of substitute assets after appeal is filed); *United States v. Voight*, 89 F.3d 1050 (3rd Cir. 1996) (following *Hurley*). Third parties, of course, may contest the forfeiture of substitute assets in the ancillary proceeding. *See United States v. Lester*, 85 F.3d 1409 (9th Cir. 1996).

Section 504—Pretrial Restraint of Substitute Assets

This amendment is necessary to resolve a split in the circuits regarding the proper interpretation of the pretrial restraining order provisions of the criminal forfeiture statutes. Under 21 U.S.C. § 853(e)(1), a court may enter a pretrial 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. *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. 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). Subsequently, however, other courts held that because Congress did not specifically reference the substitute assets provisions in the restraining order statutes, pretrial 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. Field*, 62 F.3d 246 (8th Cir. 1995); *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. 1 F.3d at ___, 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 the substitute assets provision, 21 U.S.C. § 853(p), at the appropriate place in the section dealing with pretrial restraining orders.

Department of Justice policy requires the Government, in cases involving the pretrial restraint of substitute assets, to exempt from the restraining order any property needed: 1) to pay attorneys fees in the criminal case; 2) for ordinary living expenses; and 3) to maintain the restrained property. *See* Asset Forfeiture Policy Manual (1996), Chap. 2, Sec. II.D. That policy would apply to any restraining order issued under this section.

Section 505—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. 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 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 pretrial 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. *See United States v. Sellers*, 848 F. Supp. 73 (E.D. La. 1994) (pretrial 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 pretrial 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).

Section 506—Hearings on Pretrial 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* pretrial restraining order. *See* 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.[10] 21 U.S.C. § 853(e)(1)(B) & (2). 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.

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, held not only that a post-restraint, pretrial 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 pretrial 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 [pretrial] if the attorney is to do him any good." 860 F.2d at 726. Thus, where the defendant asserts that the assets he would use to hire counsel have been improperly restrained, forcing the defendant to wait until the time of trial to contest the restraining order would constitute an unconstitutional "permanent deprivation" of property without a hearing. *Id.*

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

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

Id.

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

The Seventh Circuit continued as follows:

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

Id. See Monsanto (Cardamone, J. dissenting), 924 F.2d at 1206 ("The prosecution's ability to prepare its case without being forced to 'tip its hand' prematurely was of paramount importance to the drafters and provides a persuasive reason for delaying a full adversarial hearing on the merits of the Government's case during the post-restraint, pretrial 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 (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. 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, 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, *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 (5) also contains a provision permitting, for the first time, third parties to contest pretrial 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* 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 claim to a superior interest in the property in such a pretrial hearing. Such defenses are clearly limited by section 853(k) to the ancillary hearing and may not be asserted as a reason for amending a pretrial restraining order.

Subparagraph (E) of new paragraph (5) provides that when the pretrial 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 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 section 853(e)(1) restraints. The amendment makes clear that Rule 65 does not apply to restraints imposed under any of the provisions of section 853(e) because, in light of the amendments made by this section, that statute will contain its own procedural requirements.

Section 507—Seizure Warrant Authority

This amendment is intended to simplify use of the criminal forfeiture statutes by conforming the seizure warrant authority in criminal cases to the widely-used procedures available in civil forfeiture cases. In 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). The amendment simply incorporates the procedures in section 981(b) into the criminal forfeiture statutes.

The second sentence of the amendment to section 853(f) 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. *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)). 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.

Section 508—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. Voight*, 89 F.3d 1050 (3rd Cir. 1996); *United States v. Tanner*, 61 F.3d 231 (4th Cir. 1995); *United States v. Smith*, 966 F.2d 1045, 1050-53 (6th Cir. 1992); *United States v. Bieri*, 21 F.3d 819 (8th Cir. 1994); *United States v. Myers*, 21 F.3d 826 (8th Cir. 1994); *United States v. Ben-Hur*, 20 F.3d 313 (7th Cir. 1994); *United States v. Herrero*, 893 F.2d 1512, 1541-42 (7th Cir.), *cert. denied*, 110 S. Ct. 2623 (1990); *United States v. Hernandez-Escarsega*, 886 F.2d 1560, 1576-77 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 3237 (1990); *United States v. Sandini*, 816 F.2d 869, 975-75 (3d Cir. 1987); *United States v. Elgersma*, 971 F.2d 690 (11th Cir. 1992).

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 509—Discovery Procedure For Locating Forfeited Assets

This section 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. *United States v. Saccoccia*, 913 F. Supp. 129 (D.R.I. 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.

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.

Section 510—Collection of Criminal Forfeiture Judgment

This amendment 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.

Section 511—Appeals in Criminal Forfeiture Cases

The amendments in this section clarify the Government's authority to appeal an adverse pretrial 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 section 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, section 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, section 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 512—Non-abatement of Criminal Forfeiture When Defendant Dies Pending Appeal

This amendment (which passed the Senate in 1990 as section 1905 of section S.1970) would overturn the questionable decision of the Ninth Circuit in *United States* v. *Oberlin*, 718 F.2d 894 (9th Cir. 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 513—Standing of Third Parties to Contest Criminal Forfeiture Orders

The statute governing standing to contest a criminal forfeiture order is 21 U.S.C. § 853(n)(2). It provides that a third party filing a petition in the ancillary proceeding in a criminal forfeiture case must asset a

"legal interest" in the property ordered forfeited. The amendments in this section clarify this provision in two ways.

First, the amendment makes clear that no one has standing to assert a legal interest in contraband, and that no one other than a bona fide purchaser has standing to contest the forfeiture 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. *See United States v. Sokolow*, 1996 WL 32113 (E.D. Pa. 1996) (one cannot have a legal interest in criminal proceeds); *United States v. Rutgard*, Cr. No. 94-0408GT (S.D. Cal. Mar. 7, 1996) (wife cannot acquire legal interest in criminal proceeds under state community property law), appeal pending.

Second, the amendment codifies the case law regarding what constitutes a "legal interest" for the purposes of standing under section 853(n)(2). It defines a legal interest to include liens and other secured interests in the subject property, but to exclude the interests of general creditors, bailees, nominees and beneficiaries of constructive trusts. *See 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. Schwimmer, 968 F.2d 1570, 1581 (2d Cir. 1992); *United States v. Campos*, 859 F.2d 1233 (6th Cir. 1988).

Section 514—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 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 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.

Section 515—Intervention by the Defendant in the Ancillary Proceeding

This section amends section 853(n) to provide 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 Section 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.

Section 516—In Personam Judgments

This section 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. *United States v. Voight*, 89 F.3d 1050 (3rd Cir. 1996) (Government is entitled to a personal money judgment equal to the amount of 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.), *cert. denied*, 474 U.S. 821 (1985); *United States v. Sokolow*, 1995 WL 113079 (E.D. Pa. 1995), aff'd 81 F.3d 397 (3rd Cir. 1996). In such cases, obviously, no interests of any third parties can be implicated. Therefore, there is no need for any ancillary hearing.

Section 517—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 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 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 8553(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.

Section 518—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. It is derived from a series of recent cases in which the courts held that while the Government may not recover substitute assets from a third party who dissipates forfeitable property, *In Re: Moffitt, Zwerling & Kemler, P.C.*, 864 F. Supp. 527 (E.D. Va. 1994) (*Moffitt II*), the Government may nevertheless file an action against the third party in federal court, based on state tort law, seeking to recover the value of property illegally converted. *United States v. Moffitt, Zwerling & Kemler, P.C.*, 83 F.3d 660 (4th Cir. 1996) (conversion action may be based on Government's rightful ownership of forfeitable property under the relation back doctrine), rev'g 875 F. Supp. 1190 (E.D. Va. 1995) (*Moffitt IV*).

21 U.S.C. § 853(c) provides 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 II, supra.* As *Moffitt II* 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. This provision would only come into play, of course, if the third party failed to establish that he or she was a bona fide purchaser pursuant to 21 U.S.C. § 853(n)(6)(B).

Section 519—Forfeiture of Third Party Interests in Criminal Cases

The ancillary proceeding provisions in 21 U.S.C. § 853(n) 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 the third party holds a joint interest with 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; only the interest of the defendant is subject to forfeiture in a criminal case. Therefore, 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 conduct, as part of the criminal case, an *in rem* proceeding to forfeit the third party interests so that it is no longer necessary to file a parallel civil proceeding.

The procedure is intended to operate as follows: Following the entry of a preliminary order of forfeiture, the court would conduct an ancillary proceeding pursuant to section 853(n). As is the case under current law, that proceeding would be limited to adjudicating whether a third party has a legal interest in the forfeited property. The third party could not challenge the finding that the property is subject to forfeiture. If the third party's claim is denied, the case would be over and the court would enter a final order of forfeiture. If the court finds that the claim has merit, however, the Government would have the option of filing a separate civil forfeiture action as it may do under current law, or of proceeding directly to the forfeiture of the third party's interest under section 853(t). In that case, the third party would, of course, have the right to litigate the forfeitability of the property *de novo*, notwithstanding the finding that the property was subject to forfeiture in the criminal trial. The procedures that would apply in this instance would be the same as those available in civil forfeiture

cases brought under 18 U.S.C. § 981, including the right to a jury trial and the right to establish an innocent owner defense.

Section 520—Severance of Jointly Held Property

The section resolves a split in the courts regarding the disposition of property jointly owned by a guilty person and a third party, such as a spouse, business partner or co-tenant, whose interest is not subject to forfeiture in the criminal case. 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 third party; or allow the third 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 521—Victim Restitution

This section is intended to resolve confusion regarding the interplay between criminal forfeiture and the restitution provisions of 18 U.S.C. § 3663-64, including the mandatory restitution provisions in section 3663A.

First, the section makes clear that a defendant may not use property forfeitable to the United States to satisfy a restitution order. If a defendant has other assets not forfeitable to the United States, he must use those assets to satisfy any restitution order, not the forfeited property. This preserves the rule in existence before the enactment of the mandatory restitution statute in 1996, *see United States v. Various Computers*, 82 F.3d 582 (3rd Cir. 1996) (no double jeopardy violation to require defendant effectively to pay twice by forfeiting proceeds of crime and paying restitution to the victims), and negates any suggestion that the enactment of section 3663A provides a windfall to defendants by giving a restitution order priority over a forfeiture order.

Second, the section provides that the Government may use the procedural provisions of the forfeiture statutes, including the provisions relating to seizure warrants, restraining orders, and substitute assets—all of which are unavailable under the restitution statutes—to preserve and recover forfeitable property, and then move to dismiss the forfeiture proceeding to allow the property to be used for the benefit of the victims if the defendant has no other assets available for restitution.

Third, the section provides that in instances where the Government elects to proceed with the forfeiture of the property, it must use the property to provide restitution to victims as a first priority once the costs of the forfeiture action have been deducted, if the defendant is unable otherwise to satisfy a restitution order. Of course, the property may not be applied to victim restitution until the ancillary proceeding has been completed and the Government has obtained clear title to the property. At that time, the Government may ask the court to appoint a special master to assist in identifying and distributing the property to victims, or take any other action that facilitates the process of providing restitution.

Generally, victims of fraud and other financial crimes do not have standing to file a claim in the ancillary proceeding even if they can trace their interests to the property subject to forfeiture. That is because a person who voluntarily transfers his interest in property to another is no longer the owner of that property and thus does not have the requisite "legal right, title or interest." *See United States v. BCCI Holdings (Luxembourg) S.A.*, 46 F.3d 1185 (D.C. Cir. 1995), *cert.* denied, 115 S. Ct. 2613 (1995) (crime victims are general creditors who lack standing to file claims in the ancillary proceeding); *United States v. $3,000 in Cash*, 906 F. Supp. 1061 (E.D. Va. 1995) (same for civil forfeiture); *United States v. $79,000 in Account Number 2168050/6749900*, 1996 WL 648943 (S.D.N.Y. 1996). The exception would be a person who is the victim of a theft or embezzlement whose property was taken from him without his consent. *See United States v. Lavin*, 942 F.2d 177 (3rd Cir. 1991). Thus, this section provides a source of relief for victims who claims are not cognizable under section 853(n) but who nevertheless are entitled to restitution.

Section 522—Delivery of Property to the Marshals Service

Section 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).

Endnotes

[1] *Cabana v. Bullock*, 474 U.S. 376, 384 (1986).

[2] *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).

[3] *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").

[4] 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).

[5] Some of these statutes are amended in this Act to correct this omission, *e.g.* 18 U.S.C. § 492.

[6] *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.

[7] 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).

[8] 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.

[9] 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.

[10] 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).

Mr. HYDE. And, forgive me, Mr. Cassella, did you say something about the burden of proof?

Mr. CASSELLA. Yes, we agree that the burden of proof should be on the Government.

Mr. HYDE. Thank you.

Mr. CASSELLA. We think the standard should be the preponderance of the evidence, and we discussed that in our testimony, and I believe, Mr. Chairman, you agreed with us on that point last year. But the burden of proof should be on the Government; there should be an innocent owner defense; there should be adequate time so everyone gets his day in court, and there should be a remedy for people whose property is damaged in government custody. We have a lot of common ground on those issues.

Mr. HYDE. I believe that my staff and you and your people are negotiating in good faith, but there are serious problems here. I know the program is a good program. I do not agree with the ACLU and others that the whole thing should be abandoned, but the stories you heard this morning are really horrible, and a process that permits that to happen has to be fixed.

I think we're moving in that direction and I compliment you for that, and I hope we can, at the end of the proceedings, have a bill that you all can support and that doesn't impair appropriate forfeiture actions, but by the same token provides due process to people who get caught up in somebody's idea of probable cause that doesn't work out.

Mr. CASSELLA. Mr. Chairman, we have a great deal of common ground. We agree that there's a need for due process in the program, because without the perception by the public that there is due process, the program will not have the support that it needs. We agree that a lot of the proposals in your bill go a long way in that direction. They are the same proposals that we have in H.R. 1745, including the burden of proof and the innocent owner defense and the rest. We have worked with your staff to try to work out a compromise. It's here; we're very close. There are probably three or four sentences in this package that we've been discussing for the last 3 or 4 weeks that have yet to be resolved, that addresses your concerns, Mr. Chairman, and our concerns. And we want to continue to move in that direction.

Perhaps after everyone's had a chance to speak, if you have questions about this morning's testimony, there are some things I'd like to correct in the record, because, unfortunately, the committee didn't get the full story on some of those issues.

Mr. CONYERS. Well, we want to do that now. I can tell you, he and everybody else here has questions.

Mr. CASSELLA. If I could finish my statement then, Mr. Conyers, I'd be happy to answer those questions and we'll continue.

Mr. CONYERS. Well, you know what they are, don't you?

Mr. CASSELLA. No, I don't.

Mr. CONYERS. You didn't hear us questioning——

Mr. CASSELLA. Oh, I know what those questions were. I can answer those questions. I'd be happy to and I want to, if I could just finish this, some comments, and then we'll proceed.

Mr. CONYERS. Sure, proceed.

Mr. CASSELLA. There are some things, Mr. Chairman, in H.R. 1835 that we believe cross the line between guaranteeing due process and giving unintended relief to drug dealers and other criminals. And let me give a few examples.

H.R. 1835 contains an innocent owner defense. That's good. A person who does not know that her property is being used illegally or becomes aware of the illegal use but takes all reasonable steps to try to stop it should be protected. But the bill also would allow criminals to protect their property from forfeiture by giving it to their wives, children, and girlfriends. A drug dealer could take the money he made from selling cocaine and use it to set up a college fund for his children. A telemarketer could use the life savings he stole from an elderly widow to buy jewelry for his girlfriend. And if those people were innocent, they'd be allowed to keep the property and the victims would get nothing.

We understand that criminals have families. As someone said one time, even pornographers have kids to feed. But a drug dealer should not be allowed to send his kids to Harvard with the money he raised selling cocaine on the schoolyard. A con artist should not be allowed to shower his girlfriend with gifts purchased with the victims' money. The victims of crime should have priority in the recovery of property, not the family and friends of the criminals.

We have many other problems with the bill, but let me name two. The bill would allow seized property to be returned to the criminals pending trial to avoid a hardship. There are instances, of course, when a truly innocent person's property is held pending trial, undoubtedly to the inconvenience of the claimant. But in thousands of cases every year, property like cars, airplanes, and cash is seized from drug dealers, gamblers, and money launderers. You can't give a pile of cash back to a drug courier just because he claims some hardship.

Mr. HYDE. That's up to the court, though, is it not? In other words, it isn't an automatic return of the asset to the accused. But in a situation where there is real hardship—a business, a livelihood—all we provide is flexibility to the court to alleviate these difficult situations. Do you object to that?

Mr. CASSELLA. In the compromise we've discussed, Mr. Chairman, we have included a lot of criteria which address our concerns. But they are not in the bill as introduced today. The criteria which concern us, for example, would include not returning property that is the evidence of crime, not returning property that is going to be used to commit another crime tomorrow. We don't want to give the airplane——

Mr. HYDE. Well, I don't either. I don't want to jeopardize a legitimate criminal case, but there are circumstances where you drive somebody over the edge if they can't use their property.

Mr. CASSELLA. I was saying, Mr. Chairman, that our concern is with the kind of property that can disappear if you give it back to the person from whom it was seized, such as the pile of cash that you've seized from the drug courier. That will just disappear. And the same is true for his car, his boat, or his airplane. And think about the impact of this provision on the Southwest border. The INS seizes 19,000 vehicles a year in alien-smuggling cases. If the

Service has to return those vehicles to avoid a hardship pending trial, there will be little left of the enforcement program.

We also oppose the provision for allowing judges to appoint counsel for claimants in civil cases. However well-intended, this provision will surely encourage attorneys in search of a fee to file frivolous claims. What's more, the bill would pay for those fees out of the funds earmarked for local law enforcement. In our view, we might as well stick a siphon hose into the forfeiture fund and pump the money that Chief Moody would use to buy bullet-proof vests for his officers into the pockets of defense lawyers. And as a policy choice, we think that's a mistake.

There are other things in the bill we disagree with, but let me conclude by pointing out some things that are missing. The most important element of any asset forfeiture legislation must be a sense of balance. But this bill 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, but it is wrong to deny the Government the tools it needs to gather evidence to meet its burden.

There's also the problem with claims filed by fugitives that Mr. Conyers mentioned this morning. It is a sorry spectacle that today, because of a recent court decision, a fugitive can hide out overseas beyond the reach of the criminal courts, and yet file papers in civil forfeiture cases and expect to have them honored. The most serious omission, in our view, in the bill, Mr. Chairman, is that it does nothing to enhance criminal forfeiture. Nothing would do more to decrease our reliance on civil forfeiture than to make the criminal forfeiture laws as effective as their civil counterparts.

Finally, once due process issues have been addressed—and we believe they should be addressed—there is no reason not to expand forfeiture into new areas. From terrorism, to counterfeiting, to violations of the food and drug laws, the remedy of asset forfeiture should be applied. In fact, unless someone can name a crime for which the criminal should be allowed to keep the proceeds, we think the proceeds of all Federal crimes should be subject to forfeiture.

Mr. Chairman, at the conclusion of my testimony a year ago, I said that a balanced forfeiture bill would ensure that the forfeiture laws of the United States were tough, but fair. Tough, but fair—which is what the American people have the right to expect. I still believe that. Working together, we can craft a balanced set of forfeiture laws that combine fairness and effective law enforcement. In conversations with your staff over the past weeks, we've made a start. We should continue. We have a way to go. But a balanced bill that law enforcement can support is within our grasp.

[The prepared statement of Mr. Cassella follows:]

PREPARED STATEMENT OF STEFAN D. CASSELLA, ASSISTANT CHIEF, ASSET FORFEITURE AND MONEY LAUNDERING SECTION, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE

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 cur-

rent 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 lose 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 mean 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 were 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 $318 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 preexisting 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 Sheriffs to use as a "safe house" for victims of domestic violence.

LAND PRESERVED AS OPEN SPACE ON THE HOUSATONIC RIVER

(District of Connecticut).—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, Colombia, 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 wan possible because the defendant who owned the drug proceeds resides in Cali, Colombia 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.

RESPONEE 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.

[In Millions]

	1994	1995	1996	1997[1]
Total Receipts	$549.9	$487.5	$338.1	$110.0
Sharing with State and local law enforcement.	$228.8	$217.3	$163.4	$35.1

[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 the 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 lose 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. §853(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—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. 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 Port, 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 the burden on the government is appropriate, but elevating the *standard* is uncalled for. Indeed, at last years 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 243.

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. § 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. 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 80 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. 811 (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. 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 spectacle of 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 KAJA 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 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 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 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.

Mr. HYDE. Well, I thank you very much for that, Mr. Cassella. I just want to tell you, as a matter of tactics, I do not want to confuse civil asset forfeiture with criminal asset forfeiture. I know you want to do some things with criminal asset forfeiture, and they may well be meritorious. But I am very interested in the stories we heard this morning, plus many others we know about. I wrote about some of them in a book. I met these people. We had hearings. You were here, I'm sure, last time, and I don't want to weigh a bill down with other considerations that—they're germane, but they will frustrate what I'm trying to do. But I will tell you this: if Mr. Schumer wants to introduce a bill on criminal asset forfeiture, it will receive full hearing, full consideration. I might or might not support it. I want to support it. I'm for forfeiture. But I am against the abuses, vigorously against the abuses we heard about this morning and I want to correct them. And once we do that, I'm happy to confront criminal asset forfeiture.

Mr. CASSELLA. Mr. Chairman, if there are things about criminal asset forfeiture which require study and review, a separate bill might be the way to go. If there are things about criminal asset forfeiture which are noncontroversial, it seems to us there would be no reason not to be them on this bill. For example——

Mr. HYDE. What do you have in mind? I do not want to get into gun legislation——

Mr. CASSELLA. Well, I don't either.

Mr. HYDE. And that is a problem when you start talking about criminal asset forfeiture. You get into guns, this whole thing goes down the drain. And that's my problem—this is too important.

Mr. CASSELLA. I appreciate that, Mr. Chairman. I would just make this observation: for example, I think we all share the view that where we can do a criminal forfeiture case, we should do a criminal forfeiture case. That is our practice. Now there are some statutes for which there simply is no criminal forfeiture statute. Gambling, smuggling—you have to do the forfeiture civilly, and many others. There are some—over 100 civil forfeiture and some six or ten criminal forfeiture statutes. If we simply had a law that said "where forfeiture is otherwise authorized, the U.S. attorney may do it criminally," that would do a great deal to allow us to continue the trend that we've started since 1994 in switching over to criminal asset forfeiture. In the compromise that we've been talking about, there are, in the back, in the noncontroversial title of the bill we hope will be added, some things which do—some very noncontroversial things to improve the criminal forfeiture program.

There are some other things about criminal forfeiture which I can see need to be debated and maybe they can move separately. That's what we have in mind about trying to address criminal forfeiture here. We have the attention of the committee on this important subject. If we can get these other things done at the same time as part of a global compromise, all the better. It's good government to do it.

Mr. HYDE. John, if you don't mind, if we could hear—and I've been impolite in interceding, but we have another vote and that will be the last vote of the evening, and I'm afraid once that vote occurs, we may lose our enthusiasm for coming back. So I want to give everyone a chance.

So, Ms. Blanton, are you next?

STATEMENT OF JAN P. BLANTON, DIRECTOR, EXECUTIVE OFFICE FOR ASSET FORFEITURE, DEPARTMENT OF THE TREASURY

Ms. BLANTON. Mr. Chairman and other committee members, I'm Director at the Department of the Treasury's Executive Office for Asset Forfeiture. I would just like to introduce Bill Bradley, sitting to my right, who is counsel for my office.

When I last appeared before your committee about a year ago to speak to the merits of a bill aimed at reforming civil 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 that 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 and it has become a pivotal element in our overall enforcement strategy. And it has even benefited the often-forgotten victims of criminal activity. In fiscal year 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 expect to return over 30 million taxpayer dollars recovered from the 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 fulfill our end of this responsibility. In the last 5 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 those 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 preseizure 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 all 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 talking about. 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 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 19 U.S.C., 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 paying for the appointment of counsel in civil forfeiture actions where the claimant is not successful, 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——

Mr. HYDE. Thank you, Mr. Lefcourt. Thanks very much. Sorry to impose. Thank you, Ms. Blanton.

Ms. BLANTON. If the application of the title 19 forfeiture model to other titles of the code has left some of these more recent Federal 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 Federal statutes.

While we can appreciate the overall reform intentions of H.R. 1835, we fear that its changes to title 19 authorities will have an adverse impact on Treasury forfeiture authorities. 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 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 U.S. 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 tradi-

tional Customs cases. Without that standard, Customs will have been unable to accomplish the following seizures: rocket fuel destined for Iran; vehicles carrying tungsten stolen from a bonded and sealed freight car from Canada; 20,000 pairs of knock-off 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; products of convict and slave labor; hazardous substances, and pirated intellectual properties.

Without this standard, we believe Customs would not have been able to have made these types of seizures. 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 borders. 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.

This concludes my opening statement and I thank the committee for allowing me the time to address H.R. 1835.

[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 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 benefited 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 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 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 U.S.C., 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 respon-

sibilities, 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, and 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.

Mr. HYDE. Thank you, Ms. Blanton. And we're going to avail ourselves of your invitation and continue to work something out with you. You have different problems than the Justice Department does. We understand that. We don't want to hamper border protection or other situations like that, but we're going to get at the heart of the injustices and lack of due process that we heard about and we need your help.

Chief Moody.

STATEMENT OF BOBBY D. MOODY, CHIEF OF POLICE, MARIETTA, GA, POLICE DEPARTMENT, AND FIRST VICE PRESIDENT, INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE

Mr. MOODY. Thank you, Mr. Chairman, for the opportunity of being with you today and I will respect the lateness of the hour, and as I learned a long time ago when I was running for office within the International Association of Chiefs of Police, be brief, be brilliant, be seated. So I figure one—two out of three is not bad. I'll be seated and be brief. [Laughter.]

Mr. HYDE. You're already brilliant.

Mr. MOODY. I don't know about that. But I do appreciate the opportunity of being with you today. And I must make mention that our president, as you well know, is from Frankfurt, IL, the president of the IACP, Darryl Sanders.

I do not condone the actions that deprive people of their property without proper procedural due process that may be evidenced in the actions of some over zealous police officers. But I make no apology for the fact of wanting to put the bad guys in jail and to take their illegal-gotten gains away from them. But I firmly believe that those who have been wronged or believe that they have been wronged already have redress in current law. Suffice it to say that police departments should do the right thing in enforcing any law.

And in regards to some of the cases that have been discussed today, and even before today, I think we need to put it in proper perspective that civil asset forfeiture, along with criminal asset forfeiture, I understand measures in terms of about 80,000 cases a year. And 80 percent of those are disposed before courts; 20 percent are tried in court, and some of those, by virtue of the court process, lose their value in the weighted testimony and those items are returned.

And I agree with you, Mr. Chairman, the things that we heard today, I don't think that's the norm out there and it needs to be addressed. And we at the IACP want to work with you, as we have with Justice, to see that those—and with Treasury—to see that we address those issues.

I come to you from the trenches of the battle, though, Mr. Chairman, against illegal drugs, from an agency that has used Federal asset forfeiture provision to reclaim neighborhoods and give them back to the community. I'm going to cite a couple of examples from two cities in which I have worked. First, in Covington, GA, which is located 40 miles east of Atlanta, and the other, my current city, Marietta, GA, which is located about 15 miles from downtown Atlanta.

In Covington, we had some illegal trafficking that was occurring in an area that was adjacent to a pool hall—at the pool hall location. We had lots of calls for service to this area. We had many attempts to go to the owner and ask for his assistance in trying to help us clean up his property—all to the event where he said, "That's not my problem; that's your problem." Eventually, a homicide occurred at this location. We had the neighborhood homeowners calling us, asking for our help in helping them to rid themselves of this nuisance in their neighborhood. We again asked the owner for help. He made no bones about it. He said, "that's not my problem; that's your problem."

We, eventually, through the Federal asset forfeiture provisions arrested the property and through a court agreement he agreed to pay $10,000 and put into an awardship that he would not have a pool hall in this location again. The neighborhood literally had a reunion, thanking us and thinking that we were really the good guys when we just helped them to clean up a place where they could allow their children to enjoy and grow up and become strong adults.

Later that property was sold. It did not carry on that governance that required it not to have a pool hall and the new owners wanted to put in a new hall—a new pool hall there. Working through our community outreach network, we were able to go to the new owners and encourage them, giving them the story, and encourage them not to do something that was going to bring down the neighborhood. I'm very pleased to report they decided not to do that because of what had happened before.

We had another situation in Covington, GA, where a trailer park was adjacent to a school. The trailer park was common for those who sold drugs, who brought drugs to the community, who entice children to come on their property to buy drugs. The owner of this particular trailer park lived in Florida. The trailer park was located in Covington. Now, today, working with the owner, even

though we had to go through the civil process route, there are new homes. The trailer park was done away with. There are homes that are now owned by people who live there and the drug trafficking that was going on, enticing children to get involved in drugs, is no longer there.

We had another situation of a property owner that owned low-rent housing. We, too, encouraged him to work with us to rid his property of the illegal gang activity that was going on. He, too, told us, "I'm sorry, that's not my problem. That's your problem." Refreshing his memory of what happened at the pool hall and also what happened in the trailer park, we involved the property owner, after he heard those stories, and now that area is cleaned up.

The second area that I would like to talk about is what has happened in Marietta, GA, that borders the city of Atlanta. When I first arrived there last July, there was not a day that went by that I did not get five or six telephone calls talking about illegal drug activity in the neighborhood—prostitution, and assorted other crimes that go along with illegal drugs. In the last 6 months, we have worked with our local multijurisdictional task force and the DEA MET team in a major effort to take back the neighborhoods where these drug pockets were working in Marietta.

Today I am pleased to tell you that I don't get those calls anymore. Not only have we affected the amount of drugs coming into the city—as one street-level drug dealer said, "You just can't find drugs in Marietta today"—we are now going through the process of dismantling the organizations by taking the assets of those who profited by selling drugs to our kids.

Finally, I want to put into perspective my feelings about the lone drug dealer who stands on the corners of many American cities today. He will do more damage to our country than one person can do walking into a house and killing an entire family. As tragic as it may be for any community, and any family, or any city, the fact that, except for the family and the immediate community, the killing would be forgotten in a matter of weeks, but the lone drug dealer standing on a corner and selling young people in this country in the course of a day will maim and destroy the minds of our future leaders. He must be stopped and we must be able to dismantle the greed-for-money motive that asset forfeiture does. We must never give up our efforts to make our communities safe for our children to grow up, so that they can become all that they can be.

In closing, I'll leave you with one thought, asking that you give us asset forfeiture reform that is fair and that will enable us to continue to do our job that most police departments are doing in interrupting domestic drug trafficking in this country—an asset forfeiture provision that will enable us to continue strong highway, airport drug interdictions by cutting off the supply.

Mr. Chairman, it's not for me, in fact it's not for you, but it's important to the kids of this country. And in closing, the quote I would like to leave is something that was shared with me a while back and I would like to share it with you. "If you don't do it, who? If you don't do it now, when? If you don't do it here, where?" And if you don't do it for the kids of America, why not? Thank you.

[The prepared statement of Mr. Moody follows:]

PREPARED STATEMENT OF BOBBY D. MOODY, CHIEF OF POLICE, MARIETTA, GA, POLICE DEPARTMENT, AND FIRST VICE PRESIDENT, INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE

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:

> We have been able to remove from criminals, the proceeds of their illegal 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 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 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 prop-

erty 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.

Mr. HYDE. Well, I thank you, Chief Moody.

Mr. David Smith, Esq., of English & Smith, Alexandria, VA, is with us and if you would take the last seat, you're going to testify on behalf of the National Association of Criminal Defense Lawyers, and thank you for your legendary patience and waiting all day. Thank you. Mr. Smith.

STATEMENT OF DAVID B. SMITH, ESQ., ON BEHALF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Mr. DAVID SMITH. Thank you, Mr. Chairman. I thought I might not get a chance to speak today and I didn't consider it a great loss because I feel like I've already had quite a lot of opportunities to give you my views.

But I am glad that I did get a chance to speak, particularly after hearing some of the things that the panel said. I'd like to thank you especially, sincerely, for all of your efforts to promote forfeiture reform over the years. It's been a long haul, as you know, and as I know, and we feel, finally, this is the year where forfeiture reform may happen. And we urge that the committee continue to pursue it full tilt, and really we urge that you hold the line on compromises until later, later in the whole process, when we know—when we have a sense of what we can accomplish.

The Government talked about a couple of provisions that they said they needed, and, in particular, this civil investigative demand or some other mechanism to make their cases. We feel very strongly that they have ample investigative tools already. And not only that, but they have other provisions in mind which we have not opposed, which would give them even more investigative tools than they have today.

But we think this so-called civil investigative demand provision is really unprecedented in American history. We know that recently Congress has enacted subpoena provisions in very narrow areas like health care fraud, where documents can be subpoenaed, but that's a totally different animal than what the Government is seeking here, which is the authority to dragoon any citizen into a U.S. attorney's office with or without counsel, and force them to answer whatever questions the prosecutor cares to pose to them, without any level of suspicion—just on the mere fact that the prosecutor suspects that the person may have forfeitable assets, or may have information about forfeitable assets. There is not such a pro-

vision in American law. There never has been, and we hope there never will be.

The other provision that the Government has been campaigning for which we find completely unacceptable is this fugitive disentitlement provision. They want an absolute rule that no fugitive can contest a forfeiture case civilly. They presented their arguments to the Supreme Court last term and they lost in a unanimous decision, 9-zip. If they couldn't persuade a single Justice on this conservative Supreme Court of the merits of their argument, why should Congress be persuaded that the same idea ought to be enacted into law? It just doesn't comport with elementary notions of fairness. Just because a person chooses to thumb his nose at a court doesn't make that person an outlaw in the eyes of the law, whose property can be seized at will by the Government without any basis. And, unfortunately, that's exactly what the Government has done in a few cases prior to the Supreme Court's 9–0 decision in *Degen*. They have used the fugitive disentitlement doctrine as a weapon to go after the property of the fugitive, even without any basis to believe that it's subject to forfeiture. That just isn't fair and it's beneath our courts and our society, and it shouldn't be made law.

I think that there are basically four positive pillars of the bill that you've introduced, the bipartisan bill, which particularly merit emphasis. Obviously, placing the burden of proof on the Government where it belongs—finally.

The second key provision is providing a mechanism for the appointment of counsel—also long overdue. No matter how fair the provisions of the law may be, if there's no counsel to enforce them, the process can never really be fair.

The third key pillar of the bill is establishing a uniform innocent owner defense for all civil forfeiture statutes. We already have innocent owner defenses in section 881 of title 21 and in the money-laundering statute, but there are literally dozens of civil forfeiture statutes which have not innocent owner provision at all. And it's high time that there be an innocent owner defense. It should be a broad defense, similar to what we currently have in section 881 and in section 981, the two most frequently-used civil forfeiture statutes. It should not be a narrow defense which excludes nonbona fide purchasers from any consideration. Some of those people are innocent spouses who have given years of domestic labor in a marriage, and to treat those persons as if they've given nothing for their own home is really unrealistic and unfair.

The fourth key provision is the establishment of time limits for providing notice to claimants and also for initiating the civil forfeiture action in court. And that is also a provision that finds an echo in current law because we already have a provision in section 888(c) which requires the Government to initiate a civil forfeiture action within 60 days of seizure, but, ironically, only in the case of conveyances seized for drug-related offenses. That provision was enacted, I believe, in 1988 in reaction to the Government's zero-tolerance policy and the excesses of that policy. But it was limited to that category of cases. There's really no reason why all property owners shouldn't have similar protections. And the bill that you've introduced actually gives the Government an additional 30 days, a

total of 90 days, to file a civil forfeiture complaint. And that 90-day period doesn't even start to run until a claim is filed with the seizing agency. So the Government would get 60 days to begin with, and 90 days on top of that, at a minimum, for a total of 150 days. Plus, the provision that you've introduced provides for an extension of time for the Government for good cause shown, both for the giving of notice and for the filing of the forfeiture action. So the Government is amply protected.

The bill gives the Government much, much more time than you typically have in the State forfeiture statutes, some of which require the Government to file an action in as little as 10 days after the date of seizure.

There's really nothing radical in any of these provisions and that's generally the point of the written statement that I've submitted. All of them have precedent in State practice or in Federal practice already, or are suggested by court decisions under the due process clause. For example, the appointment of counsel may be necessary in some forfeiture cases based on due process considerations alone.

So we don't feel like this bill that you've introduced is a radical bill that needs to be watered down. We think the bill is fine as it is. There may be additional provisions that ought to be added. There may be room to compromise. But this is not the point at which to discuss compromise on this bill.

There's a lot else I could say, but I think, given the lateness of the hour, I appreciate the opportunity to say that much.

[The prepared statement of Mr. David Smith follows:]

PREPARED STATEMENT OF DAVID B. SMITH, ESQ., ON BEHALF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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 at ensuring justice and due process for persons accused of crime. A non-profit, nonpartisan, 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 1984, 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 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

A. Burden of Proof

I'll never forget a speech I heard Judge Stephen Trott give to 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 Courts 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) (Beam, 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. 1988) (state constitutional guarantee of due process requires that government prove its forfeiture case by at least a preponderance of evidence as proper 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 unimportant 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. *Forfeitlre 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 proceedings" *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.

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 seizors.

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.* Clear-

[1] Guidelines §2.01(F)(5)(v) and (vi), reprinted as an appendix to *United States* v. *One 1985 BMW 3181,* 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.)

ly, 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 *Dennis. 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 flyable. 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. sec. 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.

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 insurgent of oppression.

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[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.

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

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.

I urge the DOJ to reconsider these 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 Hagin, 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 or 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 B. Cassella, on September 5, 1996. That letter also sets forth our views or, some of the DOJ's most objectionable criminal forfeiture proposals, as well as its civil forfeiture proposals.

Well, it is fine for the Government to use that to get jurisdiction, to get into court. But consider making it an in personam case, just like all the other cases in Federal court, once a claimant files, and some of the mischief that has been done in modern Federal forfeiture will end.

And then the final thing, the one thing that would change the complexion of forfeiture more than anything else is to have forfeited property or the liquidation, the money received from liquidation of forfeited property, go into the general fund of the United States or of the State or of the local government.

If we had a bounty every time a police officer made an arrest, the people of this country would rise up in outcry. Well, what we have now is a bounty on property. And drug officers, DEA and local drug officers alike, have told me privately, you know, we used to get promoted and we used to get good writeups, good recommendations in our annual reviews by making big drug busts. It doesn't work that way anymore, Mr. Edwards. It is how much property we have seized.

If you take the financial incentive out of the priorities in law enforcement, it will change the complexion for the better of law enforcement in this country.

Mr. Chairman, thank you so much for hearing me.

[The prepared statement of Messrs. Edwards, Smith, and Troberman follows:]

ATTACHMENT A
(Excerpt from July 22, 1996, Civil Asset Forfeiture Hearing)

PREPARED STATEMENT OF E.E. (BO) EDWARDS III, ESQ., DAVID B. SMITH, AND RICHARD J. TROBERMAN, COCHAIRS, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS ASSET FORFEITURE ABUSE TASK FORCE, ON BEHALF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Chairman Hyde and Members of the Committee:

The 9,000 direct and 30,000 state and local affiliated members of the National Association of Criminal Defense Lawyers are private defense lawyers, public defenders, judges and law professors. They have devoted their lives to protecting the many provisions of the Constitution and the Bill of Rights concerned with fairness in the criminal justice system. NACDL's interest in, and special qualifications for understanding the import of H.R. 1916, and the dangers of the currently unabated federal government asset seizure and forfeiture programs, are keen.

On behalf of NACDL, we thank you for inviting us to share our collective expertise on asset seizure and forfeiture programs, and for inviting one of us, E.E. Edwards, to speak on behalf of the Association at this hearing. We are also thankful that other outstanding members of NACDL will be appearing on behalf of their clients and other bar associations. Terrance G. Reed, of Washington, D.C., and Stephen M. Komie, of Chicago, Illinois.

I. Background

A. Summary of NACDL's Position on H.R. 1916 and the DOJ's Latest "Reform" Proposal(s)

For several years now, the Department of Justice's (DOJ) asset forfeiture program and similar state and local programs, utilizing a broad array of new and expanded federal and state forfeiture statutes[1], have provided federal, state and local law enforcement agencies with an unduly powerful weapon with which to fight the War on Drugs. And too often, the weaponry has been deployed to abuse law-abiding Americans.

The unchecked use of over-broad civil forfeiture statutes has run amok. Law enforcement agencies, in their zeal, have turned the War on Drugs into a War on the Constitution. NACDL has long had several concerns with the federal asset forfeiture program, and the resulting denigration of constitutional protections. We thus support Chairman Hyde's much-needed bill, H.R. 1916, although we think it does not go far enough to reign in over-zealous law enforcement in this area. We also think the Department of Justice's latest "reform" proposal still fails to rise to the level of a meaningful set of corrections. Attached to this statement is our analysis of the latest DOJ proposal(s) (1994 and 1996), which we regard as taking away at least as much as they would give in terms of reform. Still, there is some common ground between DOJ and NACDL on this subject, and any provisions of their proposal left un-critiqued in the attachment are unobjectionable to us. See Attachments A and B.

[1] There are over two hundred federal civil forfeiture statutes, encompassing crimes from gambling and narcotics violations to child pornography profiteering.

B. Criminal Forfeiture Versus Civil Forfeiture

For purposes of this hearing, we will distinguish between civil forfeitures and criminal forfeitures. We will focus on the former.

Criminal forfeitures are part of a criminal proceeding against a defendant. The verdict of forfeiture is rendered by a court or jury only if the defendant is found guilty of the underlying crime giving rise to the forfeiture. While defendants facing criminal forfeiture have most of the constitutional safeguards afforded persons in criminal proceedings, substantial problems nevertheless persist, particularly for third party claimants who have an interest in property subject to criminal forfeiture. Moreover, in its most recent Term, the United States Supreme Court held that Federal Rule of Criminal Procedure 11(f) does not require a trial court to make a factual inquiry at the time it accepts a guilty plea to determine that there is a factual basis for a criminal forfeiture as charged in the indictment.[1] The Court also held in that case that criminal forfeiture is an element of the sentence imposed for violation of certain laws, and is not an element of the offense. Accordingly, the Court held that the right to a jury verdict on forfeitability of property does not fall within the Sixth Amendment's constitutional protection, but is merely statutory, and that a trial court does not have to advise a defendant of the right to a jury trial in a criminal forfeiture case at the time it accepts a guilty plea.

[1] Libretti v. U.S., -- U.S. --, 116 S.Ct. 356 (1995). NACDL recommends that Congress amend Rule 11(f) to require a trial judge to determine whether there is a factual basis for a criminal forfeiture included in a plea agreement. The Supreme Court in Libretti recognized the desirability of such a congressionally clarified requirement, but felt bound by the current text of 11(f), which was not changed after Congress enacted the criminal forfeiture statutes in 1970. This oversight should be corrected.

It is civil forfeiture law, however, which concerns us the most, due to the utter lack of constitutional safeguards and the unfair procedural advantages it affords the government at the expense of law-abiding citizens.[3]

C. Civil Forfeiture in Particular

Civil forfeitures are *in rem* proceedings. The government is technically targeting the property, as, according to a "legal fiction," the inanimate property is deemed to be guilty and condemned. Because the property itself is the defendant, the guilt or innocence of the property owner is said to be irrelevant. The "use" made of the property becomes the central issue. It is the legal fiction which allows many extremely harsh and unwarranted repercussions to flow from the use of civil forfeiture statutes.[4]

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[3] The abuse of the civil forfeiture laws, and the concomitant destruction of private property rights, has been well documented in both scholarly and popular publications. *See e.g.*, Honorable Henry J. Hyde, **Forfeiting Our Property Rights: Is Your Property Safe From Seizure?** (Cato Inst. 1995); Leonard L. Levy, **A License to Steal, The Forfeiture of Property** (Univ. of N. Car. 1996); Tamara Piety, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process*, 45 U. Miami L. Rev. 911 (1991); Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives*, 42 Hastings L.J. 1325 (1991); George Fishman, *Civil Asset Forfeiture Reform: The Agenda Before Congress*, 39 New York L.S.L.R. 121 (1994); Anthony J. Franze, *Casualties of War?: Drugs, Civil Forfeiture and the Plight of the Innocent Owner*, 70 Notre Dame L. Rev. 369 (1994); Brazil & Berry, "Tainted Cash or Easy Money?," Orlando Sentinel Tribune (June 14-15, 1992 expose); Schneider & Flaherty, "Presumed Guilty: The Law's Victims in the War on Drugs," Pittsburgh Press (Aug. 11-Sept. 6, 1991 expose).

[4] In a 1993 decision, the United States Supreme Court in **Austin v. U.S.**, 509 U.S. 602, all but laid to rest the legal fiction that the guilt or innocence of the property owner is irrelevant because it is the property that is the "wrongdoer" in an *in rem* forfeiture. However, during its most recent Term, the Court breathed new flames into this fiction, in **Bennis v. Michigan**, -- U.S. --, 116 S.Ct. 994 (1996); and then completely retreated from logic and fundamental fairness in **United States v. Ursery**, and **United States v. $405,089.23 U.S. Currency**, 516 U.S. --, 116 S.Ct. -- (1996).

Civil forfeitures allow the government to impose economic sanctions on persons who are beyond the reach of the criminal law -- either because there is insufficient evidence to obtain a conviction against them, or because, while innocently supplying the material means necessary for certain criminal activity, they have broken no laws themselves.

In deciding when to seize property under these laws -- power which is largely unbridled -- law enforcement officers are influenced by provisions which often allow them to profit directly from the forfeiture. This obvious conflict of interest invites abusive practices.

Historically and traditionally, as a matter of fundamental due process, the Supreme Court has recognized the need for special scrutiny where the government stands to benefit financially from the imposition of sanctions as a result of criminal laws. As Justice Antonin Scalia has well explained:

> There is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence. Imprisonment, corporal punishment and even capital punishment cost a State money; fines are a source of revenue. As we have recognized in the context of other constitutional provisions, it makes sense to scrutinize governmental action more closely when the State stands to benefit.[5]

The Supreme Court has also recognized that, under the forfeiture statutes, the government "has a direct pecuniary interest in the outcome of [forfeiture] proceeding[s]."[6] The Court put it this way:

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[5] **Harmelin v. Michigan**, 111 U.S. 2680, 2693 n.9 (1991) (Scalia, J., concurring) (citing cases).

[6] **United States v. James Daniel Good Real Property**, 510 U.S. 43 (1993).

The extent of the Government's financial stake in drug forfeiture is apparent from the 1990 memo in which the Attorney General urged United States Attorneys to increase the volume of forfeitures in order to meet the Department of Justice's annual budget target:

> "We must significantly increase production to reach our budget target."
>
> • • •
>
> "... Failure to achieve the $470 million projection would expose the Department's forfeiture program to criticism and undermine confidence in our budget projections. Every effort must be made to increase forfeiture income during the remaining three months of [fiscal year] 1990."

Executive Office of the U.S. Attorneys, U.S. Department of Justice, 38 U.S. Attorney's Bulletin 180 (Aug. 15, 1990).[7]

Likewise recognizing that the practical implications of this inherent conflict, a federal district court recently explained well the unintended consequences of the current civil forfeiture statutes so in need of congressional reform:

> Failure to strictly enforce the Excessive Fines Clause inevitably gives the government an incentive to investigate criminal activity in situations involving valuable property, regardless of its seriousness, but to ignore more serious criminal activity that does not provide financial gain to the government.[8]

Indeed, this inherent conflict of interest can and does lead to serious law enforcement problems. For example, assume that law enforcement agents receive information from an informant that a shipment of 20 kilos of cocaine, worth an estimated $500,000, is to arrive at a stash house on Monday; that it is to be "fronted" to mid-level dealers once it arrives; and that those mid-level dealers are to deliver $500,000 to the stash house on Friday. If the agents make the arrests on Monday, they can confiscate the cocaine. If, on the other hand, they wait until Friday to make arrests, they can seize the $500,000, which they can forfeit for their use. Which do you think they

[7] Id. at 502, n.2.

[8] United States v. Real Property Located at 6625 Zumeriz Drive, 845 F. Supp. 725, 735 (C.D. Cal. 1994)

will choose, the money or the cocaine? Again and again, the money is too enticing to pass up.

The incentive structure under current law is actually *debilitating* to effective law enforcement. And all too often is the root of outright abuse of entirely *innocent, but property-holding* Americans.

The presumption of innocence is fundamental to the American criminal justice system. This basic tenet is compromised whenever assets are confiscated, as they are under federal and many state civil forfeiture statutes, without any proof of wrongdoing.[9] Under these unconscionable laws, after confiscation it is up to the person whose assets have been seized to prove that he or she, and the "suspect" property, is innocent, and thus that the Government should give the property back to the owner. This turns our precious justice system "on its head."

Although these forfeiture laws *can*, as Congress intended, serve legitimate law enforcement purposes, they are currently susceptible to (and arguably *invite*) unwise, unjust, or unconstitutional abuse. The current forfeiture laws are being used to forfeit property of persons who have no responsibility for its criminal misuse – for instance, as occurs with the forfeiture of currency due to cocaine "traces" found on it (a very, very large percentage of all the currency in America). This "police practice" has funneled millions of dollars into local police and federal agency coffers, with most of the seizures -- between 80% to 90% -- *never challenged*. The reason they are so rarely challenged has nothing to do with the owner's guilt, and everything to do with the arduous path one

[9] For example, the Orlando Sentinel investigation found that no charges were filed in three out of every four cases lodged by Volusia County Sheriff's Deputies. And the Pittsburgh Press investigation found that Americans fared even worse when encountering federal law enforcement agents. 80% of the people who lost property to the federal government were never charged.

must journey against a presumption of guilt, often without the benefit of counsel, and perhaps without any money left after the seizure with which to fight the battle. As in Witness Willie Jones' case, authorities unbridled in their handling of the current, unrestrained civil forfeiture laws routinely seize large amounts of cash at airports and roadblocks without establishing any connections to drug dealing other than the money itself (and perhaps, even more perniciously, the racial "profile" of the money-holder).

The policy of allowing the seizures of large sums of cash simply because it is currency, must be re-evaluated for comportment with sound policy as well as constitutional protections. Studies have shown that between 80% and 90% of the currency available today will test positive for some kind of drug; therefore, the practice of having drug dogs "alert" on the money is meaningless.[10] The frequent practice of targeting minorities in airports and along interstate highways for search and seizure[11] is based on nothing more than blatant racism. It is morally (and should be legally) bankrupt.

Statistics on seizures document the use of racially based "profiles" to determine law enforcement targets. Willie Jones' case is but one example. There is also the infamous, but not unique, case of Volusia County, Florida. Armed with "anything goes" asset forfeiture laws

[10] *See e.g.*, United States v. $639,558 U.S. Currency, 955 F.2d 712, 714 n.2 (D.C. Cir. 1992); United States v. $53,082.00 U.S. Currency, 985 F.2d 245, 250-251 n.5 (6th Cir. 1993); United States v. $30,060.00, 39 F.3d 1039, 1042 (9th Cir. 1994). *See also* David B. Smith, Prosecution and Defense of Forfeiture Cases (Matthew Bender) at para. 4.03, 4-79-84.

[11] *See* "Tainted Cash or Easy Money", Orlando Sentinel Tribune (Jun.-Aug. 1992); "Presumed Guilty: The Law's Victims in the War on Drugs", The Pittsburgh Press (Aug. 11-16, 1991).

patterned after the federal statutes, Sheriff Bob Vogel's "elite drug squad" has seized well over $8 million in the past few years from motorists exercising their constitutional right to travel peacefully along the Nation's highway system, on "I-95."

Out of 262 seizure cases, only 63 even resulted in criminal charges. Of the 199 cases in which there was no evidence to support criminal charges, 90% of the drivers were minorities. Though neither arrested nor charged with a crime, these individuals had their money seized. When confronted with the facts of his lucrative operation, Sheriff Vogel said: "What this data tells me is that the majority of money being transported for drug activity involves blacks and Hispanics."[12] Similarly, a 10-month Pittsburgh Press investigation of drug law seizure and forfeiture included an examination of court records on 121 "drug courier" stops where money was seized and no drugs were discovered. The Pittsburgh Press found that African-American, Latino, and Asian people accounted for 77% of the cases.[13]

Wherever these unrestrained asset forfeiture statutes exist, in the state or the federal system, they invite, and have borne, abuse of the Nation's citizenry. This is true, be it by state and local officers, federal agents, or some combination of the two in ever-more frequent joint "task force" operations.

H.R. 1916 is an important first step toward ensuring that federal agents, and those with whom they work in joint task force operations, do not wreak havoc upon the People's rights in the name

[12] *See id.*

[13] *See id.*

of "asset forfeiture" and for their own financial benefit. Moreover, many state civil asset forfeiture statutes are patterned on the federal scheme. Thus, congressional correction of the federal asset forfeiture will also provide the states with a better, more just model to follow.

D. Case Study

A prime example of forfeiture "justice" in America is the Volusia County, Florida case study. In the absence of any evidence of criminal complicity, and with the Sheriff's knowledge that the currency would have to be returned, the law enforcement agency offers "settlement" to asset forfeiture victims who seek to (or who for economic reasons, must) avoid undue delay and unnecessary legal fees.[14] Rather than go to court to defend seizures, the agency cuts "deals" with the drivers.

Motorists can get some of their money back if they agree not to sue the abusive agency. For example, Sheriff's Deputies seized $19,000 from a Massachusetts paint shop owner. They returned $14,250 and kept $4750. They seized $38,923 from a Miami lawn care business owner; returned $28,923 and kept $10,000. They seized $31,000 from a Virginia car salesman; returned $27,250 and kept $3750. None of these people were charged with a crime. All were offered out-of-court settlements with no judicial supervision of the process. Indeed, Volusia County judges expressed surprise at these settlements.[15]

[14] Note that there is no "speedy trial" right to assist a citizen in getting back her wrongfully seized property, although we strongly encourage this as an amendment to H.R. 1916.

[15] See authorities cited *supra* note 3.

Volusia County is just one especially well documented case study. Its fact pattern is neither anomalous nor confined to state and local authorities. If anything, the federal government's civil asset arsenal is even more ripe for abuse, more troubling, and pervasive. Federal law enforcement's jurisdictional reach, funding and equipment grows ever-more expansive and sophisticated (even militaristic).[16]

Although DOJ professes in its public documents to abide by the principle that "[n]o property may be seized unless the government has probable cause to believe that it is subject to forfeiture,"[17] the reality is very different. Federal agents routinely seize people's property based on nothing more than otherwise inadmissible "hearsay" evidence, frequently from notoriously suspect "informants" who stand to profit from production of such "tips." DOJ gives monetary rewards to individuals who "report" information leading to a forfeiture. These contingency bounties can be as much as 25% of

[16] *See generally e.g.*, James Bovard, Lost Rights: The Destruction of American Liberty 13 (St. Martin's 1994), chronicling the fatal case of the unfortunately property rich, Donald Scott:

> Early in the morning of October 2, 1992, a small army of thirty-one people [from several law enforcement agencies, including the federal Drug Enforcement Agency (DEA)] smashed their way into sixty-one year-old Donald Scott's home on his 200-acre Trails' End Ranch in Malibu, California. The raiders were equipped with automatic weapons, flak jackets, and a battering ram. * * * After killing Scott, the agents thoroughly searched his house and ranch but failed to find any illicit drugs. [One of the claimed objectives, they then said they were looking for undocumented aliens.] Ventura County [California] district attorney Michael Bradbury investigated the raid and issued a report in 1993 that concluded that a "primary purpose of the raid was a land grab [by the agencies]."

See also Edwin Meese III & Rhett DeHart, "How Washington Subverts Your Local Sheriff," Policy Review (Jan./Feb. 1996) (explaining dangers of current over-federalization of the criminal law, with federal criminal jurisdiction now spanning over 3,000 "federal" crimes).

[17] U.S. Department of Justice, Annual Report of the Department of Justice Asset Forfeiture Program 1991 (Washington, D.C.: Government Printing Office, 1992), at 7.

the forfeiture proceeds. That kind of money can buy a lot of "tips."

The DOJ's internal documents read a little different from their public ones. A September 1992 DOJ newsletter noted: "Like children in a candy shop, the law enforcement community chose all manner and method of seizing and forfeiting property, gorging themselves in an effort which soon came to resemble one designed to raise revenues."[18] Nevertheless, Cary Copeland, Director of the DOJ's Executive Office for Asset Forfeiture, declared at a June 1993 congressional hearing: "[A]sset forfeiture is still in its relative infancy as a law enforcement program."[19] The darling of a federal police state's nursery? And the Federal Bureau of Investigation announced in 1992 that it anticipated its total seizures of private property would increase 25% each year for the following three years.[20]

Most courts have recognized the problem is the law; that any real relief from asset forfeiture abuse must come from Congress, through meaningful legislative reform. For example, as the United States Court of Appeals for the Second Circuit recently put it:

> We continue to be enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is *buried in those statutes*."[21]

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[18] U.S. Department of Justice, "Message From the Director: 'Do the Right Thing,'" *Asset Forfeiture News* (Sept./Oct. 1992), at p. 2.

[19] Statement of Cary H. Copeland before the Subcommittee on Legislation and National Security, United States House of Representatives Government Operations Committee (Jun. 22, 1993), at 4.

[20] U.S. Department of Justice, **Annual Report of the Department of Justice Asset Forfeiture Program 1991** (Washington, D.C.: Government Printing Office, 1992), at p. 27.

[21] **United States v. All Assets of Statewide Auto Parts**, 971 F.2d 896, 905 (2nd Cir. 1992).

In short, an utter tide of abuse of innocent citizens is sweeping the Nation, which has led to widespread awareness that the forfeiture law must be reformed to stop the abuse. This Committee's hearing, and H.R. 1916, should go some distance toward alerting the rest of the public and the rest of the Congress to the grave reality of the current laws, and toward correcting this egregious state of "justice" in America. We encourage you Mr. Hyde, and the rest of this Honorable Committee, to forge ahead on the road to real reform of the federal asset forfeiture regime.

II. H.R. 1916: Achieves Much; Should be Strengthened to Finish the Journey to Reform

A. Notice of Seizure and Cost Bond

H.R. 1916 would correct the unfairness spawned by the currently unconscionable "cost bond" requirements for access to justice. The bill would eliminate the requirement of the cost bond, and it would extend the time limits under which a person whose property is seized may file a claim after the government files a forfeiture action in court against the property.

Now, many claimants are losing their right to contest the forfeiture of their property due to procedural defaults. For example, they may lose their rights because of a failure to meet the extremely short time deadlines for filing a claim and cost bond with the seizing agency under 19 U.S.C. Sec. 1608 (20 days from the date of the first publication of the notice of seizure), and for filing a second verified claim (this one in federal district court), under "Supplemental Admiralty Rule c (6)" (10 days from the date of which the warrant of arrest *in rem* is executed).

Shockingly, the application of the Supplemental Rules allows warrantless seizures where there are no recognized exceptions to the constitutionally mandated warrant requirement. These rules are often ignored in order to comply with due process, but they nevertheless remain on the

books, ready for abuse.

When the DEA or the FBI seizes property, a claimant is required to post a bond in the amount of 10% of the value of the property to preserve the right to contest in court the forfeiture (not less than $250, up to a maximum of $5,000). The claimant has up to 30 days to post the bond after receipt of the notice of forfeiture. Frequently, the government seizes several items, and requires that a separate bond be posted for each item. Many people lose their property at this stage because they are unable to post the cost bond within the time limit.

This administrative forfeiture proceeding was designed to resolve uncontested forfeitures. Under this process, a post-seizure probable cause determination is waived. The property is forfeited without benefit of court intervention. The cost bond is the antiquated, perfunctory mechanism through which contested seizures are supposed to be able to proceed to judicial resolution.

However, the requirement of posting a cost bond eliminates through attrition many claims which would otherwise be contested. Adding insult to injury, the cost bond is used to pay the *government's* costs of litigating the forfeiture. This is an absurdly unjust arrangement -- letting the government take property away from someone without having to prove anything, then making the owner pay in advance the government's costs of trying to take it away from him permanently. Furthermore, unlike criminal cases, the bond is imposed without any independent determination of probable cause.

The cost bond would be abolished by H.R. 1916, as it should be.

B. Court-Appointed Counsel for Indigents

Another extremely important reform that would be accomplished by H.R. 1916 is allowance for appointment of counsel in cases in which the claimant satisfactorily demonstrates to the court

that he or she is financially unable to retain counsel to fight for the return of the seized property. The standards to be applied are the same, well-established ones applicable to the appointment of counsel for indigent criminal defendants. But the money would come directly from the Justice Assets Forfeiture Fund, so no new money would need to be budgeted for this just cause.

Contesting a forfeiture case can be an expensive proposition for one seeking the return of his or her property. Many forfeitures go uncontested due to the high cost of litigating these cases. For example, often an owner cannot economically hire counsel to defend against forfeiture of a $10,000-$20,000 automobile if the government is intent on proceeding to trial. Legal fees in such a case might well eat up the value of this seized property in short order.

If a property owner has no money with which to retain counsel (either because he is too poor, or because the government has rendered him indigent by taking or restraining his property), he does not have a right to appointed counsel. He must defend the action without aid of counsel.

Claimants in civil forfeiture cases are not entitled to counsel as a matter of right, because the Sixth Amendment does not apply to "civil" proceedings, including effectively punitive forfeitures. Nor are federal defenders and Criminal Justice Act "panel" lawyers authorized to represent claimants in civil forfeitures. There is not even a provision in the law to allow a person to recoup his or her fees if a costly fight is undertaken and the property is ultimately shown to have been wrongly seized. Consequently, many people lose their property simply because they cannot afford to hire a lawyer and have no idea how to battle the government through the complex statutory terrain without one.

The indigent counsel provision in H.R. 1916 at least provides the indigent person a legally trained champion in his or her fight to get a seized property back, and is a first step toward bringing fundamental due process into this legal twilight zone of asset forfeiture law.

C. Burdens and Standards of Proof

H.R. 1916 puts the burden of proof, and sets the standard of proof, where they should be according to fundamental principles of due process. Current statutory law gives the government many unfair procedural advantages over citizens, especially as regards the burden and the standard of proof.

Who Should Bear the Burden of Proof?

H.R. 1916 rightly places the burden of proof with the government so that the government must prove its case before it can permanently deprive a citizen of his or her property.

One of the gravest problems with the current statutory framework is the burden of proof provision, at 19 U.S.C. 1615. The statute places the burden of proof on the claimant to show that the property is not subject to forfeiture. This is fundamentally unfair and constitutionally anomalous in view of the quasi-criminal character of the proceedings and the important interest at stake. It is extremely difficult to prove a negative.

For example, when the government offers testimony that an unidentified informant claims to have participated in, or witnessed, a drug transaction at a claimant's residence, the claimant bears the burden of proof that it did not occur. This turns the criminal presumption of innocence on its ear. The reversal of the normal burden of proof is unique to civil forfeiture. In all other cases, the party trying to change the *status quo* has the burden of proof, by at least "a preponderance of the evidence."

What Should the Burden Be?

In addition to placing the burden of proof with the government, H.R. 1916 also rightly ensures that the government can deprive one of property only upon proof by "clear and convincing"

evidence that the property is forfeitable. This is much less than the standard applicable in quite similar criminal proceedings, in which the punishment can likewise be the taking of one's property, but it is still better than "probable cause." At least the clear and convincing standard recognizes that deprivation of property on allegation of criminality is fundamentally akin to a criminal matter, and not a mere "civil" one.

Moreover, Congress should clarify that the evidence allowed to meet the standard of proof must be that which existed at the time of the proceeding's commencement. Evidence acquired after the fact should not be allowed to "cure" the lack of cause at the time of the government's filing for the property. After-acquired evidence should be excluded and cases lacking cause at the time of filing should be barred.[17]

D. The Need for a Meaningful Innocent Owner Defense

H.R. 1916 provides important clarification of the drug forfeiture law's innocent owner provisions.

Presently, many innocent people lose valuable property rights because of something someone else has done which was beyond their control. The system treats a criminal defendant better than an innocent third party. In criminal forfeitures brought under 21 U.S.C. 853 and the "RICO" statutes,

[17] *See e.g.*, United States v. $191,910.00 in U.S. Currency, 16 F.3d 1051 (9th Cir. 1994) ("Without such a rule, government agents might be tempted to bring proceedings (and thereby seize property) on the basis of mere suspicion or even enmity and then engage in a fishing expedition to discover whether . . . cause exists.) *See also* United States v. $31,990, 982 F.2d 851, 856 (2nd Cir. 1993) ("The institution of a forfeiture can have serious effects on an owner's right to use and control his property. It should not be undertaken without a demonstrably good reason.")

the criminal defendant is entitled to many criminal procedure safeguards.[31] Innocent third parties in civil forfeiture proceedings should receive at least the same, and probably more rights. Instead, they are required to bear the burden of proof and overcome the government's routine use of otherwise inadmissible hearsay.

In his Annual Report of the Department of Justice Asset Forfeiture Program (1990), the Attorney General claimed:

> The Department of Justice routinely grants petitions for remission or mitigation of forfeiture, 'primarily to innocent lienholders and innocent family members.' It is the Department's policy to liberally grant such petitions as a means of avoiding harsh results.

Although this statement sounds good, it is not accurate. Experienced defense attorneys rarely file such petitions, because far from being "routinely grant[ed]," they are routinely denied.

For two centuries, 19 U.S.C. 1618, the statute governing remission, has provided for the grant of remission to petitioners who establish that they acted "without willful negligence." Historically, DOJ had granted remission based upon a showing that the petitioner was not negligent in the care and use of the property. But on August 31, 1987, DOJ issued new regulations abandoning the statutory negligence standard and requiring petitioners to meet a more stringent standard of care.[32]

To get relief through the remission process, a petitioner now must prove that forfeiture of his

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[31] However, most circuits have misinterpreted Section 853 (d)'s rebuttable presumption to mean that any property of a person convicted of a Title 21 drug felony is subject to forfeiture under section 853 if the government establishes its case by a preponderance of the evidence. Congress should clarify its intent that the standard under Section 853 is beyond a reasonable doubt.

[32] *See* 28 C.F.R. Section 9.5(b)(5)

property would violate due process, a very high threshold. This policy is not only in conflict with the report of the Attorney General. It cannot be reconciled with the negligence standard adopted by Congress in Section 1618.

Moreover, DOJ does not make remission decisions public and typically does not even explain to the petitioner its reasons for denying a petition. Remission policies and procedures are intended to function as a check on unbridled prosecutorial discretion and to avoid unfair and unjust results. As implemented under current law, remission is totally left to the discretion of the DOJ, with virtually no review or appeal of its decisions.

This lack of oversight often results in harsh, unwarranted, and arbitrary forfeiture decisions. The examples cited in the Orlando Sentinel, in the Pittsburgh Press, in Chairman Hyde's book, Forfeiting Our Property Rights, and in the book, License to Steal, all exemplify the harm to innocent citizens that results from the abuse of unbridled prosecutorial discretion.[33] Congress should reign in the DOJ with respect to innocent parties, and return the law to its rightful place -- as it was before DOJ issued its August 31, 1987, self-interested, self-regulation.

21 U.S.C. 881, the federal drug forfeiture statute, currently provides a defense from government forfeiture to an innocent owner of the property. Section 881 provides:

> "... Except that no property shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without knowledge or consent of that owner."

The majority of federal circuits have held that an owner may avoid forfeiture by establishing either

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[33] *See supra* note 1.

lack of knowledge *or* lack of consent.[36] However, a minority of circuits have held that congressional use of the word "or" *really means* "and." They have held that *in order to prevail, an owner must* establish both lack of knowledge and lack of consent.[37] Although these decisions have been heavily criticized, they unfortunately persist as binding authority in their respective circuits.[38]

The requirement of establishing both lack of knowledge and lack of consent presents a particularly harsh problem for innocent spouses. The innocent spouse may have knowledge that the other spouse is engaging in unlawful activity in the home, but does not consent to it and is indeed *powerless to do anything* to stop it. *Battered spouses are* especially hurt by the *predicament*. The no-win situation presented is either: (1) leave the family home; or (2) report the activity to law enforcement, perhaps risking physical danger, and at least, the arrest and prosecution of the spouse (whose financial support may well be essential to the family's survival).[39]

H.R. 1916 would clarify this statute, to confirm the existence of a defense when the innocent owner can establish *either* lack of knowledge *or* lack of consent.

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[36] *See e.g.*, United States v. 6109 Grubb Road, 886 F.2d 618, 625 (3d Cir. 1989); United States v. 141st Street Corp., 911 F.2d 870, 878 (2d Cir. 1990), *cert. denied*, -- U.S. --, 111 S.Ct. 1017 (1991); *United States v. One Parcel of Real Estate at 1012 Germantown Road*, 963 F.2d 1496 (11th Cir. 1992).

[37] *See e.g.*, United States v. One Parcel of Land Known as Lot 111-B, 902 F.2d 1443 (9th Cir. 1990).

[38] And in its most recent Term, the Supreme Court expressly held that in the absence of an "*innocent owner*" *statutory provision, due process is not offended by deployment of the* "guilty property" fiction to the property of an actually innocent owner. Bennis v. Michigan, -- U.S. --, 116 S.Ct. 994 (1996). Clearly, Congress must act.

[39] Such a "choice" also arguably infringes upon the concept of spousal privilege.

E. Contested Property Possession Reforms

H.R. 1916 would reform the law to ensure that contested property is not abused or destroyed by the government during the time it holds it. The bill provides for cases in which the government's holding of the property under dispute would create a substantial hardship on the person from whom the government seeks to permanently deprive the person of her property.

Victim's Right to Restitution for Wrongful Destruction of Property by the Government

H.R. 1916 would make an important, narrow amendment to the federal Tort Claims Act, to allow an action for damages against the government should it wrongfully, intentionally, or negligently destroy the individual's property while it holds it in seizure.

The federal government now does an inadequate job of maintaining seized property. And currently, innocent owners have no recourse if their property is damaged or otherwise allowed to deteriorate in value while in the custody of the government.

The government often takes two years or more after seizure to bring a forfeiture case to trial. By the time a case is resolved, the asset has often depreciated to a fraction of its seized value.

When the government wins, the depreciated asset is auctioned off for a fraction of its seized value and innocent lienholders often lose part of their equity. If the owner wins the forfeiture case, it is a pyrrhic victory – and an absolute travesty to the citizen who has been forced to spend money and time fighting the forfeiture case. The government raises its undeserved shield of sovereign immunity as a defense to any claims for depreciation and property damage. Therefore, even when the government cannot prove its case, the owner often still loses.

The United States should be liable for the loss of value and loss of use of any property it seizes if the claimant prevails, regardless of whether the government's care of the property was

negligent. This should certainly be the case when a court later determines that the seizure was illegal. Yet, under current law, it is unclear whether a claimant has a right of action against the government for losses occasioned by an illegal seizure and wrongful handling of property. H.R. 1916 would clarify the law.

Substantial Hardship Temporary Relief Provision

H.R. 1916 recognizes that often a seizure can deprive someone of their very home or livelihood before the property is returned to its rightful, private owner through the arduous asset forfeiture procedures. Accordingly, the bill provides for the temporary release of property where a claimant can demonstrate that a substantial hardship will result if property is not released during pendency of the action.

For example, where the government seizes a truck belonging to a trucker, the trucker is effectively out of business during the time it takes to resolve the forfeiture (which unfortunately, can take years, at least absent a "speedy trial"-type reform). Even if the claimant ultimately prevails, by the time he gets his truck back (even assuming it is in the same, undamaged shape it was in before the government took it), he could be out of business. H.R. 1916 would allow the trucker to continue using his truck, *under conditions imposed by the court (to safeguard the truck)*, while the action is pending and unless and until the government proves it is entitled to permanently deprive him of the truck. Meanwhile, the trucker, still employed, could continue contributing to the economy and the tax system. Other cases that come to mind in which this provision might prove essential are cases involving one's only place of residence, or a business, which, if seized, might put not only the proprietor, but all of his or her employees, out of work.

III. Other Reform Suggestions

A. Governmental Use of Hearsay Must be Curbed

One of the most egregious problems in this area is the government's ability to meet its probable cause showing through the use of hearsay. Congress needs to curb this practice.

The courts allow the government to meet its threshold, probable cause showing, through otherwise inadmissible hearsay testimony.[20] But the cases offer virtually no discussion or rationale for their holdings. They seem to reflect nothing but a judicial tradition from an inapt context: the allowance of hearsay to establish probable cause for arrest and search warrants. The judicial analogy to cases allowing hearsay to support the issuance of warrants fails, because with regard to warrants other safeguards are in place. For instance, the government has the highest burden of proof in criminal cases spawned by the issuance of warrants. Whereas, in civil forfeiture proceedings, the government has no burden of proof at all once probable cause is satisfied.

If H.R. 1916 is passed, the burden of proof will rest with the government and the hearsay problem will no longer exist. But in the absence of H.R. 1916, Congress should immediately clarify that, subject to the Rules of Evidence, hearsay is not admissible by the government to establish probable cause to forfeit property. One way or another, Congress should forbid the use of hearsay to establish cause for forfeiture.

Rule 1101 of the Federal Rules of Evidence provides that the rules "apply generally to civil actions and proceedings including admiralty and maritime cases . . . ". Rule 1101(d) exempts the

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[20] *See e.g.*, United States v. $91,960.00, 897 F.2d 1457, 1462 (8th Cir. 1990). *But see* United States v. One Pontiac Sedan, 194 F.2d 756, 760 (7th Cir.), *cert. denied*, 343 U.S. 966 (1952).

issuance of search and arrest warrants from the scope of the Rules. Significantly, Rule 1101(e) provides that, absent statutory provisions to the contrary, the Rules apply to a list of enumerated proceedings, including "actions for fines, penalties, or forfeitures" under 19 U.S.C. 1581-1624."

B. Need for Statutory Time Limits on the Government: Speedy Trial Act for Forfeiture Cases

H.R. 1916 should be strengthened to place time limits on the government's ability to hold property without moving the process along for resolution of the contested possession.

Under the present forfeiture scheme, there are inadequate statutory deadlines placed on the government to keep the process moving. For example, except in the case of conveyances seized for violation of the drug laws, there is no time limit within which the seizing agency must give notice to the owner of the property, of the government's intention to seek forfeiture of the property.

Notice

On January 15, 1993, Deputy Attorney General Cary Copeland, Director and Chief Counsel of the Executive Office for Asset Forfeiture, issued Directive 93-4, which recognizes that "a fundamental aspect of due process in any forfeiture proceeding is that notice be given as soon as practicable to apprise interested persons of the pendency of the action and afford them an opportunity to be heard."

Directive 93-4 orders that written notice to owners and other interested parties (property stakeholders) known at the time of the seizure "shall occur not later than sixty (60) days from the date of the seizure." It further provides that "where a reasonable effort of notice has not been made

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[1] Judge Beam of the Eighth Circuit has written persuasively that due process is offended by the permitting the government to forfeit a person's property on the basis of the notoriously unreliable basis of hearsay. *See* United States v. $12,390.00, 956 F.2d 801, 812 (8th Cir. 1992) (Beam, J., dissenting).

within the 60-day period and no waiver has been obtained, the seized property must be returned and the forfeiture proceeding terminated." This policy became effective March 1, 1993. Of course, this is merely a matter of DOJ policy, and not law, and thus a claimant does not enjoy standing to enforce it in court, or to contest a seizure based on a dilatory government practice with regard to the notice.

Directive 93-4 should become law, not just policy, through an amendment to H.R. 1916.

Government Commencement of Proceedings

A second, related matter, has also created problems for owners of seized property. There is no time limit governing the government's initiation of suit in federal court after receiving notice of an owner's claim and cost bond. Indeed, although the law requires that a property owner must file a claim and cost bond within 20 days of the date of first publication, there is no similar deadline placed on the government for commencing a judicial forfeiture action in district court. Governmental delay in filing an action after receipt of a claim creates a severe hardship for property owners and other stakeholders in the property (e.g., investors). Not only does delay deprive owners the use of their property for an indefinite period of time, but it also puts them in the untenable position of having to either (1) continue making payments on the seized property, thereby possibly providing a windfall to the government and creating additional loss for themselves should the government prevail, or (2) risk destroying their credit. This Hobson's Choice can result in a substantial loss to the property owner and other stakeholders.

One has virtually no remedy in this situation. Most courts have held that once the government serves Notice of Seizure and Intended Forfeiture, the court is divested of jurisdiction

under the Rules of Criminal Procedure.[11]

In the interests of justice, and in the interest of the economy, Congress should require the government to commence an action for forfeiture in district court within 60 days of receipt of the notice of claim. This time frame is already in effect in forfeitures involving seized conveyances under 21 U.S.C. 888.[12] This provision should simply be extended to all forfeitures. By giving the seizing agency 60 days to file a Notice of Intent to Forfeit, and another 60 days to file the action once a claim is received, the government would still have a total of at least 120 days from the date of seizure in which to initiate action in district court.

C. Need for a Substantial Nexus Requirement

Federal forfeiture statutes do not explicitly require that there be a substantial nexus between the alleged unlawful activity and the property seized. They should. Although the legislative history certainly suggests such a requirement, the courts are unfortunately split as to whether there need be such a substantial nexus and what it means.[13]

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[11] *See e.g.*, Shaw v. United States, 891 F.2d 602 (6th Cir. 1989), United States v. Elais, 921 F.2d 870 (9th Cir. 1990), United States v. U.S. Currency, 851 F.2d 1231 (9th Cir. 1988), United States v. Castro, 883 F.2d 1018 (11th Cir. 1989), United States v. Price, 914 F.2d 1507 (D.C. Cir. 1990).

[12] *See* 21 U.S.C. 888(c).

[13] The Senate Report accompanying the amendment adding subsection (a)(7) to 21 U.S.C. 881 noted that the proposed amendment adding real property to the categories of property that could be forfeited would lead to the seizure and forfeiture of property "indispensable to the commission of a crime." S. Rep. No. 225, 98th Cong. 1st Sess. 195, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3378. The Senate Report explained Congress' motivation in passing 21 U.S.C. 881 (a)(7) as follows:

> Under current law, if a person uses a boat or a car to transport narcotics or uses equipment to manufacture dangerous drugs, his use of the property renders it subject to civil forfeiture. But if he uses a secluded barn to store tons of marijuana, or uses his house as a manufacturing laboratory for methamphetamine, there is no provision to subject his real property to civil forfeiture even though its use was indispensable to the commission of a major drug offense and the prospect of forfeiture of the property would have been a powerful deterrent.

(emphasis added here)

Absent explicit statutory guidance to the contrary, the courts have expanded the situations in which real property can be forfeited; in many cases, doing away with the requirement that there be a substantial connection to alleged criminality. In one of the most egregious cases, the court affirmed the forfeiture of a residence based on two telephone calls made *from the informant* to the homeowner at the residence, during which the sale of cocaine was said to have been negotiated.[14] This is all the evidence the government had, but it was deemed enough to allow a forfeiture of the residence. No drugs were ever stored at the residence and no sales took place there.

Congress could not have intended such an unfair result. Congress should modify the statute to require that a court must find that a substantial connection exists between the alleged unlawful activity and the property desired by the government before the property can be lawfully forfeited. Congress should also give some examples in the legislative history, in order to guide courts as to what "substantial nexus" means under this congressional revision. H.R. 1916 should be amended to provide this explicit statutory clarification on the need for a substantial connection nexus.

D. Economic Conflict of Interest Must Be Eliminated

The incentive scheme for law enforcement's direct profiteering from the forfeiture statutes must be addressed. H.R. 1916 should be amended to address this core problem with the current forfeiture laws.

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[14] United States v. One Parcel of Real Estate Commonly Known as 916 Douglas Avenue, 903 F.2d 490 (7th Cir. 1990), *cert. denied*, 111 S.Ct. 1090 (1991).

We can no longer ignore the conflicts of interest and policy problems which arise when law enforcement and prosecutorial agencies reap financial bounty from the forfeiture decisions they make. Decisions regarding whose property to seize, and how to deal with citizens whose property has been seized is too often dictated by the profit the agencies stand to realize from the seizures.

State and local law enforcement agencies frequently work with federal agencies on forfeiture cases and share the proceeds of the forfeiture. This procedure thwarts state law, which may require *forfeited assets to be deposited into the general treasury*. It also allows states to take advantage of broader federal statutes. The types of cases the state and local agencies choose to pursue together are often influenced by the state's knowledge that the federal government will share the proceeds from the forfeited assets they acquire together. The federal government's participation in this preemption of state priorities should be eliminated by Congress.

In short, the inherent conflict of interest and unbridled discretion sanctioned by the current forfeiture law invites abuse. The opportunities for abuse are legion. For example, local police may cut deals with federal agencies to target individuals whose assets can best benefit both agencies. Joint forfeitures allow local police and federal agencies to avoid state statutory and constitutional law. Law enforcement officers and prosecutors have come to rely on forfeitures as sources of extra revenue. Congress should especially investigate the conflict of interest created when prosecutors and law enforcement agencies set quotas for forfeited assets and use the money to create additional positions and buy "informants" (to help generate still more forfeitures, for still more revenue).

IV. Recap: Congress Must Act to Reform the Abusive Asset Forfeiture Laws

In August of 1991, NACDL's Board of Directors adopted the following resolution regarding asset forfeiture:

> It is the policy of the National Association of Criminal Defense Lawyers that the seizure of a person's assets by the government should be treated in exactly the same way as the seizure of a person, and all the protection afforded by the Bill of Rights should apply.

Several basic safeguards should be incorporated into all forfeiture schemes, especially the federal one, after which so many states pattern their own:

➢ The burden of proving that forfeiture law applies should always be on the government just as it is in criminal prosecutions. The degree of proof required should be proof beyond a reasonable doubt. At the very least, it must be higher than the current mere probable cause standard.

➢ Hearsay should not be allowed in the government's case.

➢ In the absence of exigent circumstances, the government should be required to justify a seizure of property to a court before, not after, the seizure is made.

➢ The cost bond should be eliminated.

➢ Post-seizure probable cause determinations on demand should be instituted.

➢ Deadlines for property owners to comply with procedural requirements should be longer.

➢ The government should be required to promptly notify owners of the government's intent to forfeit property, and should be required to promptly commence a judicial forfeiture proceeding upon receipt of a claim -- in a manner similar to the requirement under the Speedy Trial Act.

➢ Provision should be made for the temporary release of seized property to the owner, where the claimant can demonstrate to a court that a substantial hardship will result if the property is not

so released during the pendency of the action.

➢ Forfeiture laws should recognize that innocent people often incur huge expenses in defending their property against wrongful seizure. Forfeiture laws should include an "early exit," innocent owner provision. This would allow a case to be dismissed when an innocent party shows that he has an ownership interest in the property, and the government has no proof that the person was involvement in the alleged criminal conduct.

➢ Forfeiture of real property should always require that there be a substantial nexus between the alleged unlawful activity and the property seized.

➢ Congress must acknowledge that forfeiture is a quasi-criminal action. Most people do not realize that, under current laws, a citizen can be found not guilty (indeed, may not even be charged with a crime), and nevertheless have her property taken by the government.

➢The United States government should be liable for the loss of use, and any deterioration of an asset in cases where the claimant prevails.

H.R. 1916 incorporates many of these essential safeguards, and NACDL supports the effort reflected in the bill.

V. Conclusion

We look forward to working with you, Chairman Hyde, and with the Committee, to achieve meaningful reform through H.R. 1916. We thank you again for affording us this opportunity to participate in this hearing on the need for civil asset forfeiture reform.

ATTACHMENT A

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
FORFEITURE ABUSE TASK FORCE
SECTION BY SECTION ANALYSIS OF
THE DEPARTMENT OF JUSTICE'S PROPOSED FORFEITURE ACT OF 1996

Section 101.

Time for Filing Claim; Waiver of Cost Bond.

Claimants should not be required to set forth "how and when" their ownership interest was acquired. In a proceeds case this would often be very burdensome. Claimant may have to explain how and when he acquired dozens of items of property. He shouldn't have to do this even before a complaint is filed when he may not have counsel or counsel has just been retained.

The cost bond requirement should be completely eliminated or at least greatly reduced. The cost of hiring an attorney is sufficient incentive not to pursue frivolous claims.

Section 103.

Judicial Review of Administrative Forfeitures.

19 U.S.C. 1609(d) should allow claimants to proceed under Fed. R. Crim. P. 41(e) as well as by filing a separate civil action. Many or most claimants in this situation are proceeding *pro se* and are incapable of filing a civil suit.

The claimant should have to establish that he had "no other *actual* notice of the forfeiture proceeding within the period for filing a claim." He will always have constructive notice through publication but that is constitutionally insufficient where the agency could have given him personal notice but fails to.

The claimant should not have to establish that the seizing agency failed to comply with the notice requirements of 19 U.S.C. 1607. That section merely requires the agency to send written notice to each party who appears to have an interest in the seized property. Virtually all of the reported notice cases finding a due process violation deal with the situation where the agency technically complies with §1607 but makes no effort to actually get the notice letter to the property owner once the letter is returned to the agency by the postal service as undelivered. 19 U.S.C. 1609(d) should require the claimant to establish that

the seizing agency failed to take reasonable steps to locate and serve him with written notice and that he had no other *actual* notice of the forfeiture proceeding within the period for filing a claim.

Section 105.

Preservation of Arrested Real Property.

This seems to be an attempt to nullify much of the United States Supreme Court's Good decision. The point of Good is that the government can't interfere in this way with the owner's right to use his property without going through an adversary hearing. The government has said that Good has not been a problem. Why then does it need this?

Section 108.

Prejudgment Interest.

United States shouldn't be allowed to use seized cash to reduce its borrowing needs and then refuse to disgorge that benefit if it loses the case. This provision should codify the holding in United States v. $277,000 U.S. Currency, 69 F 3d 1491 (9th Cir. 1995).

Section 121.

This section is an attempt to codify a lot of case law. In our view, much of that effort is unnecessary.

Complaint.

There should be a statutory provision barring the pursuit of a second *forfeiture* action simultaneously or successively. If the burden of proof is going to be preponderance in both cases what purpose is served by the pursuit of two forfeiture actions and how can it be justified?

Time for Filing Complaint.

This is the place to include a 90 day time limit for filing the complaint -- after claim and bond are filed. Time can be extended for good cause shown before 90 day period expires.

Claim and Answer.

We object to requiring the claimant to set forth in his claim facts supporting his standing. It's too burdensome and will give the government cheap victories where the claimant inadvertently fails to comply. In most cases standing isn't an issue. Where it is, the government can readily obtain the same facts and more thorough discovery filed with the Complaint.

Standing.

We also object to the provision making the court the sole arbiter of the facts relating to standing questions. That would diminish the right to trial by jury.

Burden of Proof.

Burden of proof provision is ok, but let's give the courts some guidance on what a "substantial connection" is -- at least by way of legislative history. Congress needs to clarify that making (let alone receiving from some notoriously suspect informant) some telephone calls from a house isn't a substantial connection, for example.

Affirmative Defenses.

If this provision is enacted the government will argue that a claimant has waived any defense not set forth in the answer. *Civil forfeiture procedure already contains numerous* traps for the unwary, ill-equipped, or ill-counseled claimant. There is no reason to create another one. Many claimants are forced to represent themselves for lack of funds. Even claimants represented by counsel usually have attorneys who know little if anything about the complex civil forfeiture law. At the time an answer must be filed they are often unaware of potential defenses to forfeiture.

Use of Hearsay at Pretrial Hearings.

We don't have a problem with the use of *reliable* hearsay at pretrial proceedings but there should be no hard and fast rule protecting the identity of the CI. If the government is seeking summary judgment based on a CI's statement, the owner should have the right to

impeach the CI, and to take his deposition. Moreover, the government clearly can't use *otherwise inadmissible hearsay at all* on a motion for summary judgment -- by the terms of Rule 56(e). Congress needs to make it clear. What sort of pre-trial hearings are contemplated here anyway?

Adverse Inferences.

There's no way we can agree to the adverse inference provision. As this is a constitutional question, it also seems inappropriate to try to address it in the statute.

Preservation of Property Subject to Forfeiture.

Why is it necessary to give the court power to enter restraining orders, create receiverships, etc., if property is under seizure? If it is realty, then James Good prevents the court from doing these things without a Good hearing.

Release of Property to Pay Criminal Defense Costs.

We have only one problem with this part of the draft -- the court is prohibited from considering any affirmative defenses at the hearing. Why should that be? Good allows affirmative defenses to be considered even at a pre-seizure hearing, which is *earlier* in time.

Excessive Fines.

No problem except for the timing. Why must claimant wait until the conclusion of the trial? There aren't many cases that go to trial. Usually a claimant would raise an excessiveness issue in his opposition to the government's motion for summary judgment or in a cross-motion for summary judgment.

Applicability.

Not applying these provisions to forfeitures under the customs laws is a major drawback. Couldn't they get Treasury on board?

Rebuttable Presumptions.

Major problems with this provision. We don't see why the government needs these presumptions to prove its cases and the presumptions would allow it to seize and forfeit huge sums of money that is "clean." The presumptions appear to allow the government to dispense with any showing that the elements of §1956 or §1957 are proven!

As a practical matter, only the government has access to proof of whether the foreign country's bank secrecy laws have rendered the United States unable to obtain records relating to the transaction by judicial process, treaty or executive agreement. The courts would have to take the government's word for it.

If the country where the transaction takes place or was intended to take place satisfies both subparagraph A and subparagraph B, then the government would forfeit the money without more! This is mind-boggling.

We have a simpler proposal. Why not just make it illegal to transfer any money -- clean or dirty -- to specified bank secrecy countries. Any money transferred in violation of the law would be subject to forfeiture. That would take care of the offshore tax havens.

Section 122.

Time for Filing Claim and Answer.

How is "actual notice of the execution of the process" to be provided to claimants? Right now there's no way to find out when process was executed except by periodically checking the file in the Clerk's Office to see when the deputy marshal's return was filed. Process is often executed *after* the receipt of the complaint.

Section 123.

Uniform Innocent Owner Defense.

The exclusion of customs cases from this provision is objectionable. The forfeiture statutes without innocent owner provisions are mainly customs statutes in title 19 and 31, so this does not really deal with the problem.

From our point of view, the DOJ proposal for the uniform innocent owner defense is a step backward, because it reduces the protections for innocent owners that are currently

found in the CSA, the INA and the Money Laundering Act. We prefer to keep the actual knowledge/willful blindness standard in current law. See NACDL's detailed critique of the same provision in DOJ's draft Forfeiture Act of 1994. Attachment B.

The government's proposal would severely limit the innocent owner defense for those who acquire a property interest after the act giving rise to the forfeiture. Only BFPs who "did all that reasonably could be expected to ensure that the purchaser was not acquiring property that was subject to forfeiture" would qualify for relief. Innocent donees and heirs, who are presently protected, would be out of luck, no matter what their equities were. The innocent homemaker would lose everything she has. The government's proposal would also abolish defenses based on state property law. The innocent homemaker with a community property interest in the forfeitable property would get nothing.

Proposed 18 U.S.C. 983(c) significantly alters current law with respect to standing. Currently bailees and beneficiaries of constructive trusts have standing to contest the forfeiture. The proposed §983(c) specifically denies those potential claimants standing. We see no reason for this. The courts have imposed standing requirements on bailees designed to thwart money couriers from hiding the identity of the bailor. That is enough.

Proposed 983(d) would require the courts to enter orders severing tenancies by the entireties and joint tenancies and transferring the property to the government for sale, or converting joint tenancies and tenancy by the entireties property to a tenancy in common, irrespective of state law. The innocent homemaker would lose all interest in her home if it was purchased with drug money because she wouldn't qualify as a BFP.

How about this scenario?: Mr. Jones uses his home, bought with clean money, to facilitate a drug transaction thereby making it subject to forfeiture. Thereafter, Jones meets and marries innocent young woman who becomes owner of home by the entireties with husband. Later, government seizes home for forfeiture. Innocent Mrs. Jones loses the roof over her head because she isn't a BFP. She is thrown out in the street with her young children.

Section 124.

Stay of Civil Forfeiture Case.

The proposed change to 21 U.S.C. 881(i) would make it too easy for the government to obtain a stay of the civil forfeiture case and remove the district court's discretion in the granting of stays. Case law requires the government to make a specific showing of the harm

it will suffer without a stay and why other methods of protecting its interest are insufficient. See e.g., In re Ramu Corp., 903 F.2d 312, 32 (5th Cir. 1990). The language in the proposed bill would require the court to grant a stay if it determines that civil discovery or trial could possibly have an adverse affect on a related criminal investigation or prosecution. That would almost always be the case.

We approve of proposed §881(i)(2), which allows the claimant to seek a stay. (He already can under the case law.) We would clarify the language, however. Claimant ought to be able to get a stay when, in order to effectively defend the civil forfeiture case, claimant must testify and thereby risk self-incrimination. The courts have held that placing the claimant in that difficult situation does *not* violate the fifth amendment privilege, however. So the proposed language ("infringe upon the claimant's right against self-incrimination") doesn't accomplish what DOJ's Stef Cassella apparently thinks it does.

Proposed §881(i)(5) would allow the government to make *all* its requests for stays *ex parte* and under seal. This is obviously unacceptable. It would effectively prevent the claimant from challenging or rebutting the prosecutor's arguments in favor of a stay.

Section 125.

Parallel Civil and Criminal Cases

This provision doesn't specifically authorize the civil forfeiture and the criminal case to be joined for trial. Isn't that what the government wants to allow? It might be a good idea. Suggestion: where the two cases are joined for trial, allow the judge to appoint the same CJA counsel to handle both matters, at least at the trial stage. That would prevent the defendant from prejudicing his criminal case by being forced to appear *pro se* in the civil forfeiture case tried by the same jury.

Section 131

Seizure Warrant Requirement.

Proposed 18 U.S.C. §981(b)(3) greatly increases the government's flexibility in deciding where to seek a seizure warrant but restricts claimants to the district where the warrant was issued if they want to file a motion for return of seized property. This isn't fair. The government has U.S. Attorneys and agents in every district. It would be allowed to choose the district most favorable to itself and make the claimant litigate any motion for return of seized property in that district, however inconvenient and expensive for the

claimant. 21 U.S.C. 881(b) would be amended to conform to the new §981(b)

Where a person is arrested or charged in a foreign country, the government could apply under §981(b)(3) to *any* federal judge or magistrate in the United States for an *ex parte* order restraining property subject to forfeiture in the United States for up to 30 days, which period could be extended for good cause shown. This provision invites completely unrestricted judge shopping. The government will go to judges or magistrates who it knows will rubber stamp their requests.

The government should be required to apply to a judge or magistrate in the district where the defendant's property is found. The provision is also objectionable because it provides no mechanism for the owner to be heard at any time. Through successive extensions of the original order a defendant's property can be frozen for a lengthy period of time without giving him any opportunity to be heard.

Finally, this provision would allow the government to freeze property without any showing -- even an *ex parte* showing -- that there is probable cause to believe the property is subject to forfeiture. This is very likely unconstitutional.

Section 132.

Civil Investigative Demands.

This provision is unacceptable for the reasons stated in our critique of the draft Forfeiture Act of 1994, which was never submitted to Congress. It's a terrible idea. See Attachment B.

Section 135.

Currency Forfeitures.

Proposed 21 U.S.C. §881(m) would create a rebuttable presumption that seized currency is forfeitable drug money in two circumstances. Neither circumstance justifies the presumption. For the reasons explained in David Smith's book (and even in the DEA's own forfeiture manual), the close proximity of personal use quantities of drugs proves little or nothing. The presumption would allow agents to seize any marijuana user's cash or pocket change, thereby inviting abuse.

The second set of circumstances is more reasonable but still no cigar. Even under the current probable cause standard, case law holds that the mere fact that a traveler offers a false explanation for his possession of the currency isn't enough by itself to prove it's drug money. It could easily be money derived from or intended for some other unlawful activity. We're concerned that the presumption would give some dishonest agents (or police, when the provision is copied on the state level) an incentive to fabricate "false explanations" secure in the knowledge that only the claimant can contradict their testimony.

While purporting elsewhere to raise the burden of proof to a preponderance, this presumption would effectively lower it again -- to a level <u>below probable cause</u>.

Section 201.

Standard of Proof for Criminal Forfeiture.

Rather than *lowering* the burden of proof in all criminal forfeitures to a preponderance, Congress should clarify that the burden of proof under 21 U.S.C. 853 is beyond a reasonable doubt. At the very least, clear and convincing standard of proof is needed.

Section 203.

Nonabatement of Forfeiture When Defendant Dies Pending Appeal.

We would limit this provision to forfeiture of the defendant's ill gotten gains, which can be fairly characterized as remedial, not punitive. Where the forfeiture is basically punishment, no purpose is served except to punish the defendant's innocent heirs. While they should not profit from her wrongdoing, neither should they be punished for it.

Section 205.

Motion and Discovery Procedures for Ancillary Hearings.

This is a useful codification of the case law that has developed. We would modify Section 205(c) to provide "the court *shall* permit the parties to conduct discovery in accordance with the Federal Rules of Civil Procedure to the extent necessary to reliably resolve factual issues before the hearing." The *denial* of needed discovery would be a denial of due process in this non-criminal context.

Section 206.

Pretrial Restraint of Substitute Assets.

While the government understandably wants the power to restrain substitute assets prior to trial, we are against it because of our continued doubts about the wisdom and constitutionality of substitute asset forfeiture and its large potential for abuse. The same Congress that enacted the landmark 1984 forfeiture act refused to authorize substitute asset forfeiture because of the same grave doubts. (Substitute asset forfeiture only passed in 1986, at the height of the War on Drugs.) If forfeiture is now to be vastly expanded to all title 18 offenses and "proceeds" is to be broadly defined, as proposed by the government, then it is all the more imperative that some limitations to be placed on the availability of substitute asset forfeiture. One such limitation is to make it impossible for the government to seize or freeze substitute assets until the government gets an order forfeiting the tainted property as to which substitution is sought. Uncontrolled pretrial seizures and freezes of substitute assets allow the government to pauperize most defendants precisely when they are most in need of assets to defendant themselves, support their families and post bond.

Congress should consider other limitations on the availability of substitute asset forfeiture. For example, it should clarify that substitute assets may not be forfeited merely because the defendant has *spent* the tainted assets, which is the government's theory in many cases. It should be available only when a defendant or his agent takes some action *for the purpose* of making the tainted property unavailable for forfeiture.

Congress should also provide that the defendant's primary homestead, up to a value of $250,000, may not be forfeited as a *substitute* asset. This humanitarian limitation will prevent substitute asset forfeiture from becoming, in effect, *Forfeiture of Estate* -- the terrible common law practice that the Framers abolished more than 200 years ago.

Section 207.

Defenses Applicable to Ancillary Proceedings in Criminal Forfeiture Cases.

This provision would limit third parties to the innocent owner defense spelled out in proposed 18 U.S.C. §983. *While that sounds reasonable and logical, it isn't.* If a third party owns the property -- rather than the criminal defendant -- then the property simply cannot be forfeited in an *in personam* criminal proceeding against the defendant in which the third party has no opportunity to be heard. The ancillary "hearing" is no substitute for a civil forfeiture proceeding. In a civil forfeiture proceeding against the third party's property, the

property owner enjoys many valuable rights he does not have in a post-conviction ancillary proceeding. He has a right to full civil discovery under the Federal Rules, and a *right* to trial by jury, at which the government will have the burden of proof by a preponderance of the evidence. In the ancillary hearing, by contrast, there is *no right to discovery, no right to a* jury trial and the third party has the burden of proof. This severe limitation of third party rights is professedly justified (and we do not think it *can be justified at all*) on the theory that the criminal trial jury has found that the property belongs to the criminal defendant and is subject to forfeiture. But once a third party establishes that he is in fact the true owner of the property, the justification for the criminal forfeiture order against the criminal defendant vanishes -- and this is so *without regard to whether the third party is "innocent."*

The government's remedy, if it still wants to forfeit the third party's property, is to bring a civil forfeiture action against the property. Then the third party will have to establish his innocence or some other defense to forfeiture. The government should not be allowed to destroy the constitutional rights of third parties by letting the ancillary hearing serve as a substitute for a full-fledged civil forfeiture proceeding.

Recognizing these problems, DOJ proposes to deal with them in Section 216 of its bill. Section 216 would deem the ancillary proceeding an *in rem* proceeding for the purpose of adjudicating the third party's interest. DOJ would place the burden of establishing forfeitability on the government, where it belongs. However, there is no provision for discovery under the Federal Rules (discovery would be granted only in the discretion of the judge) and no provision for trial by jury. We would support Section 216 *if it is modified* to require opportunity for ample discovery and provide a right to trial by jury.

Section 209.

Criminal Seizure Warrants.

This little provision would vastly expand the government's ability to seize property in criminal forfeiture cases. If enacted, the government would routinely seize all allegedly forfeitable property prior to indictment or at the time of indictment. It should be kept in mind that the criminal forfeiture statutes also allow *substitute* assets to be forfeited, a drastic remedy not available in civil forfeiture cases. Because of the broad and loosely worded substitute asset provisions of our forfeiture laws, the government would regularly be able to seize all of a criminal defendant's property prior to indictment, thereby destroying his ability to defend himself and support his family. We should not entrust prosecutors with this awesome power. Indeed, as we explained above, prosecutors should not even be granted the power to *restrain* substitute assets prior to trial, much less to seize them. Rather, Congress

should clarify that current 21 U.S.C. §853(f) does not authorize pre-trial seizure of substitute assets -- something the courts have assumed from the fact that Congress did not authorize pre-trial restraint of substitute assets.

The government has been using civil forfeiture mechanisms to seize property for ultimate criminal forfeiture. It can continue to do that.

We note that the government has included a provision (Section 212(a)(2)) attempting to deal with some of these concerns. It provides that if substitute assets are restrained, "the court *may* exempt from the restraining order assets needed to pay attorney fees, other necessary costs of living expenses, and expenses of maintaining the restrained assets." If the word "may" was changed to "shall" the provision would blunt some but by no means all of my concerns about the pre-trial restraint of substitute assets.

Section 212.

Hearing on Pretrial Restraining Orders; Assets Needed to Pay Attorney's Fees.

Like so much of this bill, section 212 tracks the language of the aborted Forfeiture Act of 1994 (§130). Our detailed critique of §130 of the 1994 bill is still valid and need not be repeated here. See Attachment B. Even with respect to assets needed to obtain counsel, the DOJ proposal would give a defendant far less protection than the courts have held to be constitutionally required. E.g., United States v. Monsanto, 924 F.2d 1186 (2d Cir.) (en banc), cert. denied, 112 S.Ct. 382 (1991); United States v. Michelle's Lounge, 39 F.2d 684 (7th Cir. 1994).

Section 214.

Appeals in Criminal Forfeiture Cases.

The government wishes to be able to appeal from every order denying a criminal forfeiture except where the Double Jeopardy Clause prohibits an appeal. Rather than awaiting and trusting the Supreme Court to apply double jeopardy principles sensibly in this context, Congress should explicitly provide that the government may not appeal from a no-forfeiture verdict by the trier of fact, and may not appeal from an order granting a Rule 29 motion which prevents the forfeiture issue from going to the jury. In other words, Congress should ensure that a "no forfeiture" verdict is treated exactly the same as a "not guilty" verdict for double jeopardy purposes.

Section 216.

Ancillary Proceeding as *in rem* for Purposes of Third Party Interests.

See the discussion above, under Section 207.

Section 301.

Forfeiture of Proceeds of Federal Offenses.

In its 1994 analysis, NACDL did not oppose the concept of forfeiting ill-gotten gains (net profits) of all criminal offenses provided that forfeiture procedure is made fair and there are adequate protections for innocent owners. See Attachment B. We see no reason to change that position. DOJ still would define "proceeds" in the broadest possible fashion (see Section 302 of the bill), making the provision highly punitive and unreasonable. *See* our 1994 analysis at pages 21-22 for a critique of this proposal. Attachment B. The unfairness of forfeiting gross proceeds (as opposed to net profits) is greatly aggravated by the substitute asset provisions and the judicially developed concept of joint and several liability. Each defendant in a criminal venture or conspiracy becomes jointly and severally liable for the *entire amount* of the gross proceeds received by all participants in the criminal venture -- usually a staggering sum that allows the government to wipe out the assets, clean or not, of every defendant.

One possible compromise would be to place the burden of going forward with respect to the cost of goods sold on the claimant/defendant and to disallow any deduction for indirect or overhead costs. The defendant or claimant is in the best position to know what his costs *were*, not the government. The government would not need to prove the absence of direct costs in a case in which the defendant or claimant has not pointed to costs that should be deducted from his gross proceeds. See United States v. Offshore N.V., 883 F.2d 1172, 1182 (3d Cir. 1989), cert. denied, 110 S.Ct. 753 (1990).

If we support a vast expansion of the concept of proceeds forfeiture, DOJ should support an amendment to the excessively broad money laundering statutes. DOJ would no longer have to prove so-called "money laundering" to obtain forfeiture of criminal proceeds so there would be no reason to retain the money laundering statutes in their present absurd form. They should be limited to what is actually money laundering and should not criminalize (and severely punish) the mere act of depositing tainted money in a bank account (18 U.S.C. 1957) or the mere deposit of such money "with the intent to promote the carrying on" of the underlying unlawful activity (18 U.S.C. 1956(a)(1)(A)). These provisions have

been routinely abused to tremendously escalate the punishment of those who engage in the underlying unlawful activity at the whim of line prosecutors.

One other problem with the term "proceeds" is its application to certain offenses that do not generate any ill-gotten gains. The best example is the obtaining of a bank loan based on an application containing one or more false statements in violation of 18 U.S.C. 1014. The entire "proceeds" obtained from such a bank loan are currently subject to civil forfeiture under §982(a)(2), whether or not the owner ever defaulted on the loan. This statute is so obviously unfair that the government has seldom used it, but it remains available for abuse. Congress should examine each section of Title 18 carefully to determine whether the adoption of "proceeds" forfeiture across the board would create similar problems.

Section 303.

Forfeiture of Firearms Used in Crimes of Violence and Felonies.

How would 18 U.S.C. 924(d) mesh with proposed 18 U.S.C. 981(a)(1)(D)? Wouldn't §924(d) be completely superseded by §981(a)(1)(D)? What is the purpose of proposed §924(d)(4)? We don't see what it accomplishes.

Section 308.

Forfeiture for Violations of Section 60501 and 1960.

We adhere to our 1994 critique of this provision. *See* NACDL Section by Section Analysis of DOJ's Proposed Forfeiture Act of 1994 at pages 18-19, Attachment B. In our view, current 18 U.S.C. 981(a)(1)(A)'s language is far too broad and invites abuse. As explained in David Smith's forfeiture treatise, at ¶5.01[1]: the broad language of that provision has been held to authorize seizure and civil forfeiture of entire legitimate businesses simply because the business's bank account was involved in a so-called "money laundering" or structuring offense. At most, the entire bank account involved in the offense should be subject to forfeiture, not the entire business that owns the bank account.

Section 313.

Forfeiture of Criminal Proceeds Transported in Interstate Commerce.

This provision would allow forfeiture of "any property involved in" a violation of 18 U.S.C. 1952(a)(1), which prohibits interstate or foreign travel or use of the mail to distribute

the proceeds of any unlawful activity listed in §1952(b). Congress should limit the forfeiture to the actual proceeds. The extremely broad "any property involved in" language would allow forfeiture of any conveyance used to transport the proceeds or perhaps any bank account into which the proceeds are deposited. If the proceeds were distributed at someone's residence, prosecutors would argue that the residence is subject to forfeiture since it "facilitated" the offense. Some courts might agree with that interpretation, causing undue hardship on persons unfortunate enough to fall within those jurisdictions.

Section 403.

Minor and Technical Amendments Relating to 1992 Forfeiture Amendments.

The DOJ would amend 18 U.S.C. 984(b) to extend the period of time in which an action to civilly forfeit substitute funds may be commenced. Currently the forfeiture suit must be *filed* within a year of the offense that is the basis for the forfeiture. DOJ would merely require a *seizure* within two years of the offense. This change would undercut the rationale of §984. As the legislative history of §984 explains, the purpose of the short limitations period is to provide some basis for believing that the substitute funds are likely to be tainted.

Section 409.

Statute of Limitations for Civil Forfeiture Actions.

We can see why the government would want the limitations to run from the time the *involvement of the property in the offense* was discovered, rather than from the time the offense is discovered. But the government doesn't need, and shouldn't be given, five years. *Three years is more than enough time.* The statutory language should also reflect the explicit requirement (being read into the statute by case law) that the government exercise reasonable diligence in investigating the case. The courts have held that under §1621, the time begins to run as soon as the government is aware of facts that should trigger an investigation leading to discovery of the offense.

Section 416.

Fugitive Disentitlement.

This section of the bill would overrule the Supreme Court's unanimous decision in Degen v. United States, 1996 WL 305720 (June 10, 1996). Before the ink on the decision

is dry, DOJ is asking Congress to overrule it! This seems to be DOJ's (over)reaction to every adverse decision on a rule of law. Maybe it ought to stop and think about whether the decision makes sense (or is constitutionally based), before running to Congress. Moreover, while in Degen, the Supreme Court did not have to decide whether disentitlement of a fugitive forfeiture claimant would violate *due process*, there is a strong argument that it would. For instance, the Seventh Circuit previously so held. *See* United States [illegible] in United States Currency, 32 F.3d 1151 (7th Cir. 1994).

ATTACHMENT B

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
FORFEITURE ABUSE TASK FORCE SECTION BY SECTION ANALYSIS OF
THE DEPARTMENT OF JUSTICE'S PROPOSED FORFEITURE ACT OF 1994

I. Section 101. Timing of Notice of Intent to Forfeit

A. Subsection (dN1): There is no valid reason why the time requirements proposed by DOJ should not also apply to United States Customs. Customs seizures include most currency seizures at or near borders and at most major airports around the country pursuant to Title 31 United States Code. Customs is also involved in seizures based on Title 19 violations.

B. Subsection (dH2): This provision is reasonable and we have no objection to the proposed amendment, subject to the proposed changes to section (d)(3), below.

C. Subsection (dH3): While we agree that a 60 day notice provision is appropriate, DOJ's proposal is actually a substantial step backward from current DOJ policy. Pursuant to DOJ Executive Office for Asset Forfeiture Directive 93-4 (January 14, 1993, effective March 1, 1993), if the seizing agency does not give notice within 60 days, then it must return the property and cannot proceed with the forfeiture ("Where a reasonable effort or notice has not been made within the 60 day period and no waiver has been obtained, the seized property must be returned and the forfeiture proceeding terminated.").

Contrary to the position asserted by DOJ in its section by section analysis (at page 1), the changes to the statute proposed in this section should confer substantive rights on claimants. Indeed, DOJ acknowledges in Directive 93-4 that prompt notice is a fundamental aspect of due process: ("A fundamental aspect of due process in any forfeiture proceeding is that notice be given as soon as practicable to appear interested persons of the pendency of the action and afford them an opportunity to be heard."). As currently proposed by DOJ, a claimant would have no real remedy for a violation of the time limit, other than the return of the property while the forfeiture is pending. This is patently unfair. There is no valid justification for not conferring substantive rights on claimants, because DOJ's proposed amendment contains adequate safeguards to protect the seizing agency where it can establish good cause for an extension of time. See Section (dN2), above. Indeed, DOJ offers no explanation of why the proposed amendment should not confer substantive rights.

Simply returning the property to the owner does not remedy the problems caused by lengthy delays in instituting forfeiture proceedings. If the government is free to pursue the forfeiture at any time up to five years from the date of discovery that the property is subject to forfeiture (the applicable statute of limitations), the owner of the property is left in an untenable position. For example, the owner doesn't know whether to continue making payments, repairs or improvements to the property. The problem will be exacerbated if the statute is further amended to provide for the forfeiture of assets traceable to such property (*see* Section 203, *infra*).

Accordingly, DOJ's proposed amendment should itself be amended to read as follows:

> (d)(3) If the seizing agency fails to provide notice to the party from whom the property was seized within the time limits set forth in this subsection and no extension is granted pursuant to subsection (d)(2), the seized article shall be returned to that party ~~pending further forfeiture proceedings~~ and the forfeiture may not take place unless ~~(A) the property constitutes the proceeds of a criminal offense; (B)~~ (A) an independent basis exists to retain the article as evidence of a violation of law, or ~~(C)~~ (B) the article continues contraband or other property the possession of which would be illegal

2. Section 102. Time to File Claim and Cost Bond; Waiver.

A. While the expansion of the time in which to file a claim is welcomed, there is no reason to expand the content of the claim to require "the time and circumstances of the claimant's acquisition of the interest in the property." 19 U.S.C. §1608 currently requires only that the claim state the claimant's interest in the property (*e.g.*, ownership, possessory, leasehold, etc.). There is no valid reason to expand this requirement, and DOJ does not offer any explanation justifying this proposed change.

B. The requirement of a cost bond (subsection (b)) should be eliminated in its entirety, rather than simply creating exceptions. The cost bond requirement has long since outlived its usefulness. There is no real danger of frivolous claims being filed, because of the high cost of hiring counsel and litigating forfeiture claims. The only reason DOJ is unwilling to see this provision eliminated is because it knows through experience that the bond requirement poses a serious impediment to the average claimant to contest a forfeiture. Under current law, if no bond is posted, the claimant forever waives his or her right to contest the forfeiture in court.

Given that the Supreme Court has held that forfeitures constitute punishment (*Austin v. United States*, 509 U.S. ___, 125 L.Ed.2d 488, 113 S.Ct. 2801 (1993)), a property owner cannot constitutionally be required to post a cost bond as a condition of contesting the forfeiture in court. (See DOJ analysis, Section 110. "Such a change is warranted in light of the recognition by the courts that the civil forfeiture actions are punitive in nature and serve as adjuncts to criminal law enforcement.") The right of free access to the courts should not be dependent on the claimant's wealth. Many people of modest means, who do qualify as indigent, are nevertheless unable to raise sufficient cash to post a bond within the short amount of time allowed, and thus no bond should be required to contest a forfeiture in court.

C. The "waiver" language in subsection (b) "all supporting information as required by the agency" is ambiguous and overly broad. Further, the proposed amendment vests too much discretion in the Attorney General and Secretary of the Treasury with regard to waiver (or reduction) of the cost bond. There are no provisions for judicial review of the denial of a waiver.

There are also no provisions to deal with the problem of the seizing agency requiring multiple bonds where multiple items of property are seized, even though there will only be one court proceeding. What often results is that the claimant must file several bonds, amounting to several, or even tens of thousands of dollars, which far exceeds the amount of costs that may be incurred.

Accordingly, NACDL strongly urges Congress to completely do away with the cost bond requirement as proposed in the Hyde bill.

3. Section 103. Time to File Action in District Court.

A. A time limit imposed on the government for filing forfeiture actions is long overdue and we strongly support the concept. However, §(b)(1) should require the action to be instituted within sixty (60) days, not ninety (90) days. If the government has trouble instituting the action within 60 days, it has the protections set forth in §(b)(2).

B. Section (b)(2) should be amended by inserting the word "good" before cause on the third line.

C. Like DOJ's proposed Section 101, this amendment is not intended to confer any substantive rights on claimants and provides the claimant with little or no remedy if the government does not file the action within 90 days. We strongly urge that Section (b)(3) confirm substantive rights, and that it be amended as follows:

> (3) If the Attorney General fails to institute a forfeiture action within the requisite time period and no extension is granted, the property shall be returned to the party from whom it was seized unless ~~(A) the property constitutes the proceeds of a criminal offense; (B)~~ (A) an independent basis exists to retain the article as evidence of a violation of law, or ~~(C)~~ (B) the article continues contraband or other property the possession of which would be illegal, and the forfeiture may not take place."

Such an amendment would be consistent with existing law for the seizure of currency in drug related offenses. 21 U.S.C. §888(e). DOJ's analysis refers to this provision (see last full paragraph, page 3) but neglects to state that that provision requires the action to be filed with 60 days, *not* 90, and that it prohibits the subsequent forfeiture if the time requirements for filing are not met. Thus, DOJ's representation that its proposed amendment makes 21 U.S.C. §888(e) unnecessary and that it should be repealed "in the interest of uniformity" is, at best, misleading.

D. Similar amendments should be made to Sections (m)(2) and (m)(3) [DRUG FORFEITURES] to make them consistent with (b)(2) and (b)(3) above.

E. The proposed amendment extending the time in which to file an answer (Section (d)) is reasonable and welcomed, and we urge its adoption.

4. Section 104. Stay of Civil Forfeiture Action.

A. The government should be required to establish probable cause in an adversarial hearing that the property is subject to forfeiture before obtaining a stay (this is especially true if the claimant must establish standing before requesting a stay). Otherwise, the claimant may be deprived of his or her property for several years, without ever being afforded a hearing to contest the seizure. Even if the Claimant ultimately prevails, the losses occasioned by such a delay are irreparable. As recently observed by the United States Supreme Court:

> The purpose of an adversary hearing is to ensure the requisite neutrality that must inform all governmental decisionmaking. That protection is of particular importance here where the Government has a direct pecuniary interest in the outcome of the proceeding . . . Moreover, the availability of a postseizure hearing may be no recompense for losses caused by erroneous seizure . . . . And even if the ultimate judicial decision is that the claimant was an innocent owner, or that the Government lacked probable cause, that determination, coming months after the seizure, "would not cure the temporary deprivation that an earlier hearing might have prevented." *Doehr, supra*, at ___, 115 L.Ed.2d 1, 111 S.Ct. 2105.

United States v. James Daniel Good Real Property, 510 U.S. ___, 126 L.Ed.2d 490, 504-05, 114 S.Ct. 492 (1993).

B. There is no good reason to relax the requirement of "for good cause shown." Consequently, we recommend that subsection (a)(1)(i) be amended to add the word "unduly" before the word "infringe" in the fourth line.

C. We welcome the amendment to make the request for stay reciprocal, although we note that the courts have been willing to grant stay requests for claimants despite the absence of express statutory language. However, serious questions are raised by the proposed amendment. For example, how is the Claimant supposed to establish that there is a related "investigation." Investigation of whom? Is it sufficient merely to assert that there is an investigation? If the claimant asserts that there is an investigation, does the government get to respond *in camera*? Doesn't the mere fact that the property has been seized suggest that there is going to be, or already is, some investigation pending?

5. Section 105. Narrowing of Statutory Innocent Owner Defense.

In her October 18, 1993 letter to Rep. Jack Brooks (D-TX), Chairman of the House Judiciary Committee, Attorney General Reno stated that DOJ's forfeiture reform proposals would "improve current procedures to insure fairness and due process to all innocent owners."

DOJ now proposes to all but abolish the statutory innocent owner defense which protects property owners who lack knowledge that their property is being (or will be) used for an unlawful purpose. DOJ proposes to replace the current statutory defense with a much more narrow defense -- one which requires the property owner to demonstrate not merely that he or she lacked knowledge of the illegal activity and was not willfully blind, but that he or she took all reasonable steps to prevent the property from being put to illegal use. In short, DOJ proposes to limit the defense to the bare constitutional minimum allowed by the Supreme Court in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 686 (1974), 40 L.Ed.2d 452, 94 S.Ct. 2080 (1974) (it would be difficult to reject the constitutional claim of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of the property.)

Thus, the "one uniform innocent owner defense" (see DOJ's Section by Section analysis at p. 7) proposed by DOJ is the minimal due process defense already afforded by the constitution. Far from "insuring fairness to innocent owners," DOJ would saddle innocent owners with what even DOJ concedes is a more onerous burden of proving that they did all that they could reasonably be expected to do to prevent the proscribed use of their property.

At oral argument in *Austin v. United States*, 113 S.Ct. 2801, 125 L.Ed.488 (1993), several justices questioned how the forfeiture of an innocent person's property could be deemed "excessive" under the Eighth Amendment's Excessive Fines Clause. In other words, those justices could not reconcile claimant Austin's position with the traditional view expressed in the *Calero Toledo* decision, which is based on the legal fiction that an *in rem* action is one against inanimate property. The Court's unanimous ruling in favor of Austin (see) clearly casts doubt on the continued vitality of the *Calero-Toledo* decision. *See also Sheldon v. United States*, 7 F.3d 1022 (Fed. Cir. 1993) (accepting Takings Clause argument rejected by the Supreme Court in *Calero Toledo*). Following *Austin*, it is difficult to believe that there will be many cases where the forfeiture of an innocent person's property on the ground that he or she failed to exercise the highest standard of care would not be deemed excessive. Thus, the onerous standard proposed by DOJ would be unconstitutional in the vast majority of cases.

Entirely apart from these constitutional problems, DOJ's proposal is simply bad policy. It would require every property owner to investigate the background of persons with whom they conduct business if there was anything even the least bit "suspicious" about the other party or the proposed transaction. Such a burden of investigation is unrealistic, unpractical and most importantly, unfair. It would impose unnecessary costs on legitimate businesses and accomplish nothing -- except the occasional forfeiture of an innocent person's property when a prosecutor decides that the person deserves to be punished for not conducting an adequate investigation or for not taking sufficient precautions.

We agree with DOJ that it would be desirable to create a uniform statutory innocent owner defense. However, that defense should be based on the current statutory defense for innocent owners found in 21 U.S.C. §881(a) and 18 U.S.C. §981(a)(2), the two most important civil forfeiture statutes. We also agree with DOJ that there should be a separate defense for innocent owners based upon lack of consent, as is currently interpreted by the majority of circuits (but which is not currently found in §981(a)(2)). The majority of federal circuits have held that an owner may avoid forfeiture by establishing either lack of knowledge or lack of

consent. See, e.g., *United States v. 6109 Grubb Road*, 886 F.2d 618, 625 (3rd Cir. 1989); *United States v. 141st Street Corp.*, 911 F.2d 870, 878 (2nd Cir. 1990), *cert. denied* ___ U.S. ___, 111 S.Ct. 1017, 112 L.Ed.2d 1099 (1991); *United States v. One Parcel of Real Estate at 1012 Germantown Road*, 963 F.2d 1496 (11th Cir. 1992). This, we believe, is the correct application of the defense.

We also agree that when an owner learns that his or her property was or is being used in the commission of an illegal act, he or she should be required to do "all that reasonably could be expected to terminate such use of the property." This, however, is very different than imposing an onerous duty of investigation on all property owners.

In sum, like DOJ, we propose that a uniform innocent owner defense be adopted to apply to all forfeitures. We therefore propose that DOJ's proposed §983 itself be amended to read as follows:

"§983. Innocent Owners.

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

(1) With respect to a property interest in existence at the time the illegal act or omission giving rise to forfeiture took place, a person is an innocent owner if:

(a) that person did not know of, and was not willfully blind to, the act or omission giving rise to forfeiture; or

(b) that upon learning of the act or omission giving rise to the forfeiture, he or she did all that reasonably could be expected under the circumstances to terminate such use of the property.

(2) With respect to a property interest acquired after the act giving rise to forfeiture has taken place, a person is an innocent owner if at the time that person acquired the interest in the property that person did not know of, nor was willfully blind to, the act or omission giving rise to the forfeiture, or the fact that the property was subject to forfeiture.

Finally, we believe it would be useful to create a safe harbor provision that would assure innocent property owners of protection where, having acquired knowledge of illegal activity involving their property, they take reasonable steps to terminate the illegal use. We would suggest Congress consider the safe harbor provision in the March 15, 1994 Draft Uniform Controlled Substances Act (Article V - Forfeiture), which provides as follows:

> Reasonable measures to prevent a [wrongdoer's] conduct or assist its prosecution include, to the extent permitted by law:
>
> (1) notifying an appropriate law enforcement agency of information that led the owner to know the conduct would occur and other information the law enforcement agency reasonably requests to prevent or prosecute the conduct; and
>
> (2) revoking permission for the [wrongdoer] to use the property or taking reasonable actions in consultation with a law enforcement agency to discourage or prevent the illegal use of the property; provided that a person shall not be required to undertake any action which may threaten any person's personal security or safety.

This safe harbor provision would not preclude a claimant from showing lack of consent in some other fashion.

DOJ also wants a different standard to apply to owners who acquire property subsequent to the unlawful conduct giving rise to forfeiture, even where the owner had no knowledge of the prior activity. The United States Supreme Court recently held that a donee can be an innocent owner, and that anyone acquiring an interest in property prior to the government's title vesting in the property following a decree of forfeiture can raise any defense that would have otherwise been available. *See, United States v. A Parcel of Land, etc.*, ___ U.S. ___, 122 L.Ed.2d 469, 113 S.Ct. 1126 (1993). There is no reason to treat donees differently than bona fide purchasers. Donees have just as much right to be secure in their ownership of property received as a gift, devise, or bequest as do bona fide purchasers. Nevertheless, DOJ now wants to legislate away the Supreme Court's holding, but does not provide any justification for such a change.

DOJ's proposed subsection (d), which provides for forfeiture of property jointly held, is unreasonable and unacceptable. It constitutes an assault on long established and time honored state law principles of property ownership. DOJ offers no valid reason for interfering with state property laws.

DOJ's proposed subsection (e), which provides a rebuttable presumption that a financial institution acted "reasonably" under certain conditions, is reasonable.

6. Section 106. Judicial Forfeitures of Real Property.

We have no objection to this proposal, which amends 19 U.S.C. §1610 to require that all forfeitures relating to real property be done through judicial proceedings, rather than administratively.

7. Section 107. Review of Administrative Forfeitures.

This proposed amendment, which would require the seizing agency to review the evidence supporting probable cause for forfeiture even where no claim is filed, is reasonable and appropriate. However, if the cost bond requirement is not eliminated, there should also be a provision allowing judicial review of an administrative decision of forfeiture in contested cases.

8. Section 108. Preservation of Arrested Real Property.

As drafted by DOJ this provision is clearly unconstitutional. See, *United States v. James Daniel Good Property et al.*, *supra*. This amendment will comport with due process only if prior to the issuance of any such order, the government establishes probable cause for the seizure at an adversarial hearing.

9. Section 109. Elimination of Right to Article III Judge in Smaller Cases.

As DOJ points out, this amendment will only work where the parties consent to waive jury, due to the Seventh Amendment right to a jury trial. However, DOJ fails to recognize that a claimant also has a constitutional right to a bench trial before an Article III judge. The Supreme Court has held that the question of whether Article III allows Congress to assign adjudication of a cause of action to a non-Article III tribunal is the same as the question whether the Seventh Amendment permits Congress to assign adjudication to a tribunal that does not employ juries as fact finders. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53-54 (1989). Thus, DOJ's proposal is constitutionally deficient.

Clearly, there should be a right to a jury trial in civil forfeiture proceedings. Indeed, the statute should make the right to a jury trial explicit in all forfeiture cases. Under current law, forfeitures of vessels on certain navigable waters are not subject to jury trials. There is no modern justification for treating the forfeiture of vessels differently from other types of property. Consequently, the statute should be amended to expressly provide the right to a jury trial in all forfeitures.

Further, existing law already allows forfeiture cases (including forfeitures involving more than $10,000) to be tried by a magistrate with the parties consent. Accordingly, there is no reason to alter existing law. The solution to the problem of handling small cases is for DOJ to be more discriminating in the cases it adopts for seizure -- not to pass unconstitutional legislation.

10. Section 110. Burden of Proof; Adverse Inferences; Rebuttable Presumptions.

A. We wholeheartedly support a change which would place the burden of proof on the seizing agency, but we believe that the constitution requires, in light of *Austin, supra*, that the standard of proof should be at least by clear and convincing evidence, as proposed in the Hyde bill (H.R. 2417).

B. Standing. We reject DOJ's proposal that would require the claimant to establish standing pre-trial, for several reasons. First, DOJ's proposal violates the constitution's Seventh Amendment right to a jury trial on this issue. Ownership is currently an issue for the jury. For example, in cases where the claimant has initially denied ownership of the property, the claimant should be able to explain the circumstances to a jury.

Second, DOJ proposes in other sections of the bill to limit the definition of who is an owner, or who has standing to contest a forfeiture. For example, DOJ proposes to legislate away the Supreme Court's decision in *A Parcel of Land, supra*, to deny standing to all but bona fide purchasers.

C. Hearsay. Hearsay should not be admissible in forfeiture proceedings. A majority of courts currently allow hearsay to establish probable cause justifying the seizure of the property and the institution of the forfeiture action. But even these courts bifurcate the probable cause hearing, so that the hearsay does not come before the jury.

However, since DOJ agrees that the burden of proof should be on the seizing agency by a preponderance of the evidence (Section 105), the justification for allowing hearsay evidence in the forfeiture trial no longer exists. Questions regarding the legality of the seizure -- in which hearsay may be admissible, can be litigated pre-trial in the form of motions to suppress, or for return of property pursuant to Fed. R. Crim. Pro. 41(e), thus eliminating the justification for the use of hearsay at trial.

Generally, hearsay is inadmissible under the Federal Rules of Evidence. These rules expressly declare that they "apply generally" in all federal court cases, unless otherwise provided in the rules themselves. F.R. 1101(b). F.R. 1101(e) expressly provides that the rules of evidence apply to proceedings under "part IV of the Tariff Act of 1930 (which includes 19 U.S.C. §1615). See generally, D. Smith, *Prosecution and Defense of Forfeiture Cases*, ¶11.03 [5]. See also, *Jones v. U.S. Drug Enforcement Administration*, 819 F. Supp. 698, 721, n. 24 (M.D. Tenn. 1993).

D. Section (d) (Affirmative Defenses) is unnecessary.

E. Section (e) (Adverse Inferences) is unreasonable, and clearly unconstitutional. There may be no adverse inferences drawn from the legitimate exercise of Fifth Amendment privilege. This is especially important in view of the fact that the Supreme Court has held that forfeitures are punishment. See, *Austin v. United States*, *supra*. *Boyd v. United States*, 116 U.S. 616, 29 L.Ed.2d 746 (1886).

F. Section (g) (Rebuttable Presumptions). The DOJ giveth (burden shift), and the taketh away (rebuttable presumptions). These rebuttable presumptions have the practical effect of putting the burden right back on the claimant, rendering illusory DOJ's proposed burden shift.

> (1) Subsection (m). DOJ's comparison to 21 U.S.C. §853 is absurd. The presumption under §853(d) arises only with respect to a person who has been convicted (found guilty beyond a reasonable doubt) of a felony drug trafficking offense. DOJ wants to extend this presumption to cases where the seizing agency merely establishes by a preponderance that the person was engaged in an offense. Furthermore, there is no need for such a provision, because the DOJ can use the "net worth" method of proof.

2) The presumptions in subsection (b)(1) and (b)(2) are equally onerous, for the same reasons. Section (b)(2) makes no sense. Does this mean that just because money was separated into amounts of less than $10,000 without any attempt to conduct a financial transaction, it is subject to forfeiture for violation of §5324?

11. Section 121. Use of Grand Jury Information for Civil Forfeitures.

Subsection (a). There is no valid reason to extend the use of grand jury information by government attorneys to civil forfeiture cases. (The provision the FIRREA Act of 1989 authorizing such use should be repealed.)

The grand jury is not a tool for civil enforcement by the government. *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 103 S.Ct. 3133, 3142 (1983). Expansion of this section will permit the government to surreptitiously expand the evidence gathering function of grand juries to gather evidence for civil forfeiture cases. Grand jury secrecy rules will preclude effective oversight. Legitimate challenges will also be difficult because of the grand jury's legitimate investigation of criminal forfeitures.

This proposal would permit the government to utilize the investigatory powers of the grand jury while forcing claimants to rely on the civil discovery process. After obtaining grand jury information, the government could then elect to pursue civil forfeiture remedies which have lower burdens of proof and more limited subpoena power. Civil subpoenas available to claimants can be served only within 100 miles of the courthouse. The government would, on the other hand, be able to compel evidence from all judicial districts.

The government can freely elect between civil and criminal forfeiture. However, claimants in civil forfeiture cases are bound by strict filing deadlines and bond requirements. Innocent owners are also limited by the federal discovery rules and relevancy requirements that do not apply in the grand jury. The government could, therefore, obtain all the investigative advantages of pursuing criminal forfeitures and later benefit from the lesser burdens of proof applicable in civil cases.

Under this proposal, the government could also gather its evidence through the grand jury and then obtain a stay of civil forfeiture proceedings (See §104, *supra*), effectively preventing claimants from gathering evidence because of the pending criminal proceeding.

Grand jury material is not needed by the government in civil forfeiture cases because civil discovery is available to the government as well as to claimants. Furthermore, the government can get already obtain grand jury materials under Fed.R.Crim.Pro 6(e) upon a proper showing of need.

Subsection (b). The same arguments are made against expanding the use of grand jury materials in administrative forfeitures.

12. Section 122. Civil Investigative Demands.

There is no valid reason, and DOJ has offered none, why it is necessary to establish an inquisitorial method of obtaining information from citizens in civil investigations. DOJ proposes, in the context of civil enforcement, to provide a procedure analogous to the issuance of a grand jury subpoena that allows *the government to gather evidence before the filing of a* civil complaint. A civil proceeding is not a criminal prosecution. Most of the constitutional protections guaranteed to criminal defendants do not attach in civil forfeitures. Under DOJ's proposal, the government would not even have to have an articulable suspicion of any wrongdoing, and the prosecutor conducting the inquisition would not be subject to any court supervision, or other safeguards traditionally associated with grand jury proceedings. Thus, the government should not be permitted to bring the intrusive powers of law enforcement to bear in civil forfeiture proceedings.

Contrary to *DOJ's* assertions, the government does gather evidence for use in civil forfeiture cases by way of their criminal investigations. These investigations which include extensive interviews of witnesses provide substantial investigative information not available to claimants. The government also retains its ability to conduct discovery after the civil complaint is filed. Additionally, the government may file a civil forfeiture complaint and have the action stayed pending the outcome of any related criminal proceeding (See §104, *supra*). At the conclusion of the criminal case, the government will have available all the evidence gathered by the United States for the criminal case. Claimants, on the other hand, are limited by the civil discovery rules and the 100 mile limitation on subpoenas power in civil cases.

The scope of the civil demand here is broader than even the civil investigative demands authorized under RICO. 18 U.S.C. §1968. This demand authorizes the government to administer oaths and compel testimony as well as compel the production of documents. The current RICO provision (Section 1968) only authorizes civil demands for the production of documents. DOJ's proposed amendment goes far beyond anything ever contemplated by Congress and far beyond any even remotely similar existing provision. There is no valid reason to expand the government's authority to compel evidence before a complaint is filed in a civil case. The proposed section also reduces the period for filing a petition opposing compliance to as short as five days. Under RICO, a party may file a petition up to 20 days after service.

The notification provisions of Subsection (d) prevent notification under circumstances that have historically been limited by statute and confined to criminal investigations leading to indictment. Use of the information has also been limited to the grand jury. There is no valid law enforcement reason to extend this authority to civil investigations by the government.

The government's financial interest in the outcome of civil and criminal forfeiture proceedings provides additional motive for overreaching where disclosure of the demand is prohibited. Congress has carefully regulated access to financial and credit information. There is no valid reason to permit the secret gathering of private information before the filing of a civil complaint where the grand jury process is available to investigate crime.

13. Section 23. Access to Records in Bank Secrecy Jurisdictions.

The reason offered by DOJ for this proposal is not valid because the claimant would still have to prove the legitimate source of the funds just as he or she would if the funds were held in an American bank. It will not be sufficient for the claimant to simply say that funds have come from a legitimate account. Proof of ownership of the funds will always be required.

There is no valid reason to treat non-production of foreign account information any differently that any other failure to comply with a legitimate discovery request. Under the Federal Rules of Civil Procedure, a party can move the court for appropriate relief for an opposing party's failure to comply. Each case should be determined on its own merits as are all present discovery disputes.

14. Section 124. Access to Tax Records.

For the reasons previously stated, civil forfeiture investigations should not be treated in the same manner as criminal investigations. The government's financial motive, as well as the lack of court supervision over civil investigations, strongly militates against expanding criminal investigative authority into the area of civil enforcement.

15. Section 125. Civil Forfeiture Seizure Warrant Authority.

Subsection (a)(2)(ii) should be changed by adding the words "judicially recognized" prior to the word "exception."

Subsection (a)(5) would authorize *ex parte* orders restraining property when a person is arrested or charged in a foreign country to permit the government to gather information to obtain probable cause. All that need be alleged is the nature and circumstances of the foreign charge and "the basis for belief" that the person arrested has property subject to forfeiture in the United States. This provision is probably unconstitutional in that it permits the restraint or seizure of property without notice or a hearing in the absence of probable cause. Restraining orders and seizure may not be obtained in criminal cases without probable cause. There is no legitimate reason to authorize restraint or seizure without probable cause for the enforcement of civil forfeitures.

Section (b) [Drug Forfeitures] doesn't make sense. Subsection (b)(4) provides for seizure without process. Thus the proposed amendment "and requests the issuance of a seizure warrant" doesn't belong here. The second part of this amendment should be changed to read: "the Attorney General has probable cause to believe that the property is subject to civil forfeiture and a judicially recognized exception to the warrant requirement exists." This makes it clear that the determination of the existence of an exception to the warrant requirement must be made by a court (*i.e.*, it is not sufficient that the AG believes, no matter how reasonable that belief, that an exception applies).

We strongly agree that an amendment is necessary in light of the Second Circuit's well reasoned opinion in *United States v. LaSanta*, 978 F.2d 1300 (2nd Cir. 1992) recognizing that there is no "forfeiture" exception to the warrant requirement, and that the Attorney General may

not seize property based solely on probable cause, absent some recognized exception to the warrant requirement.

16. Section 130. Hearings on Pretrial Restraint of Assets.

Section 130 addresses the circumstances under which a court after *ex parte* restraining order freezing a defendant's assets, can hold a hearing to consider the need for such property restraints. The overwhelming majority of federal courts have held that due process requires that a court hold such a hearing.

This proposal seeks to unduly limit the ability of a court to m... restraining order to circumstances in which (i) the defendant needs the restrained assets to pay legal fees, (ii) the order restrains assets that are not alleged to be forfeitable in the indictment, or (iii) the order cause irreparable harm to the property owner and less intrusive means exist to preserve the property for forfeiture. This proposal expressly forbids the court from entertaining challenges to the probable cause finding of an indictment, forbids application of Rule 65 of the Federal Rules of Civil Procedure, and bars third parties from raising factual challenges to the validity of the restraining order.

Under existing laws, courts issue pretrial restraining orders under their broad equitable powers, and traditional equitable doctrine requires a court to consider all relevant evidence in the exercise of its equitable discretion. Further, equity, and due process, require that the party who seeks to justify injunctive decrees bear the burden of proving their necessity. DOJ's proposal would strip federal courts of their equitable powers in an effort to reduce dramatically the burden of proof that the government must shoulder to freeze all of a defendant's assets. Most courts apply Civil Rule 65 to determine whether preliminary injunctive relief is appropriate in criminal forfeiture cases. Section 130's prohibition on application of Rule 65 is a reflection of the fact that DOJ does not want to be held to the same standard as every other litigant seeking equitable relief, but rather wants to have a grand jury make all the decisions concerning the propriety of pretrial restraining orders.

DOJ's analysis offers no explanation for why it cannot satisfy the traditional requirements for equitable relief, nor does it explain why the DOJ needs to hamstring the exercise of equitable discretion of trial courts by narrowly limiting the procedures, evidence, and criteria they can consider in modifying *ex parte* restraining orders.

As to the specific provisions proposed by DOJ, we have the following comments:

Paragraph (3)(B) unduly limits the grounds upon which modification of a restraining order may be sought where the right to counsel of choice is not implicated. It permits modification only where 1) the property restrained "would not be subject to forfeiture even if all of the facts set forth in the indictment were established or true" or 2) it causes ... irreparable harm to the moving party and less intrusive means exist to preserve the subject property for forfeiture.

The problem is that most indictments contain wholly conclusory forfeiture allegations tracking the language of the forfeiture statute without even setting forth the actual legal theory upon which the forfeiture is predicated, much less the evidentiary or factual basis for the forfeiture. In many cases the government seeks forfeiture of property that is plainly not subject to forfeiture because the prosecutor doesn't understand the law of forfeiture or else simply makes the broadest forfeiture allegations possible without carefully considering individual property items. Evidence regarding the forfeiture allegations is often not presented at all to the grand jury, which simply rubber stamps the indictment.

Given this reality, the standard established in paragraph (3)(B) is meaningless and unworkable. It assumes incorrectly that "facts" will be "set forth in the indictment," which, if "true," would make the property subject to forfeiture. But what happens when the indictment sets forth no facts at all regarding the forfeiture allegations? Is the property owner then to be deprived of an opportunity to seek modification of the restraining order that has been issued ex parte?

Even if some facts are set forth regarding forfeiture, the grand jury generally hears little or no evidence to support those facts so the indictment should not be presumed valid with respect to forfeiture. A famous judge once said that "a grand jury would indict a ham sandwich if asked to do so by a prosecutor." Defendants and third parties should have the right to argue that there is no legal or factual basis for forfeiture of particular assets and to require the government to show probable cause for forfeiture of those assets at a pretrial hearing. In other words, there is no reason to insulate the forfeiture aspect of the indictment from all challenge even where the right to counsel of choice is not implicated.

Paragraph (3)(C) should also provide that if a restraining order is modified to permit the defendant to use a particular asset to retain counsel the government may not later seek forfeiture of that asset. Counsel should not have to run the risk that the asset exempted from the restraining order may ultimately be forfeited.

17. Section 131. The Standard of Proof.

We strongly oppose this proposal to drastically lower the government's burden of proof in criminal forfeiture cases from beyond a reasonable doubt to a mere preponderance of the evidence. DOJ offers no policy reason for this radical change in the burden of proof. Nor does it assert that it has had a problem meeting the current beyond a reasonable doubt standard.

Instead, DOJ's section-by-section analysis claims that the current burden of proof is unclear and treats this as a "clarifying" amendment. DOJ provides a completely distorted summary of the case law to support its position. Under current law it is clear that the burden of proof is beyond a reasonable doubt in all criminal forfeiture cases. The only "ambiguity" concerns forfeiture of drug proceeds under 21 U.S.C. § 853(a)(1). Some circuits have misconstrued § 853(d), which creates a rebuttable presumption respecting drug proceeds, as lowering the ultimate burden of proof to preponderance of the evidence where facts triggering the presumption are present. The § 853(d) presumption plainly has no application to facilitation cases under § 853(a)(2) or enterprise forfeiture under § 853(a)(3).

Instead of lowering the burden of proof for all criminal forfeitures, Congress should delete § 853(d) altogether. The provision is unconstitutionally infirm for the reasons stated in J. D. Smith, Prosecution and Defense of Forfeiture Cases § 14.03.

18. Section 132. Early Order of Forfeiture.

We have no objection to amending Rule 32 (d)(2) of the Federal Rules of Criminal Procedure to require an entry of a preliminary order of forfeiture "as soon as practicable" after the verdict of forfeiture is returned. The proposed amendment should make clear, however, that no final order of forfeiture may be entered until all of the defendant's legal challenges to the forfeiture have been ruled upon. This would include challenges to the sufficiency of the evidence under Rule 29 and excessiveness challenges under the Eighth Amendment. Further, there should be no discovery undertaken by the government with respect to the defendant prior to sentencing, and there should be a right to a stay pending appeal.

We have no objection to the initiation of third party ancillary proceedings commencing immediately following the jury verdict on the forfeiture issues.

19. Section 133. Non Abatement of Criminal Forfeitures.

We object to the proposal to abolish the ancient common law rule that criminal forfeitures abate when the defendant dies pending appeal. Courts have properly held that abatement applies to criminal forfeitures. Given the punitive purpose of criminal forfeitures, this conclusion is sound. The government does not explain why only criminal forfeitures -- of all criminal penalties -- should not abate upon the death of the defendant.

DOJ asserts that the Solicitor General's office has written memoranda advocating the rationale for abatement in the criminal forfeiture cases. However, DOJ does not tell us what the Solicitor General's memos actually say, perhaps because their characterization of the abatement rule is unpersuasive. If it is persuasive, why hasn't the government ever sought Supreme Court review of this issue? Indeed, we see no reason to distinguish between criminal forfeiture and civil forfeitures which both serve to punish the property owner. See United States v. $47,500.00 in U.S. Currency, 863 F. Supp. 919, 920 (D. Ariz. 1993) (civil forfeiture under 18 U.S.C. 1955(d) abates upon death of the wrongdoer).

20. Section 134. Repatriation of Property.

This section, which authorizes a court to order a criminal defendant to repatriate forfeitable assets, is entirely unnecessary as it is already sufficiently covered by existing law.

21. Section 135. Codifying Procedures for Existing Ancillary Proceeding.

This proposal would give parties participating in post-trial ancillary proceedings the right to file dispositive motions, to conduct discovery, and to perfect an appeal. This section appears

to be reasonable except for subsection (D) which would deny third parties the right to an immediate appeal of an adverse judicial determination on their petition for relief if other petitions are still pending. This may work a hardship on third parties, as they may have to wait months or years to obtain appellate review of an adverse trial court finding.

22. Section 130. Pre-trial Restraint of Substitute Assets.

This proposal would dramatically expand current statutory authority to impose pretrial restraints. Currently, the government can obtain pretrial restraints only on property that is subject to forfeiture. DOJ proposes to extend the power to restrain assets to wholly legitimate "substitute" assets. In other words, a defendant would be denied the use pretrial not only of his allegedly forfeitable assets, but also his wholly legitimate assets.

The majority view of the federal appellate courts is that the government may not seize or restrain substitute assets. *United States* v. *Floyd*, 992 F.2d 498 (5th Cir. 1993); *United States* v. *Martin*, 1 F.3d 1351 (3rd Cir. 1993); *United States* v. *Rapinsky*, ___ F.3d ___ (9th Cir. 1994); 55 Cr.L. 1028. DOJ has offered no explanation for why it needs to freeze wholly legitimate assets prior to trial. Such practice will work a substantial hardship not only on defendants, but also on numerous third parties who depend upon or have vested rights in the legitimate property that will be restrained under DOJ's proposal. The hardship imposed upon third parties is especially pronounced as they are otherwise barred from protecting their property through intervention, and Section 130(a)(D) proposes to limit the ability of a third party to seek pretrial modification of a restraining order.

23. Section 137. Elimination of Superior Title as a Defense to Forfeiture.

Under existing criminal forfeiture laws, a third party property owner can obtain relief from a criminal forfeiture order if he or she can prove that he or she, rather than the convicted defendant, owned the property subject to forfeiture at the time the property originally became subject to forfeiture because of its unlawful use. Thus, third party property owners (i.e. property owners who have not been indicted or charged with any criminal conduct but whose property has nonetheless become the subject of a forfeiture order) currently have a statutory defense to criminal forfeiture of their property on the ground that they had a "right, title or interest" in the property "superior to any right, title or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property." 18 U.S.C. 1963(n)(6)(A).

DOJ's proposal would eliminate this defense as it is currently enacted. DOJ would condition the defense on an additional showing of innocence, meaning that a third party could lose their property in a criminal forfeiture case without ever having the opportunity to establish that the property was theirs and not the defendant's. This is grossly unfair, and a violation of due process, given the paucity of protections available to third party claimants. Third parties (who are not even accused of any misconduct) are barred from participating in the criminal trial, and have no right to a jury trial on their third party claims, and the burden of proof is on them to establish their superior title. Thus, even though a third party may be totally innocent of any

wrongdoing, third parties are afforded none of the protections provided to the criminal defendant. Moreover, the purpose of criminal forfeiture -- to punish a convicted defendant (and only a convicted defendant) -- is not advanced by forfeiting property that belongs to a third party not accused of any criminal conduct.

24. Section 138. Uniform Procedures for Criminal Forfeiture.

This section proposes to make the procedures currently applicable to drug forfeiture the uniform procedure for all money laundering criminal forfeitures. This proposal would expand existing money laundering law by, *inter alia*, allowing seizure of allegedly forfeitable property prior to conviction in a variety of cases involving financial institutions. Although we believe that some changes may be appropriate here, there should not be a complete incorporation by reference of the procedures set forth in 21 U.S.C. §853.

25. Section 139. Seizure Warrant Authority for RICO.

Section 139 proposes to allow the government to seize (rather than only restrain) allegedly forfeitable property pretrial in a RICO prosecution. This would be a substantial expansion of the government's forfeiture authority in RICO cases. RICO prosecutions have traditionally involved the largest forfeitures because the government is authorized to forfeit the entirety of a defendant's interest in legitimate "enterprise" under 18 U.S.C. §1963(a)(2). In particular, the use of pretrial restraining orders under RICO to freeze ongoing businesses has been controversial; expanding government authority to include outright seizure of ongoing businesses prior to the filing of a criminal case will be even more disruptive and subject to abuse.

26. Section 140. Automatic Judgment Against Transferees.

This eleventh hour provision would create an automatic personal judgment against anyone who is a transferee of property from a defendant in the amount of property transferred. Under the relation back doctrine, property is deemed to have belonged to the government at the time it was used in a way which makes it forfeitable. A defendant sometimes transfers the property to a third party for value or by gift prior to the time the government commences its forfeiture proceeding. Incredibly, DOJ now proposes to make every third party who obtains an asset from a defendant (including bankers, doctors, car dealers, etc.) personally liable to the government for the value of any asset they received from a defendant. The unfairness of this provision is palpable, as it will require third parties to pay the government the value of assets for which they have already paid value and as to which they have been given no notice that the transfer was in any way improper.

Moreover, the commercial mischief this provision will cause is reason alone to reject the proposal. Commercial entities conduct commerce with individuals who later become defendants. Unfortunately, these entities typically do not receive notice from either the government or the defendant that the assets they are dealing with may become forfeitable as a later date. Complete

commercial codes have been devised to protect the property rights of those engaged in commerce, including the creation of recordation and other notice regimes. Section 340 would give the government a hidden civil judgment for the value of assets that will not be apparent to anyone, including banks and other credit sources, until long after the defendant has sold or transferred an asset. Moreover, this civil judgment against third parties would be automatically created in a criminal proceeding in which the third parties are precluded from participating. Such a "judgment" is not worthy of the name and would be a per se violation of due process.

27. Sections 201 through 211. Expansion of the Substantive Scope of Forfeiture.

Sections 201 through 211 greatly expand the substantive scope of forfeiture. While some of these provisions are not controversial, others are alarming both for the scope of the proposed expansion and for the Department's total insensitivity to the rights of property owners and due process of law. Accordingly, NACDL opposes any substantive expansion of forfeiture unless and until the process is made fair and provides adequate protections for innocent owners. An analysis of some of the more controversial proposals follows.

28. Section 201. *Forfeiture of Proceeds of Federal Crimes.*

Section 201 would expand forfeiture to include the proceeds of <u>every</u> Title 18 offense, misdemeanor and felony alike. Currently, only a handful of offenses are covered.

29. Section 203. Forfeiture of Traceable Proceeds.

This section would amend 21 U.S.C. §881(a)(4) and (a)(7) to provide for forfeiture of proceeds traceable to property (conveyances and real property) which are used, or intended to be used to commit, or to facilitate the commission of a drug offense. Under current law, only property which is actually used, or intended to be used, is subject to forfeiture. DOJ now proposes to expand the forfeiture to property traceable to property used, or intended to be used, in violation of Title 21. Thus, the person who used his car to transport drugs (even for his own use) and who later sold that car and bought a new car would forfeit the new car under DOJ's proposal. This can, and surely will, lead to draconian results.

30. Section 207. Forfeiture for Violations of §6050I.

DOJ and IRS are currently embroiled in a heated dispute with the defense bar over the IRS's stepped up efforts to enforce 26 U.S.C. §6050I against defense counsel who file incomplete IRS Form 8300s. At least some states have specific ethics opinions prohibiting attorneys from providing the client identifying information requested on Form 8300 absent a court order. Thus, attorneys in those states face a Hobson's choice.

In December, 1993, the IRS began unilaterally imposing "intentional disregard" fines ranging from $25,000 to $100,000 on attorneys for each refusal to disclose a client's name on a Form 8300. The enforcement campaign is continuing at the present time despite the defense bar's repeated calls for a truce and a negotiated *modus vivendi*.

In a wholly gratuitous slap at the defense bar, DOJ now proposes to make all property "involved in" violations of §6050I subject to civil and criminal forfeiture under 18 U.S.C. §§ 981 and 982. This would allow the government to *forfeit the entire legal fee* -- even where paid entirely with "clean" money which was fully earned by the attorney -- in addition to potentially prosecuting the attorney and levying drastic "intentional disregard" fines.

It should not be overlooked that defense attorneys would not be the only victims of this provision. Legitimate merchants and service providers who fail to file a Form 8300 or file an incomplete form would also suffer a drastic forfeiture penalty.

31. Section 209. Summary Forfeiture of Unregistered Firearms.

This amazing provision would amend 26 U.S.C. §5872(a) to allow <u>summary</u> forfeiture of certain dangerous weapons not registered under the National Firearms Act. According to DOJ's section by section analysis, this section "would eliminate the need for what are <u>useless but costly forfeiture proceedings</u> for unregistered weapons that are popular with drug dealers and other criminals" and would allow law enforcement to simply seize weapons and declare them forfeited without any further process. DOJ notes that it is allowed to summarily forfeit controlled substances which cannot be legally possessed by anyone (21 U.S.C. §881(f)) and it apparently sees no difference between a firearm such as a machine gun which can be lawfully possessed if registered and a bale of marijuana.

A law abiding gun collector or gun dealer who has legally registered one of these dangerous weapons would have absolutely no recourse for a wrongful seizure and subsequent summary forfeiture. He would have no right to notice of the seizure and no opportunity to be heard (not even by the seizing agency) before his valuable gun is summarily forfeited. No doubt the NRA will have much to say about this proposal.

As anyone who regularly defends criminal cases knows, the definitions of firearms in 26 U.S.C. §5845 are very technical. For example, firearms within the ambit the NFA include a shotgun having a barrel of less than 18 inches and a rifle having a barrel of less than 16 inches. If a shotgun has a barrel 18 inches long it is perfectly legal. If its barrel is 17¾ inches in length it must be registered under NFA. Police conducting searches do not generally carry tape measures with them. They typically seize whatever firearms they find. DOJ's proposed amendment would allow law enforcement to arbitrarily seize and forfeit rifles and shotguns with no proof required (1) that the gun barrel is too short to be legal or (2) that the firearms are not in fact registered. According to DOJ, allowing a gun owner to be heard on these questions is a costly waste of time!

Clearly, this proposal is blatantly unconstitutional, and speaks volumes about DOJ's mindset. It treats the constitution as an inconvenience to be sidestepped. DOJ appears to have learned nothing from the Supreme Court's rebuke in the five most recent forfeiture cases to come before the Court, or from the torrent of media criticism over forfeiture abuse.

32. Sections 301 through 315. So-called Minor and Technical Amendments.

We, of course, do not oppose those amendments that are truly minor and technical corrections to various forfeiture statutes. However, under the guise of being minor or technical amendments, DOJ has included some of the most bizarre and draconian provisions in the entire Act.

33. Section 303. Extension of 18 U.S.C. §984 to All Civil Forfeitures.

We do not oppose the clarifying changes to 18 U.S.C. § 984. However, we vigorously oppose the extension of § 984 to all civil forfeitures, which is hardly a "minor and technical correction" to that statute. To the contrary, it would vastly expand the forfeitability of substitute assets in civil in rem cases. Prior to the Annunzio-Wylie Anti-Money Laundering Act of 1992, which included the current version of § 984, there was a hard and fast line between criminal in personam forfeitures (where the concept of substitute asset forfeiture was introduced in 1986) and civil in rem forfeiture where no asset forfeiture was authorized. Congress, and even the Department of Justice, believed that the punitive concept of substitute assets could not and should not be extended to civil in rem cases because it ran contrary to the fundamental legal theory upon which in rem forfeitures are based, *i.e.*, that the property itself is "tainted" by its association with criminal activity.

Section 984 made a narrowly limited breach in the aforementioned wall separating criminal and civil forfeiture in order to deal with a discrete law enforcement problem in the money laundering area. Big time launderers move large amounts of cash rapidly in and out of bank accounts also containing funds not being laundered, thereby frustrating the government's efforts to seize the laundered funds. In order to combat such methods, it was thought necessary to authorize seizure of substitute cash in the same bank account even if the substitute cash was not otherwise forfeitable. However, to prevent abuse of this new authority, Congress required that an action to forfeit substitute property under §984 be commenced within one year from the date of the offense. Section 984(c).

In a section by section analysis accompanying Annunzio-Wylie, Congress acknowledged the fundamental distinction between civil and criminal forfeiture in this regard and urged that that distinction "should be maintained." Having got its nose under the tent, the DOJ now wants to expand § 984 to all civil forfeitures, not just money laundering cases. There is no law enforcement justification for doing so and DOJ provides none, preferring to slip this major change in under the smokescreen of "minor and technical corrections."

Substitute asset forfeiture should be restricted or eliminated, not expanded. We believe that recent Supreme Court decisions throw the constitutionality of substitute asset forfeiture into serious doubt, particularly in civil in rem cases. In his concurring opinion in *Austin v. United States*, 509 U.S. __, 113 S.Ct. 2801, 2815 (1993), Justice Scalia states that the constitutionality under the Eighth Amendment of a civil forfeiture turns on whether the relationship of the property to the offense is close enough to render it "guilty" or "tainted" under traditional standards. If Justice Scalia is correct then even the current version of § 984 is unconstitutional. See also *Alexander v. United States*, 509 U.S. __, 113 S.Ct. 2766, 2775 (1993); (Kennedy, J. dissenting) ("Civil in rem forfeiture is limited in application to contraband and articles put to unlawful use, or in its broadest reach, to proceeds traceable to unlawful activity."). Not satisfied with the in rem forfeiture of traceable proceeds, the government now wants to be able to civilly confiscate completely untainted funds if the traceable proceeds somehow elude its grasp. At some point the almost mindless annual expansion of our forfeiture laws must stop. This is a good place to draw a line in the sand and say to the government: "You go no further."

The proposed amendment would also put the statutory one year statute of limitations in § 984(c) and replace it with a requirement that the substitute assets merely be seized within two years of the offense. § 984(c) currently requires that the forfeiture action be commenced within one year of the offense. As the legislative history of Section 984(c) explains, the purpose of the short limitations period is to provide some basis for believing that the substitute cash is in fact likely to be tainted.

34. Section 310. Expansion of the Term "Proceeds."

Under the guise of a "minor and technical" amendment, DOJ proposes to radically alter the definition of "proceeds" in all civil and criminal forfeitures statutes. Courts have consistently interpreted the term proceeds to mean net profits, not gross revenues. See, e.g., *United States v. Masters*, 924 F.2d 1362, 1369-70 (7th Cir. 1991) (RICO); *United States v. Lizza Industries, Inc.*, 775 F.2d 492, 499 (2nd Cir. 1985) (RICO); *United States v. Alfisi*, 799 F. Supp. 877 (E.D. Pa. 1991) (pharmacist convicted of illegally dispensing controlled substances was allowed a deduction for wholesale cost of the illegal prescriptions he filled -- 60% of gross receipts -- under 21 U.S.C. §853); *United States v. $122,942 Seized from Commerce Bank of FirstRock Bancorp, Inc.*, Nos. 92 C 20288 etc. (N.D. Ill. March 22, 1994), 55 Crl. 1027, 1029 (18 U.S.C. §981(a)(1)(C)).

This is the common definition of the term proceeds. Forcing criminals to disgorge their ill gotten gains is justifiable and even desirable, as a remedial measure designed to prevent unjust enrichment. However, DOJ now wants to convert all proceeds forfeitures into highly punitive measures by redefining the term "proceeds" to mean "all of the property derived directly or indirectly, from an offense or scheme, not just the profit." Astoundingly, DOJ offers no justification for this significant change in the law, while hiding behind the pretense that this is a minor or technical amendment designed to promote "uniformity" in the law.

The example unabashedly provided by DOJ in its Section by Section analysis illustrates the draconian results of the proposed change. All monies received as the result of a loan application containing a single false statement would be forfeitable -- even if the bank was fully

repaid, the bank was never at risk; and there was no intent to defraud the bank." Many decent and law-abiding people make some kind of false statement on a bank loan application in the belief, correct or not, that the statement will make it more likely that they will obtain the loan. DOJ would subject such people to a complete forfeiture of the loan proceeds. Ironically, the forfeiture of the loan proceeds might prevent the borrower from repaying the loan to the bank. If the loan is unsecured, the bank would have no standing to contest the forfeiture and it would be out of luck unless the government chose to grant it relief through the immigration process.

The following example is illustrative of DOJ's proposal. Assume a bank loan application for a $100,000 loan contains a false statement. The bank grants the loan. The borrower applies the proceeds of the loan to a building project of $1,000,000. The borrower then secures other financing (with no false statements), and pays off the first bank. DOJ then learns of the false statement in the original loan application. Under DOJ's proposed amendment, the borrower would forfeit the entire building project ($1,000,000), plus the $100,000 loan, even though the bank had been fully repaid. Such a result defies logic and reason. DOJ has not offered any explanation, let alone justification for this bizarre proposal.

To make matters even worse, this proposal must be considered in tandem with proposed Section 201, which would vastly expand the number of criminal offenses that allow criminal and civil forfeiture of "proceeds". While we do not oppose the concept of forfeiting ill-gotten gains (net profits), we strongly disapprove of DOJ's shameless attempt to turn this basically remedial concept into an arbitrary punishment.

Mr. HYDE. Well, thank you, Mr. Edwards.

Before I recognize Mr. Barr for some questions, you heard this morning Mr. Komie talk about quotas and you heard a rather vigorous denial from the gentleman from the Justice Department. *Have you any information to add to that?*

Mr. EDWARDS. I am very glad you asked the question, Mr. Chairman. Yes, I do.

I would suggest that the Barr memorandum that was quoted in a footnote by the U.S. Supreme Court in the *Good* decision, while it—while Mr. Barr didn't call it a quota, what it was was a memorandum to all the U.S. attorneys saying, we don't want to be embarrassed by not meeting the projections we have made to Congress. So you guys get on the ball and get this property forfeited in a hurry.

I mean, that is essentially what the memorandum said, and anyone who doesn't like my characterization of it, that is fine. They can pick up the *Good* opinion and read it and decide for themselves what *Mr. Barr* was saying.

I have been told that Attorney General Reno has sent a more subtly and discretely worded memo to U.S. attorneys within the last year. Now, I have not seen that memo. In fact, I have made inquiries to try to get a copy of it. I suspect that, Mr. Chairman, you and your staff would have greater success than I.

But I have been told by a person who said—a reporter who said that they had seen this, that a memo has gone out from the Attorney General, presumably to the U.S. attorneys, that encourages the U.S. attorneys to provide adequate asset—adequate attention to the job of forfeiting assets.

Now, again, that is all I can tell you. I am not—since I haven't seen it, I do not want to represent what its contents are. That would be inappropriate. But I have seen nothing—and I do a lot of forfeiture work, and I have seen nothing through the changes of administrations that suggests to me that the Justice Department and the various law enforcement agencies in this country that have forfeiture authority have diminished in their zeal to get property from private sources at all.

Mr. HYDE. It is conceivable that a suggestion that the local U.S. attorneys step up their forfeiture action could have bypassed Mr. Cassella. Is that conceivable?

Mr. EDWARDS. I would think so. I have never worked for the Justice Department, but I have had some exposure to bureaucracy. I suppose that sort of thing could happen.

Mr. HYDE. We have had some discussion on the standard of proof. Clear and convincing is the standard that we have in our legislation for the Government to sustain that burden of proof by clear and convincing evidence. It seems that the Justice Department is interested in reducing that to mere preponderance, or preponderance.

Mr. EDWARDS. Yes.

Mr. HYDE. Do any of you three have, starting with you, Mr. Edwards, and Mr. Kappelhoff and Mr. Reed, do you have any comment on that change if that were to be adopted?

Mr. EDWARDS. Well, Mr. Chairman, I would suggest that you got it right the first time. Asset forfeiture is punishment. And in the

ATTACHMENT B

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September 5, 1996

Stefan D. Cassella, Esq.
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Dear Stef:

I received your letter of August 26, 1996. Thus far, I have not memorialized any of my comments or suggestions in writing. I think your most recent letter calls for a written response so that there is no misunderstanding about where we stand. This letter has been reviewed and approved by my fellow co-chairs, Richard Troberman and E.E. ("Bo") Edwards and by NACDL's Legislative Director, Leslie Hagin. And thus you can consider it as representing NACDL's position even though much of it is written in the first person.

On page two of your letter, paragraph two, you state that with respect to the remaining 10 provisions on List B I have "rejected all efforts at compromise." That is not so. I made a number of suggestions for compromise, some of which you said you would consider. I do not see these suggestions reflected in your letter. I will reiterate some of them as I go down the various lists. In general, I think that I have gone much further in the direction of accommodating the DOJ's wishes than many NACDL members would think desirable. Remember, our organization strongly supports the Hyde bill but feels it does not go *far enough* in addressing our concerns! I wish the DOJ (not to mention the Treasury) could be as open-minded about reconsidering some of its more ill-conceived proposals. Of course, you are not personally to blame for the institutional biases that infect the DOJ bill. You are one of the *few* people over there who is capable of seeing another point of view.

Before I turn to List C, let me make some points about List A. The last time we spoke I requested a change in the legislative history you drafted for sections 206 and 215. You did not voice any objection to my proposal. However, the change I requested is not in the most recent draft of the legislative history for sections 206 and 215. I proposed that you strike the words "to challenge the finding that the property was subject to forfeiture" and substitute "to litigate the forfeitability of the property *de novo*. The evidence developed in the criminal proceeding

against the defendant could not be considered by the trier of fact in the *in rem* proceeding under §853(l) because the third party did not participate in the criminal proceeding." This change in the language of the legislative history is needed because the current language might be read to suggest that the third party does not have a right to litigate the forfeitability of the property *de novo*. It is also needed because current §853(n)(5) requires the court to "consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture." It needs to be made clear that this provision doesn't apply to an *in rem* proceeding under §853(l).

With respect to section 304 (dealing with the forfeiture of proceeds traceable to facilitating property in drug cases), I suggested that a narrow exception be written into the statute for the unusual situation where the facilitating property is a legitimate business. We both agreed that there is considerable unfairness in forfeiting all of the proceeds from a legitimate business which the property owner may have worked hard at for many years. I don't see why law enforcement should object to a minor exclusion for that special situation.

My colleagues, Richard Troberman and E.E. ("Bo") Edwards, have raised objections to sections 210, 304, 305, and 408, previously on List A, which I believe are well-founded. Thus, these sections should be moved to List B or C.

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

The main problem we see with respect to substitute assets based on a proceeds theory is that the government bases its estimate of the amount of proceeds subject to forfeiture on a "gross receipts" definition of proceeds, which greatly increases the amount of substitute property subject to forfeiture but which may be rejected later by the trial court based on case law holding that the defendant is entitled to a reduction for the cost of the goods sold. In addition, the government often exaggerates the amount of the defendant's gross receipts based on arbitrary assumptions about the amount of drugs sold over the life of a long conspiracy. If the government has evidence that the defendant sold X pounds of marijuana during one week, then it is sometimes simply assumed that the defendant was probably selling the same amount of marijuana during each week of a five year conspiracy. Calculating the defendant's gross receipts based on such extrapolation methods generally results in a great exaggeration of the defendant's gross receipts not to mention his actual profits. The government will then assert in the indictment that the defendant must forfeit X million dollars as substitute assets. Because the defendant did not make nearly as much profit as the government's exaggerated gross receipts figure suggests, and because the defendant's profits will usually have been spent on ordinary living expenses, he will usually have property worth a small fraction of the staggering sum alleged in the indictment. Therefore, the substitute asset allegation in the indictment, whether or not well-grounded in law or fact, will effectively freeze all of the defendant's assets in the vast majority of cases.

How is the defendant going to pay his family's living expenses and his attorney fees in these circumstances? He can't rely on §211(a)(2) because that provision applies only to property "restrained pre-trial." It doesn't apply to property that is effectively frozen as a result of the mere allegations in the indictment. The non-applicability of §211(a)(2) is also a problem with respect to substitute assets based on a facilitation theory. Whatever the theory, defendant has no mechanism for challenging the forfeiture allegations in the indictment and no right to seek exemption of property needed for attorney fees and living expenses pendente lite. If §210 is enacted, no attorney in his right mind would accept any money from such a defendant. And what we're talking about here is *clean* money or property alleged in the indictment to be forfeitable solely as a substitute asset.

Section 305
Forfeiture for Alien Smuggling

We have no objection to permitting forfeiture of the proceeds of alien smuggling so long as proceeds is not defined as "gross receipts." We do object to permitting forfeiture of "any property, real or personal. . . that is used to facilitate, or is intended to be used to facilitate, the commission of a violation of [8 U.S.C. §1324(a)(1)(A)]." Of course, conveyances used for facilitation are already subject to forfeiture under 8 U.S.C. §1324(b). The question is whether the government should also be able to forfeit real estate and other valuable property, such as a business, based on a facilitation theory. We think not. We know based on experience that the government would apply these new powers to impose harsh and often wildly disproportionate penalties on anyone who allows his property to be used *in any manner* to "*facilitate*" the smuggling of even a single alien. While the Excessive Fines Clause provides some protection against the worst excesses (assuming a property owner has the wherewithal and determination to fight the government in court), it will not prevent the run-of-the-mill extremely harsh forfeiture. In most cases the criminal forfeiture of alien smuggling proceeds, combined with substitute assets, will allow the government to confiscate all of the defendant's property anyhow.

Section 408
Closing of Loophole to Defeat Criminal Forfeiture Through Bankruptcy

We don't object to the thrust of this provision. Our problem is limited to the vagueness of the "in contemplation of a prosecution" language. What exactly does that mean? We are afraid the government will argue that whenever the defendant declared bankruptcy prior to an indictment, the bankruptcy was "in contemplation of a prosecution." This language might be changed to require either 1) that the defendant was formally put on notice via letter from the prosecutor that he was likely to be prosecuted or 2) proof by the government that the defendant instituted bankruptcy proceedings for the purpose of defeating or interfering with the

government's ability to forfeit his property.

This is an appropriate place to reiterate in writing a crucial caveat Troberman and I made earlier: NACDL's non-opposition to the List A provisions depends on the passage of the core provisions of the Hyde bill as part of the same legislative package. We also want a provision requiring the government to file its civil forfeiture complaint within 90 days of its receipt of the administrative claim unless the court extends the time limit for good cause shown. Although some of the List A provisions are not all that significant, they collectively constitute an important expansion of government forfeiture powers. We cannot agree to that unless forfeiture procedures are made more fair and the only way to do that is to pass the Hyde bill provisions or some recognizable version of them.

I will now turn to the List C provisions.

Section 101
Time for Filing Claim; Waiver of Cost Bond

With respect to the cost bond requirement I made two additional suggestions for DOJ compromise with the Hyde bill, which you said would be considered. I suggested DOJ might take the position that the maximum amount of the cost bond could be substantially reduced, which I believe would be more than adequate to deter frivolous claims, as the DOJ asserts is necessary; and second, that a trial judge be given discretion to return the cost bond to a claimant who loses the forfeiture case provided that the judge determines that the claimant's litigation position was *not* frivolous. If the purpose of the cost bond is to deter frivolous claims, then a claimant who asserts a non-frivolous position in litigation should not be compelled to pay the government's storage and litigation costs. You did not express objections to either of those suggestions of mine, and you said you would run them by your people. I have yet to hear back from you on the subject.

But I have now also had the opportunity to run this idea by my co-chairs of the NACDL Forfeiture Abuse Task Force, and the NACDL legislative director and leadership. This is an issue on which NACDL cannot backtrack. We have long strongly supported this proposal to abolish the cost bond requirement. And, still seeing no reason to deviate from that position, we continue to stand behind the Hyde bill provision. The cost bond *requirement* serves the supposed purpose of deterring frivolous claims. Rather, it simply assumes that only the poorer citizen (or indeed, the strapped middle class one) files frivolous claims, and suggests at least that one who can "afford" it can still jerk the over-burdened federal courts around, and file frivolous claims. This is at least an *odd* way to go about deterring frivolity in the courts. Even if the cost bond requirement *did* deter some frivolous claims, we think it clearly deters a much greater number of *non-frivolous* claims by those unfortunate enough to have been "priced out" of justice by the cost bond requirement -- economically barred from their supposed right of equal access

to justice.

In short, the cost bond requirement must be abolished, as Chairman Hyde has proposed in H.R. 1916. NACDL remains unconvinced that there should be a "poll tax" for justice in America. We remain convinced that Chairman Hyde's proposed abolition of this anomalous, anti-democratic, "justice tax" is a critically important reform to the law of asset forfeiture. As you know, the courts have ample powers (e.g., Rule 11), and every incentive -- given their notorious case (over)loads -- to boot out frivolous claims, be they filed by the poor or the rich.

I have no objection to a provision requiring the claimant to state "the nature and extent of his ownership interest" in the property. However, for the reasons I previously explained, we strongly object to a requirement that the claimant also state "how and when it was acquired." The how and when requirement would be onerous in many cases and we see no justification for it. The claimant may, of course, be required to explain how and when he acquired the property once litigation commences in the district court. The government frequently files form interrogatories together with the complaint in order to determine whether the claimant has standing to contest the forfeiture. We see no reason why a claimant should have to explain how and when he acquired each piece of property the government has seized at a very early stage in the proceeding, when he often hasn't even obtained the assistance of counsel yet. There are many cases where the government seizes literally everything a claimant owns, including many items of relatively small value. It would be extraordinarily difficult, if not impossible, for the claimant to quickly and accurately provide details as to how and when he acquired each piece of property.

In your letter you provide an example of the kind of information a claimant would be required to tell the government under the provision. However, you do not give any information as to "how and when" the hypothetical owner of the money acquired it. The mere statement that the money represents the operating capital of his business does not tell us how and when he acquired it.

Section 105
Preservation of Arrested Real Property

We have no objection to a statutory provision which merely codifies the Supreme Court's decision in United States v. James Daniel Good Real Property, 510 U.S. 43 (1993). However, we believe that the DOJ proposal does more than that. The videotaping of the interior of an occupied home is a very significant invasion of the privacy interests of the homeowner. As such, it interferes with the owner's use and enjoyment of the property. After all, one reason people choose to live in private dwellings is to protect the privacy of their possessions and lifestyle. Videotaping the interior of a home and all of its contents is the functional equivalent of a search. We believe that either a search warrant or an order issued after an adversary hearing

pursuant to Good would be required in order to authorize such videotaping. Apart from the constitutional issue involved, we also do not understand why law enforcement feels there is such a need to videotape. Normally, the government does not seek forfeiture of the homeowner's personal property contained within the home. In those cases, we see no justification for videotaping the entire contents of the home. In some cases, the government may have an interest in videotaping valuable fixtures such as an expensive chandelier hanging in the dining room. Those concerns can be dealt with in a far less intrusive manner than videotaping the entire contents of the house. Such videotaping will often merely be an excuse for rummaging through the homeowner's possessions in search of incriminating evidence.

Section 107
Prejudgment Interest

We see no reason why the government should not have to disgorge any benefit it receives from using the claimant's money when it loses the case. We would fully codify the decision in United States v. $277,000.00 U.S. Currency, 69 F.3d 1491 (9th Cir. 1995). That decision does not expose the government to "unlimited liability based on uncertain calculations of what the government could have earned by investing the claimant's money," as you claim in your letter. The decision merely requires the government to pay prejudgment interest based on the then current Treasury borrowing rate. This is readily calculable and will merely deprive the government of the pecuniary benefit it has received by detaining the property owner's money. As the Ninth Circuit pointed out, the government derives a greater economic benefit from cash held by the Treasury than cash deposited into commercial banks at below Treasury interest rates because the cash deposited reduces the government's borrowing needs, which is the equivalent of earning interest. 69 F.3d at 1494-96. The DOJ has said the same thing for years. I remember going through that drill when I was deputy chief of the Asset Forfeiture Office. The government's proposal is designed to allow the government to continue to derive an unjustified benefit from the wrongful seizure of a citizen's money. Shame!

Section 121
Trial Procedure for Civil Forfeiture

We have no objection in principal to the codification of case law governing civil forfeiture procedures. However, we would like to study your codification more closely before signing off on that part of section 121.

United States v. Ursery, 116 S.Ct. 2135 (1996) does not deal with the problem of successive criminal and civil forfeiture actions, but rather with the separate question of successive criminal prosecutions and civil forfeiture actions. Of course, Ursery merely held that the Double Jeopardy Clause is not implicated by such successive actions. It does not prevent

Congress from enacting measures to ensure that the government does not overreach. Congress did just that in 18 U.S.C. §924(d), which was amended following the Supreme Court's double jeopardy decision in the 89 Firearms case in 1984. Section 924(d)(1) prohibits the government from bringing or continuing a civil forfeiture action against weapons following an acquittal of the gun owner. I would extend the same type of protection to all civil forfeiture actions, not just those involving guns. Other forms of property should have at least as much protection as guns. Congress should also require the government to elect between criminal and civil forfeiture remedies. There is no reason why the government should be able to bring a civil forfeiture action after losing a criminal forfeiture action *governed by the same burden of proof* where both actions involve the same factual issues and a jury has already ruled in the property owner's favor in the criminal forfeiture action. Indeed, well established principles of collateral estoppel would bar the government from doing that. I would concede your point that if the property is involved in a crime other than the one for which the defendant was convicted, a separate civil forfeiture action should not be barred. However, I would use a "same conduct" test here rather than a "same offense" test because it is too easy for the government to predicate the forfeiture on a slightly different offense than was charged in the criminal forfeiture case.

On the issue of standing, I would refer you to my previous criticism of section 101. How and when a claimant acquired a property interest generally has no bearing on his standing to contest the forfeiture. Normally, the evidence would only be relevant on the merits of the litigation, for example, on whether or not the property constitutes drug proceeds. Requiring a claimant to set forth the "nature and extent of his ownership interest" will allow the judge to determine on the face of the pleadings whether or not the claimant has alleged a sufficient interest to confer standing. If the claimant is merely an unsecured creditor that should be apparent from his description of the nature and extent of his ownership interest. We see no reason to require a further showing of how and when the claimant acquired his alleged interest at this stage of the proceedings. You suggest that an unscrupulous claimant presently has the ability to tailor his standing claims to fit whatever facts are adduced by the government. However, even today the claimant is required to state the interest in the property by virtue of which he claims to have standing. As I noted above, the government presently has the right to send interrogatories to the claimant at the same time the complaint is filed. Supp. Rule C(6) requires the claimant to answer the interrogatories served with the complaint at the time he files his answer. Therefore, the claimant must submit voluminous information regarding the evidence supporting his standing well before he gets to discover any of the government's evidence.

Although there is not a lot of caselaw on the question of whether standing is an issue exclusively for the court, I would cite the following cases to you for the proposition that standing is a jury issue where there is a genuine issue of material fact. United States v. DKG Appaloosas, Inc., 630 F. Supp. 1540, 1557-61, 1567-68 (E.D.Tex. 1986), *affirmed*, 829 F.2d 532 (5th Cir. 1987), *cert. denied*, 485 U.S. 976 (1988) (case in which the government was in unusual position of attempting to prove that horse ranch was really owned by a Bahamian shell corporation rather than by claimant, a convicted drug kingpin; the jury was not convinced); United States v.

Premises Known as 526 Luscomb Drive, 866 F.2d 213 (6th Cir. 1989), United States v. Contents of Account, 847 F. Supp. 329, 333 (S.D.N.Y. 1994) (husband's statement that he and his wife share jointly in their property holdings and that he had authority to sign his wife's name and make withdrawals or deposits in bank account held in his wife's name raised genuine issue of material fact as to his standing to challenge forfeiture of those accounts). As these cases illustrate, sometimes the entire case turns on a disputed issue of fact which is determinative of standing. That issue of fact must be decided by a jury rather than a court.

NACDL abides by its long-standing support for Chairman Hyde's proposal to correct the applicable standard of proof in civil asset forfeiture cases, raising the government's burden to clear and convincing proof. We think the clear and convincing standard is appropriate given the importance of the property interests at stake and especially given the punitive character of most civil forfeiture actions. *See* Department of Law Enforcement v. Real Property, 588 So.2d 957 (Fla. 1991) (holding that clear and convincing standard is constitutionally required in all civil forfeiture cases). Nonetheless, I do not believe that a preponderance standard would be a "deal breaker." It is a significant improvement over mere probable cause. We are more troubled by the government's proposal (in §201) to *lower* the burden of proof in criminal forfeiture cases.

We do not regard the "substantial connection" requirement as a major concession by the government. As you know, there isn't a dimes worth of difference between the cases holding that that is presently the government's burden and the cases which do not require a substantial connection. The results reached by the courts are the same regardless of which standard is applied. That is why we believe that Congress must define, at least in the legislative history, what it means by a substantial connection. Otherwise, the courts may hold that the slimmest possible nexus with a home, such as the use of a telephone on one occasion, constitutes a "substantial nexus."

I am still opposed to the section on affirmative defenses. I do not understand how it would protect claimants from any implication that they are required to put on evidence in support of an affirmative defense during the government's case in chief. I don't know where such a requirement could be inferred from. I am still concerned that many claimants will unknowingly waive affirmative defenses by failing to plead them. You say that the government will make the same waiver argument even if this provision is not enacted because that is what Rule 8(b) requires. So be it. But I will not help the government make that argument.

If the courts are not going to admit or give any weight to unreliable hearsay, then it does no harm to the government to insert the word "reliable" in this provision. You concede that no one should have to face the loss of his property "at trial" without being able to confront the witnesses against him, but your proposal would allow property to be forfeited on a government motion for summary judgment based on a CI's alleged statement to an agent. In many ways, that is even more unfair than not being confronted with the CI at trial. We see no reason to provide absolute protections for the identity of the government CI in pretrial proceedings. The common

law Roviaro balancing test provides more than adequate protection for the government. See ¶10.04[1] of my treatise on the informer's privilege. As you are aware, few civil forfeiture cases actually go to trial. Most are decided on motions for summary judgment. Thus, this is a very important point. By the way, I do not believe that the present probable cause standard affords complete anonymity for informants. Most courts would hold that a claimant has a right to depose the confidential informant if the informant is a key witness. Your proposal would actually be a step backwards.

I don't understand your comments with respect to the Fifth Amendment privilege/adverse inference issue. I don't understand why you think the constitutional issue is limited to a narrow category of cases where there is an identity of issues in a civil forfeiture case and a pending criminal prosecution. You state that, in the vast majority of cases, there would be no constitutional issue under Baxter. Why? I still believe this issue is entirely constitutional in nature and therefore it is inappropriate for Congress to attempt to legislate in this area. Of course, Congress can provide greater protection than the Fifth Amendment requires -- but it may not provide less. That is what the DOJ proposal would do.

I agree that the government should be able to take steps short of seizure to preserve property subject to civil forfeiture. However, subsection (k) authorizes the judge to take certain steps, including physical seizure and the creation of a receivership, which would require a Good hearing. It needs to be made clear that if the action the court proposes to take to preserve the property would interfere with the owner's enjoyment or use, then there must be notice and an opportunity to be heard in accordance with the dictates of the Good decision. The problem with the subsection as written is that it is not limited to restraining orders and the like. Rather, it also authorizes far more drastic interferences with a property owner's rights. Even some restraining orders could interfere with the owner's use and enjoyment of his property.

With respect to the release of property to pay criminal defense costs, I believe you exaggerate the difficulties inherent in allowing consideration of affirmative defenses at the hearing. Evidently the Supreme Court saw no such difficulties when, in the Good case, it held that the Constitution requires consideration of affirmative defenses even at a pre-seizure hearing in a case involving real property. The government always has the option of trying to work things out with the defendant and his attorneys by releasing a reasonable amount of money to pay the criminal defense costs. The government's proposal also fails to give sufficient weight to the defendant's interest in obtaining the release of attorney fees necessary for the defense of his criminal case. Under the DOJ proposal a defendant may have a perfect affirmative defense to forfeiture which the court will not hear because the defendant is barred from even raising it at the pre-trial hearing. Why should that defendant be deprived of the financial means necessary to defend himself against serious criminal charges? NACDL can never agree to that. Again, this whole question is a matter of constitutional law and we believe that it is inappropriate for Congress to restrict a defendant's Sixth Amendment rights through legislation.

I believe that district judges can be trusted to not make excessiveness determinations until they have sufficient facts upon which to base their decision. I am not aware of any courts deciding such issues before they are ripe for decision. However, they may well be ripe for decision, before the end of a trial. For example, suppose the government seeks forfeiture of an expensive vehicle based on an allegation that a single marijuana cigarette was found inside the glove compartment of the car. That type of case ought to be subject to dismissal based on an excessiveness claim. Why should a defendant be forced to undergo the expense and inconvenience of a trial when the only issue is going to be the excessiveness of the forfeiture? I am still not sure exactly what the government's proposed legislation would entail. Would the claimant not be able to raise an excessiveness issue in opposition to the government's motion for summary judgment? If so, how can the government justify that?

You did not address my concern that the government's proposal would leave forfeitures under the customs laws unreformed. That is, the burden of proof in thousands of cases under the customs laws would remain on the property owner and the government would only have to show probable cause to believe that the property is subject to forfeiture. 19 U.S.C. §1615 would remain unchanged. This is not acceptable to NACDL.

I am glad to hear that you recognize I have raised some legitimate concerns with respect to the rebuttable presumptions regarding money laundering. You note that, in discussions with the Senate staff earlier this year, DOJ agreed that it would be necessary to tighten up the provisions so that the government, for example, would have to establish a factor from each of the two categories, to avoid a situation where the government could rely on the presumption in virtually any case involving a drug producing country like Colombia or a bank secrecy jurisdiction like the Cayman Islands. I am sympathetic to the government's concern about losing money laundering cases involving the most sophisticated and dangerous international criminals. I believe that some sort of evidentiary presumption may be justifiable in certain of these cases. I would suggest that you take another stab at drafting more reasonable presumptions. I don't think it is my role to do that for DOJ and frankly I don't have time to do so. However, I would be happy to discuss that with you and respond to your proposals. Nonetheless, I think you have exaggerated the risk that the government may someday lose one of these big cases. After all, preponderance of the evidence is not so much higher a standard than probable cause. If the government can't establish its case by a preponderance of the evidence perhaps it does not deserve to win. If and when the government loses such a case, that might be a better time to draft evidentiary presumptions to prevent that from happening again. You might then have a better understanding of what you really need.

By the way, my suggestion to simply make it illegal for an American to engage in banking transactions in specified bank secrecy jurisdictions was not in jest. Congress ought to consider that.

Section 123
Uniform Innocent Owner Defense

You have little to say about this provision in your letter. You don't respond specifically to the concerns NACDL detailed in its June 1996 critique, which is attachment A to our written statement of July 22, 1996 before the House Judiciary Committee. We cannot accept this provision for all of the reasons stated in that earlier document. We regard it as a big step backwards. The limitation of new section 983 to Title 18 civil forfeitures is a glaring deficiency in DOJ's proposal. I know that the Treasury Department is unwilling to accept any reforms but that is not our problem. I guess they will just have to be hit over the head with a two-by-four. If I were Chairman Hyde, I would grill the responsible Treasury officials as to why they believe it is unacceptable to provide any protections for innocent owners in civil forfeiture cases under the customs laws and in IRS forfeiture cases. I would love to be in the hearing room when they try to justify their position.

Section 124
Stay of Civil Forfeiture Case

Your letter does not deal with my criticism of §881(i)(5) which would allow the government to make all of its requests for stays *ex parte* and under seal. This provision would effectively prevent the claimant from challenging or rebutting the prosecutor's arguments in favor of the stay. This is obviously unacceptable. Moreover, we object to §881(I)(1) because it would make it easier for the government to obtain a stay than at present. Your proposal would basically require the court to grant the government's request for a stay in every case in which the government sought one. There is no justification for that.

You misunderstand my problem with §881(I)(2), which allows the claimant to seek a stay. I am not suggesting that the claimant be permitted to obtain a stay where his Fifth Amendment privilege is not implicated. What I am saying is that the claimant's ability to get a stay must not depend on whether or not the continuation of the forfeiture proceeding may infringe on his right against compulsory self-incrimination. Not because the Fifth Amendment isn't implicated, but because the courts have held that forcing the defendant to choose between incriminating himself and presenting a defense to the civil forfeiture proceeding does not violate the Fifth Amendment privilege. Thus, the language of §881(I)(2) needs to be tweaked.

Section 131
Seizure Warrant Requirement

Your position with respect to proposed §981(b)(3) is logical. I don't consider this an important point. However, I would still feel more comfortable if, as I suggested before, the

legislative history acknowledges the burdens placed on a property owner by defending a case in a foreign district and encourages the courts to liberally grant motions for transfer under 28 U.S.C. §1404(a).

Section 132
Civil Investigative Demands

Our 1994 critique of this provision still stands. (The 1994 critique is attachment B to our written statement of July 22, 1996 before the House Judiciary Committee.) I am amazed that this extraordinary provision was ever considered "non-controversial" by Congress. You state that this provision is intended to deal only with the "rare case where grand jury process is unavailable because no criminal investigation is contemplated." But 80% of all civil forfeitures occur in cases in which there is no criminal conviction. Thus, the use of the provision would hardly be limited to the rare case.

You provide, as an example of the need for this provision, the hypothetical case of a deceased leader of a South American drug organization with assets hidden in the United States. You note that there is currently no authority to issue subpoenas to compel financial institutions or anyone else to provide evidence that would lead to the discovery of those assets so that can be forfeited. However, I believe it would be easy to use a grand jury to investigate that very case despite the fact that you could not indict the deceased leader of the drug organization. You could certainly indict his accomplices and co-conspirators. Hiding drug related assets in the American banking system would certainly violate the money laundering statutes. But, let's assume for the sake of argument that a grand jury investigation could not be used in these circumstances. If the government's real interest is only at getting at bank records, why not simply amend 18 U.S.C. §986 to allow for the issuance of subpoenas for bank records prior to the commencement of a civil forfeiture action? That would be a far more limited and thus less objectionable provision.

You state that "similar provisions have been part of other civil statutes for decades without any indication that any of the horror stories you envision have occurred." I am not aware of any other similar provisions that are anywhere near as far reaching as this one would be. I am not familiar with the administrative subpoena provision added to the FIRREA Act in 1989. However, I suspect that it is limited to subpoenas for documentary evidence unlike section 132. It is also obviously limited to bank fraud cases. I would not want to give even the most responsible prosecutor the tremendous powers that section 132 would provide him. But unfortunately not every prosecutor fits the ideal. I am confident that this provision would be abused regularly because there are no restrictions on the prosecutor's power. The government has ample means to investigate civil forfeiture cases at present. Other provisions of the DOJ bill which we have not objected to would augment the government's investigative powers. For example, section 134 would make tax return information available to the government at the

investigatory stage. Section 133 would provide the government with access to records in bank secrecy jurisdictions; and section 418 would amend the FIRREA Act to permit the use of grand jury material by government attorneys in all civil forfeiture cases involving criminal proceeds forfeitable under §981(a)(1)(C) instead of only those involving certain bank frauds.

Section 135
Currency Forfeitures

Your explanation for this provision is refreshingly candid. Although, in theory, the burden of proof would remain on the government, in practical effect the burden of proof would once again be shifted to the owner of the currency to explain the origin and intended use of the money. As you state, "as a practical matter, what this provision does is to ensure that in drug courier cases, the claimant has to take the stand to explain the provenance of the currency. He cannot rely on a motion to dismiss the forfeiture case for lack of evidence at the close of the government's case in chief under Rule 50." That is precisely what is wrong with this provision. It blatantly undermines the provision shifting the burden of proof to the government. You are correct in predicting that without the presumption, there will be cases where drug couriers sit on their hands while courts toss out cases because the suspicious circumstances by themselves don't add up to proof by a preponderance. But you cite a case, United States v. $30,060.00, 39 F.3d 1039 (9th Cir. 1994), in which the same thing happened under the current probable cause standard. As you know, there are many other such cases. Thus, the police would not be substantially worse off under the preponderance standard than under the current probable cause standard. Indeed, as we noted in our June 1996 critique, which is attachment A to NACDL's written statement of July 22, 1996 before the House Judiciary Committee, this rebuttable presumption would actually have the effect of lowering the government's burden of proof to something below what it is today. This can hardly be labeled progress. The leitmotif running through much of your letter is that somehow the government must be ensured against ever losing a case. NACDL cannot accept that screwy premise. It's good for the system if the government loses occasionally!

I find it strange that the state police have so much difficulty in accepting a preponderance of the evidence standard. After all, virtually every state statute incorporates a preponderance of the evidence standard in drug cases and several large states require clear and convincing evidence. What is so objectionable about requiring the police to meet the same standard of proof in federal forfeiture cases? You also seem to think it remarkable that the police are willing to support the enactment of an innocent owner defense. But, as we point out in our June 1996 critique, the most significant federal forfeiture statutes already have innocent owner defenses in them and they provide for a much broader innocent owner defense than the one proposed in the DOJ bill. Thus, the DOJ bill is a big step backwards with respect to the federal statutory innocent owner defense. I am reasonably confident that the burden of proof will be changed to at least a preponderance standard whether or not the police support it. The police just want to

be able to continue to seize any traveler's money on suspicion and call it a forfeiture case. The NACDL is certainly not going to encourage that.

Section 201
Standard of Proof for Criminal Forfeiture

Your discussion of this issue is simply not accurate. Libretti v. United States, 116 S.Ct. 356 (1995) did not address the question of what the burden of proof is in a criminal forfeiture case. Even though Libretti treated criminal forfeiture as an aspect of sentencing, there is no requirement that Congress establish a preponderance standard to govern the jury's verdict under Rule 31(e) of the Federal Rules of Criminal Procedure. In fact, as is absolutely clear from the legislative history of all the criminal forfeiture statutes on the books, Congress plainly intended to establish a beyond a reasonable doubt standard. The courts have repeatedly recognized this, contrary to your letter. *See, e.g.*, United States v. Petrillo, 14 F.3d 881, 902-06 (3d Cir. 1994), United States v. $814,254.76 in U.S. Currency, 51 F.3d 207, 211 (9th Cir. 1995) (criminal forfeiture under 18 U.S.C. §982(a) requires proof beyond a reasonable doubt), United States v. Pryba, 674 F. Supp. 1518, 1520-21 (E.D.Va. 1987), *affirmed*, 900 F.2d 748 (4th Cir.), *cert. denied*, 498 U.S. 924 (1990) (beyond a reasonable doubt standard applies to RICO forfeitures), United States v. Cauble, 706 F.2d 1322, 1347 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984) (RICO). *See also* 18 U.S.C. §1467(c)(1) (requiring the government to meet the beyond-a-reasonable-doubt burden for criminal forfeitures in federal obscenity prosecutions), Sullivan v. Louisiana, 113 S.Ct. 2078, 2081 (1993) ("It is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. . . . In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.")

In fact, before the government decided that it was in its interest to ignore the clear legislative history, the government conceded that the government's burden of proof under §853 is also beyond a reasonable doubt. *See* United States v. Lyons, 802 F.2d 646, 647 (2d Cir. 1986), *cert. denied*, 480 U.S. 931 (1987) (agreeing with government's position that burden of proof is beyond a reasonable doubt). The Senate report on the 1984 legislation which included §853 repeatedly demonstrates Congress' understanding that the government's overall burden of proof under §853, as well as under the amended RICO forfeiture provisions, would remain beyond a reasonable doubt. United States v. Eierman, 929 F.2d at 1547-48 (discussing legislative history). *See also* H.R. Rep. No. 845, 98th Cong., 2d Sess. 18, 38 (1984) (adopting the Justice Department's request for language that criminal forfeiture must be established by proof beyond a reasonable doubt). Because, following common law precedent, the Congress decided to provide for a jury verdict in criminal forfeiture cases, Congress naturally assumed that that verdict would be rendered under a beyond a reasonable doubt standard. I see no reason to change the law, but there is a need to clarify Congress' original intent. I was involved in drafting the 1984 legislation and am absolutely certain that Congress intended a beyond a

reasonable doubt standard in both the RICO and the §853 statutes. But don't take my word for it. Look at the legislative history again! Unfortunately, many courts have ignored that legislative history in cases under §853 and that is why Congress needs to clarify its intent.

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

The government recently won the Ursery case by relying on an artificial distinction between *in rem* and *in personam* proceedings. Here the government wants to ignore that distinction and treat *in personam* criminal forfeitures like civil *in rem* forfeitures for purposes of abatement. The government should not be able to have it both ways.

Your premise that civil forfeitures survive the death of the wrongdoer is also incorrect. The federal common law rule is that civil actions for penalties or forfeitures do not survive the death of a defendant. *See* paragraph 14.05, page 14-44.4(8) of my treatise for a huge collection of cases on this point. In United States v. $47,409.00 in U.S. Currency, 820 F. Supp. 919 (N.D. Ohio 1993), an Ohio district judge held that a civil forfeiture under 18 U.S.C. §1955(d) abates upon the death of the wrongdoer. The judge in that case wrote a comprehensive and persuasive analysis of the issue in line with my treatise. Thus, there is no anomalous distinction between the results in criminal and civil forfeiture cases that needs to be changed by Congress. There are simply some erroneous decisions holding that civil forfeitures do not abate because the action is against the property. The Supreme Court has repeatedly rejected that fiction in recent years.

In NACDL's June 1996 critique we offered what is essentially a compromise: provide for non-abatement of the criminal forfeiture where it involves proceeds. We said that where the forfeiture involves facilitation property it is clearly punitive in nature and no purpose is served by punishing the defendant's innocent heirs. On the other hand, there is no reason to allow them to profit from his wrongdoing, so we do not find forfeiture of drug proceeds to be illogical in this context.

Sections 205 and 208
Pretrial Restraint of Substitute Assets/Seizure Warrant Authority

The Second and Fourth Circuits have held incorrectly that the government presently has the authority to restrain substitute assets pretrial. All the subsequent circuit cases have rejected that position based on clear legislative history to the contrary and on the plain language of the criminal forfeiture statutes. Thus, while section 205 may merely codify the Second and Fourth Circuit case law, that is meaningless since those cases are wrongly decided. What you are actually asking Congress to do is grant you new authority to restrain substitute assets for forfeiture. In our discussions I took the position that the government did not need this new

authority. I relied mainly on proposed section 210 of your bill, not section 209. It would amend §§ 1963(c) and 853(c) to provide that a third party may contest the forfeiture of substitute assets if the third party's interest in the property is vested before the property is named in an indictment, information or bill of particulars. My argument was that §210 will obviate the need to restrain substitute assets because if they are transferred after being named in an indictment, information or bill of particulars, the third party will have no interest in them. Section 209 provides the government with additional authority to recover substitute assets from a third party transferee. Although NACDL opposes §§209 and 210 for the reasons stated elsewhere, the burden is on the government to show why it needs §§205 and 208 in addition to the new authority that would be granted to it under §§209 and 210.

I also suggested that NACDL might be willing to support a more limited pretrial restraint provision -- one requiring the government to show that there is reason to believe the defendant will improperly transfer his assets without a restraining order. I do not see why that is unreasonable. As presently drafted, section 205 would give the government an automatic right to a restraining order reaching substitute assets upon indictment. We see no reason to require the district court to rubber stamp a request for such a far-reaching restraining order in every case. The government should have to demonstrate a need for this extreme measure and the defendant should have an opportunity to be heard before the restraining order is issued.

In NACDL's June 1996 critique we suggested that Congress should enact some sensible limitations on the scope of substitute asset forfeiture. We suggested that it should clarify that substitute assets may not be forfeited merely because the defendant had *spent* the tainted assets, which is the government's theory in many cases. Substitute asset forfeiture should be available only when a defendant or his agent *take some action for the purpose of making the tainted property unavailable* for forfeiture. We also suggested that Congress should provide that the defendant's primary homestead, up to a value of $250,000.00, may not be forfeited as a substitute asset. This humanitarian limitation would prevent substitute asset forfeiture from becoming, in effect, forfeiture of estate, the terrible common law practice that the Framers abolished more than 200 years ago. The government has not responded to these suggestions.

You state that prosecutors have exercised restraint in not attempting to seize substitute assets under §853(f). However, that is not surprising since it is clear that §853(f) does not authorize the seizure of substitute assets. If assets are not subject to pretrial restraint, then it logically follows they are not subject to pretrial seizure.

In NACDL's June 1996 critique we noted that proposed section 211(a)(2), which deals with exemptions from restraining orders, merely gives the district court discretion to exempt money needed to pay attorney fees and other necessary living expenses. We suggested that the word "may" be changed to "shall" so as to provide more assurance that the provision's salutary purposes will actually be achieved.

§853(f) currently authorizes seizure of even tainted assets only on a showing by the government that less drastic measures such as a restraining order are likely to be ineffective in protecting the government's interests. We see no reason to alter that provision to require judges to issue seizure warrants in every case. That would be the effect of amending 21 U.S.C. §853(f) to conform the procedure for issuing a seizure warrant to the procedure in civil forfeiture cases. Criminal forfeiture cases are fundamentally different in that the court's jurisdiction does not depend upon a prior seizure of the property.

Section 209
Forfeitable Property Transferred to Third Parties

The NACDL believes that the Supreme Court decided Caplan & Drysdale v. United States, 491 U.S. 617 (1989) wrongly. We are not going to encourage Congress to enact legislation that makes it easier to forfeit attorney fees, particularly attorney fees that have already been fully earned. If this provision was limited to sham transactions, we could support it. However, as in the Moffitt, Zwerling case, this provision would hurt honest defense attorneys who have simply made a mistake in accepting a fee that they had reasonable cause to believe might be tainted. It is bad enough for the government to take the fee away before it has been spent: it is quite another thing for the government to be able to sue the defense attorneys and collect a judgment for the amount of the fees long after they have been spent. This will often entail substantial hardship for the attorneys as in the Moffitt, Zwerling case. In that very case, had the government acted sooner to put the defense attorneys on notice that it considered their fee to be subject to forfeiture, they could have withdrawn from the case before spending a huge amount of time defending it. They also could have segregated the fee money pending litigation over its forfeitability. The government won the Moffitt, Zwerling case in the Fourth Circuit and we therefore see no need to codify the result in that case. Because the outcome of these cases may turn to some degree on equitable considerations, it is probably best to leave the matter to the courts.

Section 211
Hearings on Pretrial Restraining Orders; Assets Needed to Pay Attorneys' Fees

I am pleased to see that you are willing to discuss alternatives to this section. We would be happy to do this. I believe that this is one provision where compromise could be reached. But I doubt that it can be done in time for enactment in this session of Congress. I understand the government's objection to allowing the court to look behind the grand jury indictment to review whether there is probable cause to support the underlying criminal charge. That is clearly subject to abuse for discovery purposes. Nonetheless, that is what the Second Circuit sitting *en banc* in United States v. Monsanto, 924 F.2d 1186 (2d Cir.), *cert. denied*, 112 S.Ct. 382 (1991), said was constitutionally required. Only one judge on the Second Circuit dissented. I am not

aware of any authority to the contrary decided after Monsanto. Thus, here is another area where you are asking the defense bar to alter existing law to our detriment. And again, you are asking us to agree to provide less protection than a distinguished court has said is constitutionally required. So this presents considerable difficulties, not the least of which is that this is a pocketbook issue for defense lawyers. If the government expects significant defense bar concessions here, it should be prepared to offer important concessions elsewhere in the bill. So far I do not see any readiness on the part of the government to do so.

Section 213
Appeals in Criminal Forfeiture Cases

This dispute also does not turn on whether Libretti was correctly decided. Libretti says nothing about whether or when the government may appeal an adverse decision regarding criminal forfeiture. I find this proposal to be one of the most offensive ones in the package in that it demonstrates the government's lack of respect for jury verdicts. Again, DOJ apparently believes it ought to win every case it brings and if the jury disagrees, then to hell with them. Even in a civil forfeiture case the Seventh Amendment prevents the government from asking a federal appellate court to reexamine the facts found by the jury. *See* Gasperini v. Center for Humanities, Inc., 116 S.Ct. 2211 (1996). In particular, take a look at Justice Scalia's wonderful dissent in that case, joined by your friends Justice Thomas and Chief Justice Rehnquist. If a federal appellate tribunal may not constitutionally reexamine a civil jury verdict, why in the world should a criminal verdict under Rule 31(e) be subject to review by an appellate court? In the handful of states where juries are entrusted with non-capital sentencing responsibilities, the state may not appeal the jury's sentence. Why is this any different? We have no objection to authorizing government appeals from post-verdict decisions of a district judge denying forfeiture. Such a right of appeal would parallel the government's right to appeal the grant of a Rule 29(c) motion for judgment of acquittal.

Section 301/302
Forfeiture of Proceeds of Federal Crimes/Uniform Definition of Proceeds

As set forth in our June 1996 critique, NACDL will not support any expansion of proceeds forfeiture unless proceeds is defined as profits, not gross receipts. We are not saying that a criminal should be given credit for his overhead. The caselaw distinguishes between overhead expenses and the cost of the goods sold. We are merely allowing the defendant to show what the cost of the goods sold are, whether those goods are widgets or marijuana. The fact that so many cases have interpreted the ambiguous word "proceeds" to mean net profits should suggest to the government that the forfeiture of gross receipts is often too harsh. As we noted in our June 1996 critique, the unfairness of forfeiting gross receipts is greatly aggravated by the substitute asset provisions and the judicially developed concept of joint and several

liability. Each defendant in a criminal venture or conspiracy becomes jointly and severally liable for the entire amount of the gross proceeds received by all participants in the criminal venture -- usually a staggering sum that allows the government to wipe out the assets of every defendant.

The best example of the untoward results that would follow from adopting the government's definition of proceeds arises in cases under 18 U.S.C. §1014. If a person makes a single false statement on a bank loan application the government may forfeit the entire amount of the loan proceeds he obtained from the bank. Everybody knows that it is extremely common for borrowers to make false statements on bank loan applications. These false statements are often immaterial and the bank may not lose a penny. Nonetheless, whenever the government sees fit to do so, it may destroy the borrower's life by prosecuting him for a §1014 offense and forfeiting the entire amount of the bank loan. Usually the bank loan is for the purpose of purchasing a home. If the defendant isn't rich, he loses his home. This is an outrageous provision and Congress ought to amend §§981 and 982 to exclude false bank loan applications from their ambit. I have found that the government uses §1014 forfeitures extremely selectively to "get" defendants or third parties whom it doesn't like for other reasons having nothing to do with the merits of the §1014 case. Most of the time the bank has not lost a dime, but the government seeks a huge forfeiture anyway.

If Congress *does* enact a broad provision authorizing forfeiture of proceeds for all Title 18 felonies, then it should seriously consider restricting the Money Laundering Act to offenses that actually involve money laundering and not include mere receipt and deposit offenses. If there is any justification for the extraordinary breadth of 18 U.S.C. §§1956 and 1957, it lies in the fact that forfeiture cannot be accomplished for the predicate crimes themselves. Once it is possible to forfeit the proceeds of all Title 18 felonies without charging money laundering, §§1956 and 1957 should be trimmed back substantially.

Section 308
Forfeiture for Violations of §6050I

The NACDL is certainly not going to support this provision. As you know, our organization has been fighting for many years to get Congress to modify §6050I so that defense attorneys can comply with their ethical obligations and at the same time comply with the law, which in many states is not possible at present. *See, e.g.*, United States v. Monnat, 853 F.Supp. 1301, 1303 (D. Kan. 1994); Tarlow, "IRS Currency Reporting -- Form 8300 Revisited," The Champion, July 1996, at 42. We have had no success with Congress and we have also had no success with the IRS and the DOJ in trying to get them to treat attorneys differently than car dealers and jewelry merchants. Lenin once said that the capitalists would try to sell the ropes that the Communists would use to hang them. We, as an organization, have no intention of providing you with the ropes to hang us.

The more serious violations of §6050I also involve violations of 18 U.S.C. §§1956 and 1957. Therefore, in the more serious cases, the government may forfeit the unreported cash under §§981 and 982. We see no reason to provide the government with the same harsh remedy for §6050I violations that do not amount to money laundering. It ought to be enough that the merchant or attorney can be convicted of a felony offense merely for failing to file IRS Form 8300. You neglect to mention that merchants and others who fail to file Form 8300 are also subject to heavy civil money penalties by the IRS. Indeed, even if one files the form but refuses to complete certain portions of the form because one desires to protect one's client's confidences, the IRS can and does levy heavy civil penalties against the defense attorney and those penalties must be paid in full before the attorney has the right to challenge the penalty assessment in court. Civil penalties under 26 U.S.C. §6721(e) for intentional non-disclosure of information equal the greater of $25,000 or the amount of the cash received in a transaction, up to $100,000. This is outrageous and should be changed. Very few attorneys have the wherewithal to pay these heavy civil penalties and therefore must immediately knuckle under to the IRS' demands. It is hardly necessary to threaten the attorney with forfeiture of his fee in addition to these onerous civil penalties. In any event, IRS takes the position that non-compliance with §6050I makes the proceeds of the transaction forfeitable under 26 U.S.C. §7203.

Section 403
Minor and Technical Amendments Relating to 1992 Forfeiture Amendments

I opposed §984 because I regarded it as a case of the camel's nose getting under the tent. The government's current proposals prove me right. Having gotten its nose under the tent, the government now wishes to extend the dubious principal of substitute asset forfeiture in civil forfeiture cases across the board. I would never agree to this. I believe substitute asset forfeiture should be restricted, not expanded. I believe there is a good chance that the Supreme Court will someday hold substitute asset forfeiture unconstitutional on Eighth Amendment grounds because there is absolutely no nexus between a substitute asset and the predicate offense. Substitute asset forfeiture seems to run afoul of the Excessive Fines Clause.

As the legislative history of §984 explains, the purpose of the one year limitations period was to provide a factual basis for believing that the substitute funds were also likely to be tainted. The government is ignoring that rationale in arguing for a much longer limitations period. Currently, the forfeiture suit must be *filed* within a year of the offense that is the basis for the forfeiture. The DOJ proposal would merely require a *seizure* within two years of the offense. That change completely undercuts the rationale of §984.

Section 409
Statute of Limitations for Civil Forfeiture

Your "compromise" proposal is another example of the government wanting to have its cake and eat it too. I cannot see why three years is not enough time for the government to commence a forfeiture action after it discovers the involvement of the property in the offense. That change would still give the government the benefit of a much longer limitations period than it presently enjoys in many cases. For example, if the involvement of the property was only discovered 10 years after the offense was committed, the government would have three additional years (a total of 13 years after the offense was committed) in which to bring a forfeiture action. At present, §1621 would begin to run from the date of the discovery of the offense and would bar the forfeiture of the property. Our willingness to let the limitations period run from the time the involvement of the property in the offense is discovered is a very substantial concession to the government.

Section 416
Fugitive Disentitlement

Your reading of the Supreme Court's decision in Degen v. United States, 116 S.Ct. 1777 (1996), is seriously flawed. I do not see one word in the opinion which can be read as inviting Congress to codify the application of the disentitlement doctrine in the civil forfeiture context. True, the court did hold that judges lack the authority to create so sweeping a sanction on their own. However, the court made clear its disapproval of the way the disentitlement doctrine has been applied in civil forfeiture cases and that disapproval does not rest mainly on the judges' lack of authority. It rests rather on considerations of fundamental fairness. The Degen court did not have to decide whether disentitlement of a fugitive forfeiture claimant would violate due process, but it suggested that the due process issue was a serious one. The Seventh Circuit has held that application of the disentitlement doctrine in this context is a due process violation, relying on the same line of old Supreme Court cases discussed in Degen. *See* United States v. $40,877.59 in U.S. Currency, 32 F.3d 1151 (7th Cir. 1994). I find the Seventh Circuit's constitutional analysis compelling and I believe the Supreme Court will decide the issue the same way if Congress is foolish enough to enact DOJ's proposal.

I believe that our exchange of views has been useful and illuminating. I hope that it helps the government to see our point of view more clearly than it did previously. I think we have identified the areas where we can find common ground and those where we cannot. Unfortunately, the latter area is a very broad one. We would be happy to continue these

discussions at your convenience

Sincerely,

David B. Smith

David B. Smith
Co-Chair, NACDL Forfeiture Abuse Task Force,
on behalf of the NACDL Forfeiture Abuse Task Force and NACDL

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Mr. HYDE. Well, Mr. Smith, I want to thank you again. You have been real helpful to us, not just today, but in the past. And I would hope—and again, this may be utopian—that you and the Government would be willing to sit down with us and give us a give-and-take across the table to try and come to closure on some of these things. We want to do something. We want to do the best we can. We don't want to harm criminal asset forfeiture and let drug dealers escape. We know how useful forfeiture laws can be as a source of punishment for the wrongdoers and assistance to law enforcement.

But we're talking about something different. We're talking about due process that has been denied. And there may be things that Mr. Cassella disagrees with, and I understand that, and I understand the awkwardness of Mr. Bailey being here with a pending matter that you're not permitted to talk about. I didn't know about that until this morning, and it was too late to do anything about. But we still wanted to hear what he had to say. But we understand the burden that you're laboring under.

Mr. CASSELLA. I appreciate your understanding of that, Mr. Chairman, because I can't comment on a case with a pending investigation.

Mr. HYDE. I understand, and had I known that, other arrangements would have been made. But, nonetheless, I think we're close on this; I really do. And I don't want the door slammed by the Government, and at the same time I know the defense bar doesn't want to give away the store, and I don't blame you.

Mr. DAVID SMITH. Particularly at the outset of the process.

Mr. HYDE. I understand. I understand. But I don't even like hinting that we'd give away anything at any part of the process. But we want to do the right thing. And we want to find out what the right thing is. And we need to pick your brains and exploit your good will to have this work, and we will.

So, we expect a vote within 5 minutes or so, so we don't have much time, but Mr. Conyers has been most accommodating and I want to yield what time he needs.

Mr. CONYERS. Thank you, Mr. Chairman. I'll yield to anybody here. I just have eight forfeiture cases that I'd like to put before Mr. Cassella for comment: Mr. Bradley, Ms. Blanton, Mr. Moody even—since you talked a little bit about law—*the William Munnerlynn* case, the *Dr. Richard Lowe* case, the McCorkel seizure, the *George Gephard* case, *Gerald Lefcourt's* case, the *Willie Jones* case, the *Harlan Van Der Zee* case, and the *Don Carlson* case.

None of these cases were drug dealers. And that's the chairman's point. This reform isn't about what we do with drug dealers that are poisoning our children. It's not about how well the forfeiture money is being spent. It may not even be abuse of process. Do you know how many hundreds of millions of dollars of police abuse in police violence cases occur every year? These laws weren't ineffective; they were abused and misapplied. Some of what I'm hearing here reminds me of that. But, I'm not sure that's what we have here.

So we need to deal with this. I think we're going to need a meeting. I think much of this can be done in a meeting setting, rather than a formal hearing.

But you're talking to us about drug dealers. We're talking to you about citizens. The guy who buys a plane is not a drug dealer. The family doctor whose cash is seized isn't dealing drugs, and so forth, right down the list.

Now, finally, before I yield to anybody that needs time, we've all been in negotiations, lots of negotiations. We can't come forward and say we're willing to negotiate and then say off the record that these negotiations are not moving. We don't see any need for any change or accepting any of the revisions to this measure. I mean, we're all veterans at negotiation. So the one thing I want to do, and I have urged comity all during this hearing, but the one thing I can't permit myself to do is be deceived that we're working at two levels: one level that we all assert we're negotiating, and then the other level is that "You ain't getting nothing here, buddy."

So we have to—I mean, the state of the hearings seem to be a little touch-and-go now. I have not been a party to any of the negotiations. So everything that's been told to me is hearsay. But negotiations in good faith are negotiations in good faith. So I urge you to keep these comments in mind.

I yield back the balance of my time. I thank you for your staying here so long today. It was inavoidable.

Mr. HYDE. Thank you very much, Mr. Conyers.

Mr. Bryant, another saintly person who's spent a lot of time here.

Mr. BRYANT. Thank you, and I, too, want to add my appreciation to the panel for testifying today. Chief Moody and certainly the folks from Justice and Treasury have given a balance to this panel, but I would also, coming from a prosecutorial background, suggest that there is a great deal of information involved in all of these cases and I get a sense that we haven't heard from all sides of these cases.

My good friend, Bo Edwards, and I had a chance to speak—he had a 7 o'clock flight and had to leave, but, I hate to do this, since he's gone and cannot defend his client, but I didn't realize that this was going to come up. The *Willie Jones* case that Mr. Conyers, the ranking member, has asked about, I do have some information about that case and I don't have about these other cases. Although I was particularly concerned about Mr. *Lefcourt's* case where, after this gentleman was apprised that this could be drug money, could be tainted money, he went ahead and participated in a fourth transaction, which almost to me ratified the first three.

Also, in Bo Edwards' case of the doctor and the banker and the failure to file the CTR's and the whole scheme that was gone through there, just seems to be a lack of clean hands—I know that's an equitable doctrine, but certainly I have some concerns about that case. But the Willie Jones case was in the middle district of Tennessee and I was the U.S. attorney in the Western District and not directly involved in the case, but I do know that that had every piece of evidence as being a drug case, as being a courier. Mr. Jones was caught in the airport in Nashville, as I understand, and the money was found on him. He did not know how

much money he was carrying, which is very unusual for a person carrying money, that you don't know how much money you've got when it, I think, turned out to be $11,000.

And he was carrying that money, he said, to Houston, TX, which we all know is a drug source city, to purchase shrubbery, plants. He had a nursery there in Nashville, and when questioned about where he was going to purchase those plants, he didn't know. He was going to go down there, and get a phone book, and look up somebody in the phone book to buy these plants from. And when asked, "Well, how are you going to transport those plants back?", he said, "Well, I'm going to fly back to Nashville; get my truck; drive to Houston; pick up the plants, and drive back."

And the amazing thing about this, in addition to purchasing his ticket, I believe with cash, was that he was going to do all this negotiation within a period of about an hour, as I recall. His turnaround flight back after landing in Houston was within an hour, as I recall, and certainly—people say, "Well, they didn't find any drugs on him," and of course, you know, couriers, the mules, you don't find both at the same time. You either have the drugs or you have the money. And I told Bo, if I ever get in trouble, I'm going to hire him as my lawyer, because I still can't understand how he won that case later on an appeal. I lost track of the case, but I do know those as the underlying facts and——

Mr. HYDE. Mr. Bryant, would you yield to me for just a question?

Mr. BRYANT. Yes, sir.

Mr. HYDE. We had Mr. Jones testify here a year ago, and my recollection of that case is that he wasn't charged with anything, but they kept his money. I have a problem with that arrangement where they fine you by confiscating thousands of dollars, and you walk away. That might happen in Guinea Bissau or somewhere, but in America—doesn't that trouble you?

Mr. BRYANT. It does, but that does happen. I think Mr. Cassella has indicated now that maybe 80 percent——

Mr. CASSELLA. Eighty percent of cases involve an arrest.

Mr. BRYANT. Yes, involve an arrest. So while I don't argue with the chairman and the bill that——

Mr. HYDE. Well, I'm troubled by the fact that they grabbed Mr. Jones at the airport because he fit a profile—God help you if you fit a profile—and they confiscated his money. And they let him go, and that's the end of story except he had a hell of fight to get his money back. Doesn't that look topsy-turvy to you? Shouldn't they convict you of something first—and then have a fine levied by a court, and then you pay it? But to confiscate your money, and let you go and have you go scratch for your own money, I have a problem with that.

Mr. BRYANT. Well, I hesitate to reclaim my time from the chairman——

Mr. HYDE. Oh, no, no; please forgive me.

Mr. BRYANT. I think our prosecutors have to enforce the law, and the law does allow a civil forfeiture independent of the criminal forfeiture, and if that is truly our problem, then perhaps we ought to consider doing away completely with the civil forfeiture aspects, and that way we would mandate our prosecutors to follow the criminal procedure and the prosecution. I don't advocate that, but

I would just add as a note that, as I rushed out of Washington about 2 months ago, I apparently was thought to be a courier, because they were questioning me about where I was going—a southern city, in Memphis; I had only one bag; I had bought my ticket that day, and I showed them my congressional ID, and I hoped that would stop them from searching me; it did not. What saved me in the end was the fact that I was a frequent flyer; I had frequent flyer mileage and——

Mr. HYDE. But you look so unsuspicious that it's suspicious. [Laughter.]

Mr. BRYANT. I apparently did fit the courier profile that day, but, with that, I will yield back my time.

Mr. HYDE. Thank you very much.

Mr. Scott, the gentleman from Virginia.

Mr. SCOTT. Thank you, Mr. Chairman. I just had one question for Mr. Cassella.

Did I understand you to say that 20 percent of the people from whom you get property there's no arrest?

Mr. CASSELLA. Twenty percent of the forfeitures do not involve a parallel arrest or prosecution. Most of those are cases where we find abandoned property; we might find cash in a locker in a bus station or a train station, and we don't know who to prosecute; there's no one connected with the property—maybe in an automobile; maybe we seize a container coming in at a port of entry, and we find drugs and money or other property. In those cases there is no one to prosecute. We haven't identified a particular defendant; nevertheless, the property is seized. If anyone comes forward and files a claim, they may of course, and in the overwhelming number of cases no one would file a claim in such a case, because who wants to associate himself with that property and then expose himself to prosecution?

Mr. SCOTT. In what portion of the cases do you return the property?

Mr. CASSELLA. Do you mean after an adverse judgment by a court? I know that in 1995, for example, of the 33,000 seizures by the Justice Department and however many actually resulted in a case, only 48 cases were adverse judgments against the Government, so a minuscule percentage. We can never guarantee we're going to win every case, but the number of cases where we have adverse judgments is very, very small.

Mr. SCOTT. Do you return property other than because of an adverse judgment?

Mr. CASSELLA. Sure. Settlements, sometimes we will make a seizure; the claimant will come in and explain that he's an innocent owner. If the explanation is reasonable, the property goes right back. I mean, we only——

Mr. SCOTT. How many are those?

Mr. CASSELLA. I don't have any numbers on those.

Mr. SCOTT. Ms. Blanton, do you have those comparable numbers for the customs agencies? How many of the seized assets are returned?

Ms. BLANTON. No, I don't have any exact numbers. I'm sure that I could probably get them if you would like?

Mr. SCOTT. Do you have any general numbers? I mean, do you return a lot of things?

Ms. BLANTON. When you're talking about seizures made at the border, yes, a large percentage of those seizures are remitted to the property owner in lieu of some fine or penalty.

Mr. SCOTT. And what process do they have to go through to get the property back?

Ms. BLANTON. I think I'd like Mr. Bradley, if he could, to help me out there.

Mr. BRADLEY. If I could, understanding particularly with the Customs Service there's a different class of seizure, many of those are public welfare or embargo concerns, and they enforce maybe 1,000 laws at the border for other agencies. Ninety percent of those seizures, I'm informed by Customs counsel, 90 percent of the property that's seized in those cases is ultimately returned to the violator in one form or another.

Mr. SCOTT. To the violator? You mean the alleged violator?

Mr. BRADLEY. To the alleged—well, there still may be a violation. In fact, there may be a violation in many cases that there may be a penalty imposed. There may be some corrective action taken; the duty—the correct duty may be levied against the property; the property is ultimately returned, so the person still may be a violator, but the property is still returned.

Mr. SCOTT. And what do the people have to do to get the property back?

Mr. BRADLEY. Well, ordinarily the Customs—the process under title 19 in the Customs laws is primarily administrative, and more often than not the Customs Service will accept a handwritten letter asserting that you are the owner of the property and you have some interest, and they will proceed administratively to adjudicate those interests in the types of cases that they seize at the border.

Mr. SCOTT. But of the 90 percent that you eventually return, how long are the people without their property?

Mr. BRADLEY. Well, that could vary depending on the type of property. If it's embargoed goods going to a country where they may not be allowed to be exported, they may never get them back, but certainly after that, if they can show that those goods are not destined for that country, they will get the goods back, but that could take longer than detaining trademark violation goods or something like that. So it will vary depending on the types of goods seized and the law enforced.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. HYDE. Thank you very much. I would like to take great pleasure in announcing that the vote was done by a voice vote, so we are saved from that hasty journey. The House has adjourned, and so with that information, I am sure expedition will be the rule of the day. Mr. Barr is recognized.

Mr. BARR. Thank you, Mr. Chairman. We have extensive testimony and written materials from last year, and now we have some very, very good material that we've gained today, both through oral testimony as well as the written record here, and I intend to go through that, particularly Chief Moody. If there are any things in particular—because I know you have a lot of experience out there in the real world working these cases—if I could ask you to take,

you and your colleagues, take another very careful look at this legislation—and I know that you've looked carefully at it already and at the legislation from last year, and let me know very frankly if there are—if you could sort of prioritize to some extent, if there are some things in this legislation that would create more serious roadblocks than others.

Because, again, I certainly speak for myself, but I think I share the chairman's view also and many of the other cosponsors of this legislation. We all have a very clear appreciation for how important asset forfeiture is as a tool for law enforcement and for prosecutors at both the State level and the Federal level, and we don't want to unduly hamper the use of the tool, but by the same token there are some changes, some that the Department has already seen fit to implement, and we appreciate that. We appreciate the Department's indication, again, here today, that they're willing to work with us to continue to try and address these problems, but we do have a concern that there are—that there do remain some areas as reflected in this legislation that are worthy of our attention: the burdens and the innocent owner defense, and so forth.

But I would very much appreciate all of the witnesses, but particularly Chief Moody, since we're in the same jurisdiction down there, if there are some specific cases that you can point out to us where there would be very serious problems, and it would hamper your ability to legitimately conduct bona fide asset forfeiture actions, so that we could take those into account and any final adjustments that might need to be made to this, I would very much appreciate it.

And, again, thank all of the members of the panel and Mr. Chairman for bringing this important legislation forward.

Mr. HYDE. Thank you very much, Congressman Barr.

I would ask Mr. Cassella if the Justice Department could provide for the record a document describing the percentage of civil forfeiture cases that are accompanied by criminal prosecution.

Mr. CASSELLA. Eighty percent, Mr. Chairman.

Mr. HYDE. Eighty percent are criminally-prosecuted, and 20 percent are not?

Mr. CASSELLA. Oh, no, I'm sorry. I thought you meant in what percentage of civil cases is there a parallel criminal prosecution; that's 80 percent.

Mr. HYDE. Well, we have it for the record; we don't need it in writing.

All right, well, again, thank you so much for your testimony. Mr. Cassella.

Mr. CASSELLA. Mr. Chairman, if I could, I just wanted to make a comment in response to what Congressman Conyers said and, Mr. Chairman, what you've said about the need for a compromise here. We have been working with your staff, and we very much want to produce a bill that we all can agree on. We had a starting point, and you had a starting point, and we have worked together these last few weeks. We think we've put together a bill which addresses your concerns and addresses our concerns and that we can work together to advance. I hope that that's still on track. It is our view that when we met with your staff the last time—it was last week—that the draft we had was something that we were within

a sentence or two of being able to nail down and say, "This is something that we all can go forward and support."

We had to address—what remained were such issues as Ms. Blanton's concern with the application of these statutes to the Customs laws. We agree with them that these things ought not to apply in the same way to the Customs laws, for the reasons that you heard, but as to the due process concerns and also as to the things that law enforcement needs, we think we're in this compromise, and we've just about got it nailed down.

Mr. HYDE. Well, the civil investigative demands, I had hoped that issue was put to rest.

Mr. CASSELLA. That's not in this package, Mr. Chairman. We withdrew that the last time we met with your staff.

Mr. HYDE. I understood that. I just thought I heard—my memory could be faulty—that it was raised today as still viable, and I thought that's something we've put to rest. Good. Well, we really want to work together with you. We want your support, and we want your support to persist over in the other body as well as here. We want a bill the President will sign, but we want a bill that's worthwhile, that accomplishes something, and that's where Mr. Smith comes in. It won't satisfy Mr. Smith's constituency; you won't be happy with it; you'd just as soon leave it alone and toughen up criminal; I understand that, but we have some changes that I want to make to provide due process——

Mr. DELAHUNT. Mr. Chairman.

Mr. HYDE [continuing]. And if we can do that, that's great, and we can cooperate on other things, too.

Mr. Delahunt.

Mr. DELAHUNT. Yes. I just want to pick up on comments that you and the ranking member made. I think everybody agrees that reform is needed and that it has to occur, and I understand that Mr. Cassella has been dealing with your staff. I think it's important that this committee put out a bill that everybody agrees with, including the constituencies represented by Mr. Smith and other panelists who have testified here today. I think it can be done here. I don't think it should be deferred to a later stage in the process. I would hope that we could secure language that everybody could agree with: the administration, representatives from NACDL, representatives from victims' groups, and representatives of the National District Attorneys' Association, so that we don't continue negotiations after it leaves this particular committee, given the time and the effort that the chairman and other sponsors have spent on this. I'd like to see that happen.

Mr. Smith.

Mr. DAVID SMITH. If I might respond to that, Mr. Chairman—one of the problems, sir, is that the Government is telling us over and over again that any deal they cut here is a deal for this chamber only and will not bind them, and they will not give us any consideration whatsoever in the Senate, where they think they've got the deck stacked in their favor.

Mr. DELAHUNT. Well, then let me just—is that a true representation of the administration's position, Mr. Cassella?

Mr. CASSELLA. No, not exactly, Congressman. Our position is that we will work out a compromise in this chamber in good faith.

We've done—come a long way meeting with Mr. Smith and his colleagues as well as the committee staff, but the Senate is another body, and the administration's view is that it doesn't make deals in the House that bind the Senate; that is what I am told has been always the administration's view. A different dynamic may be at work; Members there may have different views. Neither party will be bound by whatever happens in the House. When we get to the Senate, we'll see what the Senators want to do, but as to this body, if we can work out a deal that we can support, we will support it.

Mr. DELAHUNT. Can I—let me ask a question of Mr. Cassella. What is the bottom line in terms of the moneys that are—the dollars that are realized, either through the sale of assets or through the sale of cash?

Mr. CASSELLA. How many dollars are deposited into the assets forfeiture fund?

Mr. DELAHUNT. Right.

Mr. CASSELLA. Two years ago it was $549 million per year. Then it dropped down to $480 million, and last year it was $338 million, a 38-percent decrease.

Mr. DELAHUNT. Can you tell me how those moneys are disbursed?

Mr. CASSELLA. About half of it goes to the State and local law enforcement agencies through the equitable sharing program, and the rest of it, through an appropriation that Congress gives the Attorney General, is used to finance the Asset Forfeiture Program. It pays for the storage of the property that is being seized and stored pending trial; it pays for contractors who process the claims that are filed. There's a process by which remission petitions can be filed, so that persons who don't have a valid claim at law, nevertheless, can petition the Attorney General for mitigation of the forfeiture, and there's some overhead cost in administering that program. And then, of course, we pay for the training of the agents and so forth, out of the appropriation. So it's split in that way.

Mr. DELAHUNT. I thought I heard earlier testimony that some funding had been available for victim programs and for——

Mr. CASSELLA. Of the money that's distributed to——

Mr. DELAHUNT. Is that what you—is that the equitable sharing program that you referred to?

Mr. CASSELLA. Of the money that goes through equitable sharing to the State and local police, 15 percent may be passed through by the police to other community-based organizations that might make use of the money. With respect to property that we seize in kind, that is real property in a rural area that might be turned into a rural retreat for a drug treatment program through the Weed and Seed Program; we can turn that property over to a community-based organization.

Mr. DELAHUNT. Mr. Chairman, I just conclude by making a statement to you, given the representation made by the Department of Justice. You might seriously want to consider communicating with that other body, either through members of this committee or members of the staff, to try to bring finally to closure what ought to have occurred, I presume, years ago.

Mr. HYDE. You mean work with the Senate? Is that what you're suggesting? [Laughter.]

Go over and talk to them and discuss this issue with them? I think that's a brilliant insight, and I intend to follow your suggestion.

Mr. DELAHUNT. Thank you, Mr. Chairman.

Mr. HYDE. But I will say this to Mr. Cassella, two things: first of all, you're very honest, God love you for that. No. 2, the only purpose of negotiating with you is to get your support, to get the support of your agency, so that they will back whatever we agree on over in the other body. If your support ends at the ocean shore there, and it's a new sheet of paper over in the other body, we're kind of spinning our wheels. I mean, your support is kind of academic. It certainly isn't political, and I would rather get a little more substance from you. I'd like to have a product that you can say, "We can live with this," and start out with it over in the other Chamber at least and not repudiate or reject the work that we're doing. Otherwise, we are spinning our wheels. So, anyway, you were candid with us and we want to negotiate; we want your ideas. There are many reasons, things we don't see that you see in the bill; you have already. We certainly want Mr. Smith's very helpful assistance, and we'll come out with the best bill we can, and then we'll try to sell it to the Senate, and we would like to have you helping us, not obstructing us. Very good.

Well, thank you. This has been a great day, exhausting, but we've all learned something. Thank you. The committee stands adjourned.

[Whereupon, at 6:52 p.m., the committee adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING

PREPARED STATEMENT OF NADINE STROSSEN, PRESIDENT, AMERICAN CIVIL LIBERTIES UNION

I. INTRODUCTION

Mr. Chairman and Members of the Judiciary Committee, on behalf of the American Civil Liberties Union, I am pleased to here to day to support the bi-partisan sponsored Asset Forfeiture Reform Act (hereinafter "the Act"). Also, thank you for inviting me to share our comments with you regarding civil asset forfeiture laws and their need for reform.

The ACLU believes that all civil forfeiture schemes inherently violate fundamental constitutional rights, including the right not to be deprived of property without due process of law and the right to be free from punishment that is disproportionate to the offense. While we believe the practice of civil forfeiture should be abandoned, we support meaningful reform efforts which would mitigate its harshness and incorporate equitable provisions and principles of due process. The Act addresses many of our concerns and takes a significant step forward that is long overdue. This bill would reform forfeiture proceedings to provide property owners with some significant procedural protections. It would also make it more difficult for the government to confiscate the property of innocent owners—people who were not aware of, or did not consent to, any illicit activity in connection with their property. In addition, it provides indigent property owners with the opportunity to have counsel appointed to represent them during the forfeiture proceedings. These reforms are critically needed because innocent property owners, or those who have committed only minor infractions are now subject to draconian punishments and property deprivations with rather limited constitutional or procedural protections. Because of these and other important procedural protections it provides, the ACLU endorses this legislation and urges Congress to swiftly pass the Civil Asset Forfeiture Reform Act.

I would like to personally commend Chairman Hyde for his leadership and long standing commitment to reforming civil asset forfeiture in our nation. Mr. Chairman, you began this legislative journey, with the support of the American Civil Liberties Union and the National Association of Criminal Defense Lawyers, back in 1993, with the introduction of the H.R. 2417, the "Asset Forfeiture Reform Act of 1993." You also made a powerful case for civil asset forfeiture reform in your book [1] in which you documented and exposed many of the abuses inherent to the asset forfeiture system. Last year, you reintroduced your civil asset forfeiture reform legislation, however, there was insufficient time left in the 104th Congress to fully consider the bill.[2] It is now time to complete the good work you started by passing your legislation early in the 105th Congress.

The current legislation is a hallmark of your legislative leadership. You have drafted a bill that has gained wide bi-partisan support, as well as endorsements from across the political spectrum. From the ACLU to the Institute for Justice to the CATO Institute, you have forged a diverse coalition of support from organizations that traditionally make for "strange bedfellows." All of these organizations are united with one common goal—reforming the terribly unjust federal civil asset forfeiture laws.

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[1] *See* Representative Henry J. Hyde, *Forfeiting Your Property Rights: Is Your Property Safe From Seizure?* (1995).

[2] H.R. 1916 (104th Congress, Second Session).

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II. PROBLEMS WITH CIVIL ASSET FORFEITURE

The roots of civil forfeiture can be traced back to medieval England where kings used the procedure to seize the property of disloyal nobles. The American model for civil forfeiture dates back to the eighteenth-century where forfeiture laws were used to combat piracy and customs violations. Under this system, courts permitted the government seize the offending ship as a civil remedy, rather than requiring criminal prosecution of the owners. These owners were usually not American and difficult to locate for criminal prosecution. Thus, permitting the government to proceed against the vessel under a civil forfeiture action, the government could punish an owner for a crime with minimal evidence and without any of the constitutional protections afforded a criminal defendant.

The modem era of civil asset forfeiture flows from these same archaic legal concepts. It is based on the legal fiction that inanimate objects may be found guilty and condemned. Thereby, the object or property is subject to seizure and forfeiture to the government. Pursuant to this construct, the guilt or innocence of the owner is irrelevant, because the forfeiture action is against the "object" not the "owner." In fact, no criminal arrest or conviction is even necessary to subject property to forfeiture. Government authorities must simply satisfy a requirement of probable cause that the property was used in an illicit activity or was purchased with funds from illicit activity in order to subject the property to forfeiture. As a result, civil forfeiture constitutes a dangerous, collateral weapon for law enforcement agencies where criminal convictions are more difficult to come by.

The profound inequity of civil asset forfeiture system is exemplified by the distinction between criminal and civil forfeiture. Criminal forfeiture is imposed in a criminal proceeding directed against an *individual* for his or her alleged misconduct. While a defendant in a criminal forfeiture prosecution is entitled to all the constitutional and procedural protections associated with the criminal process, a person facing civil forfeiture, on the other hand, receives none of the constitutional safeguards associated with the doctrines of due process and criminal procedure.

The irony and unfairness created under this system is worth illustrating. A major drug trafficker prosecuted under criminal forfeiture statutes is correctly afforded all of the due process and constitutional protections governing the forfeiture of their property. Whereas, an innocent 72 year old grandmother, whose grandson, without her knowledge, allegedly makes a drug sale from her front porch is subject to losing her home and possessions without the benefit of indictment, hearing, trial, or any other constitutional or procedural protection—not even the right to counsel.[3]

Not surprisingly, civil forfeiture has been especially attractive to law enforcement authorities because success demands very little in the way of proof or connection to actual wrong. Civil asset forfeiture originally was championed by law enforcement officials as a powerful weapon to fight the "war on drugs." Indeed, it was thought of as some form of poetic justice: seizing the assets of major drug traffickers and using these assets to fund legitimate law enforcement initiatives. However, as a result of the ease with which law enforcement authorities are able to secure forfeitures, the use and abuse of forfeiture has skyrocketed. In some localities, it is being used against everything from drugs to drunk driving to prostitution. Unfortunately, in their zeal, law enforcement agencies have turned civil forfeiture into a nightmare come true for thousands of ordinary people who have minor brushes with the law or who are completely innocent of wrongdoing. Tragically, scores of innocent citizens and the Constitution have become casualties in this so-called "war."

While civil forfeiture proceedings have been held not to require the fundamental protections essential to a criminal proceeding, they are nevertheless penal. Indeed, the Supreme Court has recognized that in certain circumstances civil forfeiture may be punitive in nature and thus regulated by the Excessive Fines Clause of the Eighth Amendment.[4] The legal fiction that surrounds civil asset forfeiture provides no comfort for those individuals who find themselves exposed to the harsh penalties associated with the criminal system without any of the fundamental constitutional and procedural protections inherent to the criminal justice system.

III. ABUSES IN CIVIL ASSET FORFEITURE: THE VICTIMS

The limited constitutional protections for individuals subjected to civil forfeiture laws coupled with unbridled, permissive law enforcement authority, creates a civil

[3] Illustration is based upon a real case documented in the statement of James Hoyle, submitted to the House Committee on Government Operations, Legislation and National Security Subcommittee, Re: The Federal Asset Forfeiture Program, September 30, 1992.

[4] *See, e.g., Austin* v. *United States*, 113 S. Ct. 2801 (1993); *Alexander* v. *United States*, 113 S. Ct. 2766 (1993).

forfeiture system that is ripe for abuse. Particularly appalling is the list of cases documenting the disproportionate victimization of minorities through the use of racially based criteria to unlawfully target and stop African-American and Hispanic travelers. Willie Jones, an African-American landscaper, had the misfortune to experience this humiliation.[5] He had $9600 in cash seized from him at the Nashville airport simply because he fit a so called "drug courier profile"—that is, an African-American paying for a round-trip airline ticket with cash. He actually planned to use the money to buy landscape materials. Unfortunately, Mr. Jones' plight is not that unusual. Several investigative media reports have chronicled and exposed how civil forfeiture is particularly harsh on minorities as a result of the extensive use of racially based profiles to determine law enforcement targets.[6]

Further abuse is found in what is sometimes described as law enforcement extortion. This involves the practice of offering "out of court" cash settlements to otherwise innocent or minimally culpable individuals whose property was seized in exchange for a return of their property. Debra V. Hill's case illustrates this practice in action. She and her family were guests in a house that police raided. During the raid, the police discovered a small amount of methamphetamine in a box of clothing that did not belong to her. The police confiscated the $550 in her possession. She was so desperate for the cash that she agreed to forfeit $250 to the prosecutor in return for the remaining $300. When the charges against her were dropped, she did not receive the balance of her money.[7] And there is the case of Kevin Perry, a gravel pit laborer from Ossipee, New Hampshire. After he and his wife pleaded guilty to the misdemeanor of growing four marijuana plants, the United States sought to forfeit their mobile home, worth $22,000. Following a fifteen-month battle to avoid homelessness, the government finally agreed to return the home for $2500. In order to pay the $2500, Mr. Perry had to take out a loan to be repaid at a rate of $155.63 a month.[8]

Finally, the lucrative business of asset forfeiture has created a strong temptation for law enforcement officials to pursue assets at the expense of pursuing convictions. The extensive use of civil forfeiture by federal and state law enforcement authorities has led to the confiscation of billions of dollars in drug assets. All of the money and property seized by state and federal officials is deposited back into the budgets of the seizing agencies. What originally was seen as a means of forcing criminals to pay for their own apprehension, has become an incentive for local, state and federal officials to seize property to auction justice to the highest bidder. As a result, major drug dealers are allowed to barter their way out of lengthy prison terms by prosecutors who have become preoccupied with huge sums of money to be obtained from drug forfeiture assets.

Conversely, low level drug users, with no assets or information to swap, are exposed to the full wrath of the harsh drug laws. specifically designed over the past decade for the worst drug offenders. Last fall, two reporters from the *Boston Globe* uncovered the distressing truth about this practice in action in Massachusetts. They compared the distinctly different experiences of Rachel Acevedo and Stephen Fenderson. Rachel Acevedo, a 25-year-old mother of three, is currently serving a ten year mandatory sentence, without the possibility of parole. She was prosecuted along with her former boyfriend for selling four ounces of cocaine to an undercover drug officer. The boyfriend fled before trial, leaving Ms. Acevedo the lone target for the prosecutors. Stephen Fenderson, on the other hand, had his home raided by police, where they found 23 bags of cocaine, a loaded illegal shotgun, ammunition, and other drugs hidden throughout the house. All tolled, these offenses would normally subject him to a mandatory sentence of fifteen years in prison. This did not occur. Mr. Fenderson forfeited $425,000 in drug money, and is a free man today after serving only 2½ years.[9] It seems that crime does pay if you are able to ante up to law enforcement.

IV. REFORMING FEDERAL CIVIL ASSET FORFEITURE LAWS

To be sure, the abuses discussed above clearly make the case for the need to reform the civil asset forfeiture laws. The current law of civil forfeiture borders on the

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[5] Andrew Schneider & Mary P. Flaherty, *Drug Agents Are More Likely to Stop Minorities.* Pitt. Press. Aug. 12., 1991, at A1.

[6] *See e.g.,* Steve Berry & Jeff Brazil. *Tainted Cash or Easy Money?,* Orlando Sentinel, June 14. 1992, at A–1; *supra* note 3; see also *60 Minutes: You're Under Arrest* (CBS television broadcast. Apr. 5, 1992).

[7] *Oregonian,* June 20, 1990, p. D4.

[8] *USA Today,* May 18, 1992, pp. 1A, 7A.

[9] Dick Lehr & Bruce Butterfield, *Small-Timers Get Hard Time,* The Boston Globe, Metro p.1 (September 24, 1995).

Medieval: it allows law enforcement authorities full discretion to confiscate any and all cash and property based upon mere suspicion of wrong doing; owners of such money and property are not entitled to appointed legal counsel; unjust procedural barriers such as unreasonable short time limits to contest a seizure and the requirement that a property owner post a bond in order to contest the seizure often times bar recovery; and the uncharged and completely innocent are presumed guilty in court because the burden of proof is on the individual whose property is being seized. The Act represents a sound first step in the effort to reform the civil asset forfeiture laws. While the Act contains several significant improvements, we believe that the following provisions are particularly essential to any meaningful forfeiture reform legislation.

Possibly the most important provision in the Act, places the burden of proof on the government to prove that property it has seized was subject to forfeiture by clear and convincing evidence.[10] Under current law, the government is simply required to meet its low standard of proof—probable cause that the property is subject to forfeiture—then the burden shifts to the property owner to prove either the "properties innocence," or that the owner did not know and did not consent to the property's illegal use.[11] The government's probable cause burden, in reality, means only slightly more than a hunch and far less than what is necessary to prove guilt in a criminal court. It is commonplace to have a seizure and forfeiture of money and property based solely on hearsay "evidence" that is deemed too unreliable to be admissible in most other judicial proceedings. These burdens, easy on the government, hard on the property owner, often result in the seizure of property owned by one against whom the government cannot support a criminal charge.[12] An owner can only overcome this presumption by proving that he had no knowledge of the illicit activity or did not consent to that activity. That is, the owner is required to prove a negative. The Act corrects this unfairness by simply restoring fundamental due process for property owners by changing these unfair evidentiary rules.

The Act also offers a clarification of the "innocent owner" defense. This provision specifically provides for the protection of owners from civil forfeiture who neither knew of the criminal misuse of their property nor consented to the illegal activity. Although under this codification, an innocent owner would still have the burden of proving his ignorance or nonconsent, the ACLU believes this provision would provide additional protection for innocent property owners and insure uniform enforcement of the forfeiture laws.[13]

The appointment of legal counsel for indigent property owners is provided for under the Act. Indigent property owners are given the opportunity to obtain court-appointed counsel to assist them throughout the forfeiture process. Since the civil forfeiture system can be just as punitive as the criminal system, it is essential that those citizens exposed to either system receive legal counsel to protect their rights and liberties. The ACLU believes that this provision is absolutely essential in order to insure that individuals can avail themselves of the other reforms contained in the Act that are designed to protect their property rights and liberties. Indeed, without the right to counsel, the other reforms in the Act may be rendered meaningless for many property owners. In many respects, this provision alone breathes life into the Act.

The ACLU also strongly supports the provisions in Act that improve the unfair procedural obstacles that make it difficult to contest forfeitures. First of all, the Act extends the deadline to contest a government forfeiture from as little as ten days to thirty days. Although we would prefer a longer period of time,[14] this provision improves the extremely short time period currently in effect; thus, reducing the chances that a claimant will miss the deadline for filing a claim to recover his prop-

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[10] This standard has been adopted in New York and Florida. *See,* N.Y. Civ. Prac. L & R Section 1311(3) (McKinney, Supp. 1994): *Department of Law Enforcement* v. *Real Property,* 588 So.2d 957, 967 (Fl. 1991).

[11] This is commonly referred to the "innocent owner" defense which requires the owner of seized property to carry the burden of proving that she did not know and did not consent to the property's illegal use. 21 U.S.C. Sec. 881(a).

[12] Eighty percent of the people who lost property to the Federal government were never charged with a crime. "Government Seizure Victimize Innocent," *Pittsburgh Press.* August 11, 1991.

[13] The Supreme Court's recent confounding decision in *Bennis* v. *Michigan,* 116 S. Ct. 994 (1996) emphasized the importance of the innocent owner defense. Despite acknowledging, that Ms. Bennis lacked any knowledge that her husband had used their jointly owned automobile to engage in criminal sexual indiscretions with a prostitute. the Court permitted the forfeiture of the automobile.

[14] Chairman Hyde's previous Asset Forfeiture Reform Act H.R. 2417, provided for a sixty day time period for filing a claim. This would be a preferable time period.

erty. In addition, the Act also eliminates the need for an owner to pay the cost of a bond in order to file a claim. The government has strictly enforced these requirements, and has permanently deprived owners of their property for any slight noncompliance with them. It also would allow for the release of confiscated property if the seizure causes a substantial hardship on the owner and a right to sue if confiscated property is damaged through governmental negligence.

V. THE ACLU SUPPORTS ADDITIONAL REFORM MEASURES

While the ACLU supports the Act and urge its adoption, we believe additional provisions should be added to the bill that would further curtail abuses and protect the civil liberties of citizens. Any future forfeiture reform initiatives should include the following measures:

A person should be convicted criminally before the government may seize the property involved.

The government should be required to conduct an adversarial preliminary hearing prior to seizure.

The standard of proof to support a property forfeiture should be beyond a reasonable doubt.

The property seized should be limited to the items used to facilitate the criminal enterprise.

Civil asset forfeiture proceeds should be turned over to the federal government's general fund to allow for the equitable distribution of the proceeds among federal governmental agencies.

VI. CONCLUSION

Civil forfeiture as a whole stands outside the doctrines of due process and criminal procedure. Despite the widespread use and well documented misuse of civil forfeiture, it is an arcane legal doctrine which exists merely because of its historical foundation and its fiscal advantage to law enforcement agencies. While promoted as a civil cause of action, its ramifications are more akin to the harsh punitive aspects associated with the criminal system—without any of the important fundamental constitutional due process protections for civil rights and liberties. This leaves many citizens unprotected from law enforcement's overzealous and unencumbered use of these laws. The time is long overdue to reform the unfair civil asset forfeiture system.

As stated earlier, while the ACLU believes that all civil forfeiture schemes should be abandoned, we do endorse the bi-partisan supported Civil Asset Forfeiture Reform Act. It mitigates the harshness of civil asset forfeiture by establishing important equitable provisions and principles of due process for individual property owners who are faced with a prospective forfeiture. Accordingly, we urge Congress to promptly pass the Act. We also hope that Congress will eventually pass further measures that will completely overhaul civil asset forfeiture programs. Only such a complete overhaul will fully restore fundamental rights for all Americans.

We thank you, Chairman Hyde, for the opportunity to present our comments to the Judiciary Committee today.

PREPARED STATEMENT OF ROGER PILON, PH.D., J.D., SENIOR FELLOW AND DIRECTOR, CENTER FOR CONSTITUTIONAL STUDIES, CATO INSTITUTE

Mr. Chairman, distinguished members of the committee, my name is Roger Pilon, I am a senior fellow at the Cato Institute and the director of Cato's Center for Constitutional Studies.

I want to thank you, Mr. Chairman, for inviting me to testify before the committee on H.R. 1835,[1] the Civil Asset Forfeiture Reform Act of 1997. Your recent book on forfeiture, which I am pleased to have edited and the Cato Institute is proud to have published,[2] is a refreshing call for reform. You are to be commended for having written it, for having introduced this bill, and, more generally, for having taken up the issue of forfeiture reform when so many in Congress have ignored it.

That the state of our forfeiture law today is a disgrace is hardly in question. A body of "law" that enables law enforcement personnel to stop motorists and seize their cash on the spot, to seize and sometimes destroy boats, cars, homes, airplanes, and businesses in often fruitless drug searches, and even to kill and maim in the

[1] The bill is to be assigned a new number late in the day on June 10, 1997.

[2] Henry J. Hyde, *Forfeiting Our Property Rights: Is Your Property Safe From Seizure?* (Cato Institute, 1995).

course of seizure operations is out of control.[3] Even lawyers who come upon this area of the law for the first time are taken aback by the injustice and utter irrationality of it all.

About the only people who defend forfeiture law today are those in law enforcement who benefit from it, either as a "tool of their trade" or, more directly, by keeping the goods they seize—a conflict of interest so stark that it takes us to another age. In fact, that is just the problem with modern forfeiture law: in practice as well as in theory, its roots are in notions that have no place whatever in our legal system, animistic and authoritarian notions that countless people have died over the ages to bury and replace with the rule of law.

The very styling of the relatively few cases that make it to court tells the story: *United States* v. *$405,089.23 U.S. Currency;*[4] *United States* v. *92 Buena Vista Avenue;*[5] *United States* v. *One Mercedes 560 SEL.*[6] 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 by sacrificed in atonement or forfeited to the Crown, modern forfeiture law, filtered through early American admiralty and customs law, has simply carried forward, uncritically, the practice of charging things.

Thus, officials today can seize a person's property, real or chattel, without notice or hearing, upon an ex parte showing of mere probable cause to believe that the property has somehow been "involved" in a crime. Neither the owner nor anyone else need be charged with a crime, for the action, again, is against the thing. The allegation of "involvement" may range from a belief that the property is contraband to a belief that it represents the proceeds of crime (even if the property is in the hands of someone not suspected of criminal activity), that it is an instrumentality of crime, or that it somehow "facilitates" crime. And the probable cause showing may be based on nothing more than hearsay, innuendo, or even the paid, self-serving testimony of a party with interests adverse to the property owner.

Once the property is seized, the burden is upon any owner who wants to get his property back to prove its "innocence"—not by a probable-cause but by a preponderance-of-the-evidence standard. Yet that is possible only where innocent-owner defenses have been enacted or allowed.[7] In defending the innocence of his accused property, the owner must of course prove a negative. Moreover, he must do that against the overwhelming resources of the government. And if he has been involved in activity that in any way might lead 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 by Congress 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.

Because others will testify before the committee about their tragic experiences under this law—many examples of which you set out in your book, Mr. Chairman—let me not give further examples here but instead focus on two basic questions: (1) What is the legitimate function and scope of forfeiture law? and (2) Does this bill comport with such law?

As suggested above, I am of the view that our civil forfeiture law is fundamentally unsound and that we need for the most part not merely to reform but to abandon it, relegating it to the dustbin of history from which it came. Because I have dis-

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[3] For those and many more examples, see Chairman Hyde's book.

[4] 516 U.S. ———, 116 S. Ct. 2135 (1996).

[5] 507 U.S. 111; 113 S. Ct. 1126 (1993).

[6] 919 F.2d 327 (5th Cir. 1990).

[7] Thus, in the *Bennis* case, which the Supreme Court decided in its last term, Mrs. Bennis lost her half-interest in the family car when Michigan officials seized it following her husband's use of the car for an assignation with a prostitute—there being no innocent-owner defense available under the state statute. Wronged by her husband, Mrs. Bennis was wronged again by the Michigan law. *Bennis* v. *Michigan,* 116 S. Ct. 994 (1996).

cussed the basis for that conclusion in some detail in an essay that I have attached to this statement,[8] let me simply summarize my arguments here.

Only people commit crimes. The idea that property can be "guilty"—an idea that flows from the so-called personification doctrine, which is the basis of our civil forfeiture law—is simply too fantastic to be taken seriously. Unfortunately, however, this bill does nothing to challenge that "hoary doctrine"—as you characterized the guilty-property fiction in your book, Mr. Chairman. Under the bill, the government could continue to bring cases not against people but against property. In quasi-criminal proceedings, the property would be charged, but those proceedings would have few of the safeguards found in true criminal proceedings. To be sure, the government would have the burden of proving, "by clear and convincing evidence, that the property was subject to forfeiture"—no small improvement. But the substantive law—the criteria for determining when property would be "subject to forfeiture"—would remain unchanged.

Thus, even under this proposal for reform, the personification doctrine remains the linchpin of our forfeiture law, even if we no longer say that in so many words. To see how the doctrine cannot be justified, it is useful to look first at the ordinary criminal case, where a real person is charged. In such a case, the aim of the criminal proceeding is to determine the guilt or non-guilt of the accused and, if guilty, to determine a remedy that will right the wrong at issue. Thus, not only compensation for crime victims but even punishment is, in this generic sense, "remedial"—a term the Court, in forfeiture cases, has found it all but impossible to define or apply in a principled way.[9] Ideally, those and only those who commit crimes should remedy their wrongdoing. The remedy should be a function of the wrong to be remedied: it should "fit" the wrong, whether it takes the form of compensation or punishment proper or both. And property should come into play only insofar as it may satisfy one of those sanctions against the person.

When we turn to forfeiture law, however, we are invited to shift our focus from the accused person to some property (of his or of someone else) and invited further to believe that the property committed some "wrong," for it is the property that is charged and is "subject to forfeiture." Why? Why go after the property rather than, or in addition to, the accused? There are indefensible practical reasons: e.g., a prosecutor may think the evidence too thin for a criminal indictment; but since forfeiture concerns "only property," he may be less reluctant to argue, ex parte, that there is probable cause to believe the property "facilitated" a crime.

Such practical reasons do not go to the underlying theory of the matter, however. By way of deeper "justification," there are three basic rationales for forfeiture: to return ill-gotten goods; to remove contraband; and, of particular importance for our purposes, because the property "facilitates" crime. What we need to ask, then, is whether any of those rationales can be justified as remedial.[10]

Clearly, the first is. If a man robs a bank, we can seize the ill-gotten gain not for forfeiture to the government but for return to the bank. Setting aside complications that might later arise from conversions and third-party victims, no one objects to forfeiture in this context, not least because the forfeiture is less "of the property" than "from the criminal," and is directly related to the crime the forfeiture is meant to remedy. The forfeiture, in short, remedies the wrong, at least in part. But we don't need forfeiture—much less the personification doctrine—to bring about that end. An ordinary criminal proceeding will do.

But if the fruits-of-crime rationale for forfeiture is not ordinarily problematic from a remedial perspective, neither is the contraband rationale. To be sure, there is always disagreement about what should be contraband—especially, today, regarding the never-ending "war on drugs." But once Congress decides to make the possession of alcohol, or drugs, or tobacco, or whatever illegal, then the seizure for forfeiture of that contraband can be said to remedy the "wrong" of possession. Here too, how-

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[8] Roger Pilon, *Can American Asset Forfeiture Law Be Justified?* 39 N.Y.L. Sch. L. Rev. 311 (1994).

[9] For the most recent example, see *United States* v. *Ursery*, 516 U.S. ———; 116 S. Ct. 2135 (1996), in which the Court said that forfeiture is punishment "for purposes of" the Excessive Fines Clause of the Constitution but not "for purposes of" the Double Jeopardy Clause—about which Justice Stevens said, in dissent, that the argument makes "little sense." I have criticized the Court's analysis in *Ursery* (and in *Bennis*) in the Federalist Society's *Criminal Law and Procedure News*, Vol. 1, No. 2, Spring 1997; see also there my criticisms of arguments put forth in that same issue in defense of forfeiture by Mr. Stefan D. Cassella, assistant chief, Asset Forfeiture and Money Laundering Section, U.S. Department of Justice.

[10] A quite different rationale—the rationale that led to American forfeiture law in the first place—is to enable a court to obtain jurisdiction over a real person—such as a foreign ship owner who failed to pay customs. That use of seizure and forfeiture is not at issue here.

ever, it is not "guilty property," or the personification doctrine, that justifies this remedy.

We come, then, to the facilitation doctrine proper. When property is forfeited because it "facilitates" a crime—even when it is the property of the criminal himself—there is no obvious connection between the "remedy" and the wrong to be remedied. If I make a call from my home to consummate a drug deal, how does the forfeiture of my telephone, or my home, or the livestock on my property, "remedy" that crime? What is the connection, from a remedial perspective, between the crime and—let us be more candid than the Supreme Court—the "punishment"? And if that connection is missing when it is my property that is being forfeited, it is missing a fortiori when the property of some third party is forfeited on the ground that his property "facilitated" my crime.

Today, countless forfeitures take place under the facilitation doctrine. The property is personified. It is then said to be "guilty" because it "facilitated" a crime—however tenuous the connection may be. As a result, it is "subject to forfeiture." Never mind that the forfeiture will in no way remedy the crime—especially if the owner is not the criminal. Facilitation forfeiture can make no pretense at being remedial because it need take no measure of the crime that gives rise to it. Minor crimes can lead to major facilitation forfeitures. Ships can and have been forfeited over the discovery of a marijuana "roach" on board.[11] Apartment buildings, hotels, cars, and second mortgages can and have been forfeited over illegal activities "involving" them.[12]

The facilitation doctrine is boundless in practice because it is groundless in principle. Yet it drives our forfeiture law and practice today, and this bill leaves it in place. No "nexus" refinements will solve the problem. Nor will refinements of the "innocent-owner defense," which effectively deputizes innocent people. The inclusion of that defense in all federal forfeiture statutes is to be welcomed, of course, even if the bill leaves the burden on the owner to prove his innocence, and even if such proof may be difficult or may be otherwise problematic. (Suppose, for example, that my son makes a drug deal from our house, on a phone that is tapped at the other end. In principle, under this bill, I am now put to a choice between reporting my son to the police or losing my home for its having "facilitated" a crime.) None of this, however, goes to the facilitation rationale for forfeiture. This substantive foundation of so much of our civil forfeiture law, the handmaiden of the personification doctrine, must be torn up, root and branch. Only then can we hope to secure the idea that forfeiture, in a free society, is not a free-standing doctrine but a very limited element in a remedial scheme that is rooted, in the end, in a rational system of wrongs to be remedied.

In summary, I commend you again, Mr. Chairman, for taking on this issue and for proposing this legislation. The bill does not, in my judgment, go far enough, for the reasons I have stated. Nevertheless, it would bring about a significant improvement over the situation we have today. Thus, for this reason alone I support it. Thank you.

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[11] See National Association of Criminal Defense Lawyers, *Washington Digest*, July 25, 1988, at 1–2. (Seizure of the Woods Hole (Mass.) Oceanographic Institute's Atlantis.)

[12] See Seth Faison, "In Largest Takeover Under Narcotics Law, U.S. Seizes a Large New York City Hotel," *New York Times*, June 9, 1994, at A1, B3.

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CAN AMERICAN ASSET FORFEITURE LAW BE JUSTIFIED?

Roger Pilon

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CAN AMERICAN ASSET FORFEITURE LAW BE JUSTIFIED?

ROGER PILON*

I. INTRODUCTION

American asset forfeiture law, however varied by federal or state system, enables law enforcement officials to seize private property believed to be connected to wrongdoing for the purpose of forfeiture to the government.[1] Finding its roots in the Old Testament, in medieval doctrine, and in admiralty law, forfeiture has been with us since our inception as a nation.[2] In recent years, however, it has taken on a life of its own as a tool in the never-ending War on Drugs,[3] becoming something of an addiction to the law enforcement community that so profits from its practice. As a result of that increased use, and the abuse that has attended it, forfeiture law is under scrutiny today as perhaps never before in our history.[4]

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1. *See, e.g.*, 21 U.S.C. § 881 (1988 & Supp. V 1994) (statute providing for the forfeiture of real property, vehicles, possessions, and conveyances used, or intended to be used, to facilitate the commission of certain drug-related crimes). *See generally* STEVEN L. KESSLER, CIVIL AND CRIMINAL FORFEITURE: FEDERAL AND STATE PRACTICE (1993 & Supp. 1994); DAVID B. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES (1992).

2. *See, e.g.*, OLIVER W. HOLMES, JR., THE COMMON LAW 1-38 (Little, Brown & Co. 1923) (1881) (comparing and contrasting the common law with other doctrines, specifically the doctrines of admirality and maritime law, to illustrate examples of early forfeiture); Jacob J. Finkelstein, *The Goring Ox: Some Historical Perspective on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 TEMPLE L.Q. 169 (1973); *The History of Forfeiture*, 2 LOW PROFILE 12 (1993).

3. 21 U.S.C. § 881(a) (1988 & Supp. V 1994) (specifically noting that controlled substances which are "manufactured, distributed, dispensed, or acquired" and all "raw materials, products, and equipment" used or intended for use in "manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance . . . " shall be subject to forfeiture).

4. *See, e.g.*, HENRY J. HYDE, FORFEITING OUR PROPERTY RIGHTS: IS YOUR PROPERTY SAFE FROM SEIZURE? (1995); Tamara R. Piety, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process*, 45 U. MIAMI L. REV. 911 (1991); J. William Snyder, Jr., *Reining in Civil Forfeiture Law and Protecting Innocent Owners From Civil Asset Forfeiture:* United States v. 92 Buena Vista Avenue, 72 N. CAR. L. REV. 1333 (1994); Terrance G. Reed, *American Forfeiture Law: Property Owners Meet the Prosecutor*, Cato Policy Analysis No. 179 (Cato Inst., Sept. 29, 1992). In the legal press, *see, e.g.*, John Henry Hingson III, *Federal Asset-Forfeiture Laws:*

This essay steps back from much of the case law and commentary on the subject to ask a simple question: Can American asset forfeiture law be justified? Although simple in form, the question requires an answer of several parts. Part II draws a brief picture of modern American forfeiture law, with examples taken from recent Supreme Court decisions and elsewhere to show how forfeiture works in practice.[5] Part III outlines the theory of justification, showing how law, if it is to be justified, must be grounded not simply in political but in moral theory—and in particular in the theory of rights.[6] Against that background, Part IV outlines the theory of rights and derives a theory of remedies, both private and public,[7] treating "remedy" in its generic sense, not in the sense in which "remedial" is opposed to "punitive," as in much of the forfeiture case law.[8] Finally, Part V shows the place of seizure and forfeiture under the theory—it is a very small place—and shows further that arguments purporting to justify the rest of forfeiture law will not withstand scrutiny.[9] Part VI concludes that most of American asset forfeiture law cannot be justified and thus should be abolished.

II. MODERN ASSET FORFEITURE LAW

Although modern asset forfeiture law varies by federal or state statute, the essence of that law is simple and stark. Stated operationally, under most civil asset forfeiture statutes, as opposed to criminal statutes, law enforcement officials can seize a person's property, real or chattel, without notice or hearing, upon an *ex parte* showing of mere probable cause to believe that the property has somehow been "involved" in a

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Time for Reform, LEG. TIMES, May 2, 1994, at 25 (Opinion and Commentary); *Run Amok?*, NAT'L L.J., Apr. 12, 1993, at 12 (Editorial). In the popular press, *see, e.g.*, Jeff Brazil & Steve Berry, *Tainted Cash or Easy Money?* ORLANDO SENTINEL TRIB., June 14, 1992, at A-1, A-17, June 15, 1992, at A-6; Andrew Schneider & Mary P. Flaherty, *Presumed Guilty: The Law's Victims in the War on Drugs*, PITT. PRESS, Aug. 11-Sept. 16, 1991 (series reprint, 1991); Gary Webb, *The Forfeiture Racket*, SAN JOSE MERCURY NEWS (reprint of two articles appearing Aug. 30, 1993); Deborah Yetter, *Police Work or Piracy? The Government's Power to Take Property in Drug Cases*, COURIER-J. (Louisville, Ky.), Oct. 6, 1991, at 16A; Oct. 7, 1991, at 1A; *see also 20/20: Killing in Paradise* (ABC television broadcast, Apr. 2, 1993); *Street Stories* (CBS television broadcast, July 9, 1992); *60 Minutes: You're Under Arrest* (CBS television broadcast, Apr. 5, 1992).

5. *See infra* notes 10-39 and accompanying text.

6. *See infra* notes 40-50 and accompanying text.

7. *See infra* notes 51-71 and accompanying text.

8. *See, e.g.*, Austin v. United States, 113 S. Ct. 2801, 2808 (1993).

9. *See infra* notes 72-74 and accompanying text.

crime.[10] Proceeding thus *in rem*—against the property, not the person—the government need not charge the owner or anyone else with a crime, for the action is against "the property."[11] 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 the owner, if he wants to try to get his property back, to prove its "innocence," not by a probable-cause but by a preponderance-of-the-evidence standard. Until recently, that standard has been all but impossible to meet because "the thing is primarily considered the offender."[12] Imbued with personality, the thing is said to be "tainted" by its unlawful use. Therefore, the rights of the owner never come into consideration. Given the manifest injustice in that, Congress and several states in the 1980s enacted innocent-owner defenses.[13] But under those defenses, the owner must prove that he lacked both control over and knowledge of the property's unlawful use—negatives that are often impossible to prove.[14] Moreover, before the Supreme Court reined in the "relation-back" doctrine in 1993[15]—which holds that title to property vests in the government at the

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10. For a more expansive discussion of this and the descriptive points that follow, see SMITH, *supra* note 1.

11. *See* Comment, *State and Federal Forfeiture of Property Involved in Drug Transactions*, 92 DICK. L. REV. 461, 461 n.3 (1988).

12. Goldsmith-Grant v. United States, 254 U.S. 505, 511 (1921).

13. *See, e.g.*, 21 U.S.C. §§ 881(a)(4)(C), 881(a)(6); Michael Goldsmith & Mark Linderman, *Asset Forfeiture and Third Party Rights: The Need for Further Law Reform*, 1989 DUKE L. J. 1254, 1272-75 (arguing that the apparent reasons Congress amended the civil forfeiture statute to include an innocent owner defense were "the public's outrage over the potential hardship of 'zero tolerance' on innocent third parties, and . . . the perceived need [by the Justice Department] to enact reforms rather than risk restrictive rulings by judges angered by the 'zero tolerance' policy.").

14. *See, e.g.*, Seth Faison, *In Largest Takeover Under Narcotics Law, U.S. Seizes a Large New York City Hotel*, N.Y. TIMES, June 9, 1994, at A1, B3 (unable to stem drug trafficking in the building, officials simply seized it); Ron Galperin, *Landlords vs. Drug Dealers*, L.A. TIMES, Jan. 12, 1992, at K1, K5.

15. United States v. 92 Buena Vista Avenue, 113 S. Ct. 1126, 1134-38 (1993) (finding that § 881(h), the relation-back provision of the forfeiture statute, does not vest ownership in the Government at the moment the proceeds of the illegal transaction were used to fund the purchase of the property); *see id.* at 1137 ("The Government cannot

time it is used illegally, even if the property changes hands many times after that—those few owners who could prove their innocence often lost because the relation-back doctrine was said to trump the innocent-owner defense.

The substantive and procedural hurdles owners face are only compounded by the practical hurdles. Deprived of their property, ranging from homes, cars, boats, and airplanes to businesses and bank accounts, owners are at a distinct legal and practical disadvantage if they choose to wage a costly legal battle against the government to recover their property. Moreover, if the owner 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—the risk of self-incrimination entailed by any effort to get the property back has to be weighed against the value of the property. Often, this means that the owner will simply not make the effort.

In contrast with civil forfeiture, as just outlined, criminal forfeiture is a recent development in American law, stemming from the enactment by Congress in 1970 of the Racketeer Influenced and Corrupt Organizations Act (RICO).[16] Although Congress has steadily increased its reach[17]—and the RICO statute itself is extraordinarily vague—criminal forfeiture is relatively less objectionable than civil forfeiture because it is justified as punishment for a crime and thus follows only after an *in personam* proceeding against the person, not an *in rem* proceeding against the property. Defendants are thus entitled to the procedural protections of the criminal law, including the requisite burdens and standards of proof. And forfeiture turns on conviction, not on the antiquated fictions of civil forfeiture. Although criminal forfeiture is in a sense broader than civil forfeiture, because under it the government can reach even "untainted" assets, that result follows simply from the different rationales for criminal and civil forfeiture. Under criminal forfeiture, property is forfeited because of the guilt of the owner, not the "guilt" of the property.

Four decisions handed down by the Supreme Court in 1993 serve to illustrate both how forfeiture works in practice and how the Court has begun finally to rein this law in, albeit in a very limited way. In *Alexander v. United States*,[18] a criminal forfeiture case, defendant Alexander was convicted under federal obscenity laws and RICO of

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profit from the common-law doctrine of relation back until it has obtained a judgment of forfeiture."); *see also* Snyder, *supra* note 4.

16. 18 U.S.C. §§ 1963-1968 (1988 & Supp. V 1994); *see also* Alexander v. United States, 113 S. Ct. 2766, 2772 (1993).

17. *See* Terrance Reed, *Criminal Forfeiture under the Comprehensive Forfeiture Act of 1984: Raising the Stakes*, 22 AM. CRIM. L. REV. 747, 748 (1985).

18. 113 S. Ct. 2766 (1993).

having sold seven obscene magazines and videotapes through his numerous businesses dealing in sexually explicit materials. In addition to a fine of $100,000 and a prison sentence of 6 years, he was ordered to forfeit 10 pieces of commercial real estate, 31 current or former businesses, including all of their assets, and nearly $9 million in monies acquired through racketeering activity. The Supreme Court upheld his conviction against a First Amendment challenge but remanded the case for a determination as to whether "RICO's forfeiture provisions, as applied in this case, . . . resulted in an 'excessive' penalty within the meaning of the Eighth Amendment's Excessive Fines Clause."[19] Although the Court gave no real guidance on this question, it did hold, at least, that *in personam* criminal forfeiture "is clearly a form of monetary punishment no different, for Eighth Amendment purposes, from a traditional 'fine.'"[20]

In a companion case, *Austin v. United States*,[21] the Supreme Court faced the question of whether the Eighth Amendment's Excessive Fines Clause applies also to civil forfeiture. In that case defendant Austin pled guilty to a state drug charge of possessing two grams of cocaine, worth about $2000, with intent to distribute, for which he had been sentenced to seven years in prison. The federal government subsequently filed an *in rem* action for forfeiture of Austin's home and auto body shop, alleging that the property had "facilitated" the commission of a crime. Against the government's claim that civil forfeiture, being civil and not criminal, is not punitive and so is not subject to the Excessive Fines Clause, the Court said—in a good example of the kind of "reasoning" one finds in forfeiture law—that "even though this Court has rejected the 'innocence' of the owner as a common-law defense to forfeiture, it consistently has recognized that forfeiture serves, at least in part, to punish the owner."[22] Thus, because it is in part punitive, civil forfeiture is subject to the Excessive Fines Clause. But here also, the Court gave no real guidance as to whether any given forfeiture might be constitutionally excessive.

The innocent-owner defense arose in yet another civil forfeiture case the Court decided in 1993, *United States v. 92 Buena Vista Avenue*,[23] where the question before the Court was whether the government could

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19. *Id.* at 2776.

20. *Id.* at 2775 (citing Austin v. United States, 113 S. Ct. 2801 (1993), and noting that when the Excessive Fines Clause of the Eighth Amendment was drafted and ratified, the "word 'fine' was understood to mean a payment to a soverign as punishment for some offense") (citation omitted).

21. 113 S. Ct. 2801.

22. *Id.* at 2810 (quoting Dobbin's Distillery v. United States, 96 U.S. 395, 404 (1878)).

23. 113 S. Ct. 1126 (1993).

invoke the relation-back doctrine to claim title against an innocent owner. Here, the owner had purchased a home in 1982 with funds given to her by a man with whom she was intimately involved from 1981 until 1987.[24] In 1989, the government filed an *in rem* action against the property, claiming probable cause to believe that the home had been purchased with funds traceable to illegal drug activity.[25] In response to her innocent-owner defense, the district court held that the defense applies only to bona fide purchasers for value and only to persons who acquire an interest in the property before the acts giving rise to the forfeiture take place. The Supreme Court rejected the lower court's conclusions, holding that the donee was in fact an "owner" and that the fictional retroactive vesting of the relation-back doctrine is not self-executing but occurs only upon a forfeiture judgment.[26] Until such a judgment, therefore, the innocent-owner defense is available to the owner.

Finally, late in 1993, in *United States v. James Daniel Good Real Property*,[27] the Court held that, "unless exigent circumstances are present, the Due Process Clause requires the Government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture."[28] Here, the government initiated an *in rem* action against the house and land of a man who had pled guilty to violating state drug laws four and one-half years earlier—a lapse of time that speaks volumes about the oft-stated "crime-fighting" rationale for forfeiture. The Court's opinion was limited, however, to procedural questions, and its holding applies only to real property, not to chattels.

As the cases just outlined should indicate, the Supreme Court is placing at least some restraints on the government's forfeiture power, but with the limited exception of *Buena Vista*, and possibly *Austin* (where the question was simply whether civil forfeiture is punitive), the Court has yet to raise serious or systematic questions about the underlying rationale for forfeiture. As a result, proponents of reform—whether in Congress,[29] among the National Conference of Commissioners on Uniform State

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24. *Id.* at 1130.

25. *Id.*

26. *See id.* at 1136-38.

27. 114 S. Ct. 492 (1993).

28. *Id.* at 505.

29. Both Congressman Henry J. Hyde, the chairman of the House Judiciary Committee in the 104th Congress, and Congressman John Conyers introduced forfeiture reform bills in the 103rd Congress: H.R. 2417, 103d Cong., 1st Sess. § 1 (1993) (a companion bill, S. 1655, 103d Cong., 1st Sess. (1993), was later introduced by Senator Jim Jeffords in the United States Senate) and H.R. 3547, 103d Cong., 1st Sess. § 1 (1993), respectively.

Laws,[30] or the Justice Department itself[31]—are little encouraged to do more than chip away the more offensive aspects of the practice. In fact, the recent Justice Department proposal, if anything, expands the government's forfeiture power.[32]

But while the cases just cited may indicate some movement toward forfeiture reform, they do not give a wholly accurate picture of forfeiture in practice. After all, they are cases in which the owner, for whatever reason, was willing and able to contest the forfeiture—all the way to the Supreme Court. As recent reports in the popular press have revealed,[33] many victims of government forfeiture policy have not been so fortunate.

Until reporters exposed it in 1992, for example,[34] a drug squad operating out of the sheriff's office of Volusia County, Florida, stopped thousands of motorists traveling Interstate 95 who fit a "drug-courier profile"—seventy percent black or Hispanic—then simply confiscated, on the spot, any funds those motorists were carrying in excess of $100.[35] In 1989, in Jacksonville, Florida, U.S. Customs Service agents destroyed a new $24,000 sailboat in a fruitless search for drugs, then refused to compensate the owner, requiring him to seek a private claim bill from Congress that eventually gave him partial compensation.[36]

"Mere" property examples such as those could continue almost endlessly, but it is not only property that is endangered by the zeal that surrounds forfeiture. In March of 1994, for example, a 13-member Boston Police Department SWAT team, acting on an informant's tip, broke down the door of the wrong apartment in a search for drugs and guns, then pinned down and handcuffed the seventy-five-year-old black

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30. AMENDMENTS TO UNIFORM CONTROLLED SUBSTANCES ACT (1990) (Draft for Approval: Nat'l Conference of Comm'rs on Uniform State Laws, July 29-Aug. 5, 1994) 1-30 (on file with the *New York Law School Law Review*).

31. Cheryl Anthony Epps, *DOJ 'Forfeiture Reform' Proposal Ignores Problems In Current Law and Expands Government's Ability to Seize Property*, WASH. DIGEST, May 1994, No. 8, at 1.

32. *Id.* at 2.

33. *See supra* note 4 and accompanying text.

34. *See* Brazil & Berry, *supra* note 4.

35. *See Testimony Slams Drug Team Tactics*, MIAMI HERALD, Apr. 29, 1994, at B5; *The Seizure Squads*, ST. PETERSBURG TIMES, Nov. 15, 1992, at 2D (Editorial); Jeff Brazil, *Forfeiture Laws Seize National Scorn*, ORLANDO SENTINEL, Aug. 2, 1992, at A-1, A-21. For a thorough discussion of this issue, see Carol M. Bast, *The Plight of the Minority Motorist*, 39 N.Y.L. SCH. L. REV. 49 (1994).

36. James Bovard, *The Custom Service's Chain Saw Massacre*, WALL ST. J., Mar. 27, 1992, at A14; Red Marston, *Customs Destroys Boat and a Dream*, ST. PETERSBURG TIMES, Feb. 5, 1993, at 8C; *Florida Man's Plight Sparks Customs Service Bill*, UPI, Mar. 13, 1992, *available in* LEXIS, News Library, UPI File.

minister who lived there, resulting in his death a few minutes later from a heart attack.[37] And on the other side of the country, in perhaps the most celebrated case of its kind, thirty local, state, and federal agents burst into a Malibu, California, home—nominally in a fruitless search for drugs, but actually, as a subsequent investigation brought out, as part of a forfeiture action—during the course of which the owner was shot and killed.[38]

Again, examples of forfeiture in practice could be cited at length—most, but by no means all, taken from the ever-expanding War on Drugs. Driving forfeiture, of course, is the fact that law enforcement agencies get to keep what they seize—an invitation to abuse so patent that it survives only because the War on Drugs, from which it flows, is itself driven by so blinding a moral fervor.[39] Given that fervor, appeals to reason have proven futile. Nevertheless, it is only through reason that the issue of forfeiture can be sorted out and its true rationale, if any, discovered.

III. JUSTIFICATION

Taking the profits out of crime, denying criminals the means of crime, and punishing criminals for the crimes they commit are among the reasons cited as justification for modern American asset forfeiture law. Thus stated, those reasons seem compelling, yet they lead to the law and legal practices just outlined. To determine whether that law and those practices are justified, therefore, it is not enough to give a reason or even a set of reasons. After all, even if we could dramatically reduce the crime rate by executing all convicted felons, however minor their crimes, or by incarcerating all males between the ages of fifteen and thirty, that reason would hardly justify those practices.

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37. Sara Rimer, *Minister Who Sought Peace Dies in a Botched Drug Raid*, N.Y. TIMES, Mar. 28, 1994, at A1, A13; *Police Mistakes Cited in Death of Boston Man*, N.Y. TIMES, May 16, 1994, at A12.

38. *See Report on the Death of Donald Scott*, Office of the District Attorney, Cty. of Ventura, Cal. (March 30, 1993); *see also* Richard Miniter, *Ill-Gotten Gains*, REASON, Aug.-Sept. 1993, at 32-33; Miniter, *Property Seizures On Trial*, INSIGHT, Feb. 22, 1993, at 10; *60 Minutes: You're Under Arrest* (CBS television broadcast, Apr. 5, 1992).

39. For an outstanding critique of the War on Drugs, see STEVEN B. DUKE & ALBERT C. GROSS, AMERICA'S LONGEST WAR: RETHINKING OUR TRAGIC CRUSADE AGAINST DRUGS (1993); *see also Conservative U.S. Judge Offers a Word on Drugs: Decriminalize*, N.Y. TIMES, Mar. 4, 1994, at A25 (quoting U.S. Dist. Judge Vaughn R. Walker: "I make no bones about my personal view that the best course of action for us to take is exactly the same course of action we took after Prohibition, and that is decriminalization. . . .").

To get to the bottom of the matter, then, what is needed is a theory of justification, rooted in first principles, which relates reasons systematically.[40] And that theory must itself be grounded in reason, not will, political or otherwise, for will-based theories of justification, even systematic ones, do not do the job.[41] It is no justification of forfeiture law, for example, to say simply that it has been recognized by courts or declared by legislatures. Mere declaration, even by legal authorities, tells us simply what the law is, not whether it is justified. Nor does declaration coupled with democratic process solve the problem of justification.[42] For democracy derives whatever moral force it enjoys from the political right of self-rule, which is grounded in turn in the individual right of self-rule. Yet that individual right—the bedrock of a free society—is precisely the right that democratic process necessarily overrides, as the following analysis shows.

The problem that justification through democratic process faces, in a nutshell, is the problem of preserving individual autonomy—the right of self-rule on which democracy itself is founded. Clearly, majority rule does not do that, for under it the majority, by definition, rules the minority. (The numbers make no difference, of course, whether they are 51 to 49, or 99 to 1.) But neither does the argument from social-contract theory fare any better—the idea that the minority is bound by virtue of prior unanimous consent to the process. That argument may get the legal regime off the ground and running—and it works in its application to private associations, which individuals are free to enter and leave—but it does not serve to justify majority rule except among members of a founding generation who actually do consent to that rule. Nor, finally, does pointing to the individual's right to leave solve the problem of preserving minority rights, for it begs the question, forcing members of the minority to choose between their right to stay and their right to rule themselves.[43] Thus, even democratic government is at bottom a forced association, which is why America's founding generation spoke of

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40. *See, e.g.*, LAWRENCE C. BECKER, ON JUSTIFYING MORAL JUDGMENTS (1973); ALAN GEWIRTH, REASON AND MORALITY 1-47 (1978); Robert S. Summers, *Two Types of Substantive Reasons: The Core of a Theory of Common-Law Justification*, 63 CORNELL L. REV. 707 (1978).

41. *See* Roger Pilon, *On Moral and Legal Justification*, 11 SW. U. L. REV. 1327 (1979).

42. For a critique of democratic theory from a somewhat different perspective than will be argued here, see ROBERT P. WOLFF, IN DEFENSE OF ANARCHISM 22-67 (1970).

43. For a more detailed discussion of these issues, see Roger Pilon, *Individual Rights, Democracy, and Constitutional Order: On the Foundations of Legitimacy*, 11 CATO J. 373 (1992) (discussing challenges that face the Russian people in their attempt to legitimize their government).

government as a "necessary evil," and why George Washington remarked that "[g]overnment is not reason, it is not eloquence, it is force."[44]

What these reflections indicate, then, is that insofar as political or process theories justify anything, they depend in the end on substantive or moral theories, which is precisely what America's founding documents indicate—from the Declaration of Independence through the Constitution and the Bill of Rights to the Civil War Amendments.[45] Those documents all proceed, at least by implication, not in the organic tradition of majority rule but in the more individualistic and libertarian tradition of state-of-nature theory, which begins with the world of private individuals, then derives the rights of those individuals, and finally demonstrates how limited governments and limited governmental powers arise, more or less legitimately, to secure those individual rights. Individuals and their rights come first, in short, government and its powers come second, with governmental powers derived from individual rights.[46]

Thus, at the core of the theory of justification is the theory of rights, for in the end, both individuals and governments justify their actions, when challenged to do so, by showing them to be performed "by right." Individuals can do this directly, by appeal to the theory of rights. Governments must do so indirectly, by appeal either to a delegated power alone or, better, to a delegated power undergirded by a natural individual right.

An example of delegated power alone is the power of eminent domain. Governments can claim to exercise that power "by right," when they can, only because individuals in the original position delegated it to them. Nevertheless, this power is problematic because, as noted above, delegation that can bind those not in the original position is itself problematic; and because this particular power is not one that individuals have to delegate in the first place. There is, after all, no individual power of eminent domain in the state of nature, which is why it was known in the seventeenth and eighteenth centuries as "the despotic power."[47] The

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44. FRANK J. WILSTACH, A DICTIONARY OF SIMILES 526 (rev. ed. 1924); *see also* William Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 585-86 (1972): "In essence, Lockean social contract theory says this: . . . Government is a servant, necessary but evil, to which its subjects have surrendered only what they must, and that grudgingly . . . . [H]is was the accepted theory of government in America when the American doctrine of eminent domain was being hammered out."

45. *See, e.g.*, BERNARD BAILYN, THE IDEALOGICAL ORIGINS OF THE AMERICAN REVOLUTION 188 (1967); EDWARD S. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW 4-5, 61, 67, 89 (1955).

46. *See* Roger Pilon, *Freedom, Responsibility, and the Constitution: On Recovering Our Founding Principles*, 68 NOTRE DAME L. REV. 507 (1993).

47. *See* Stoebuck, *supra* note 44.

power's saving grace is its compensation requirement, which leaves individuals whose property is taken at least as well off (in principle) as they were before the taking took place.[48] Still, the association is forced.

An example of delegated power undergirded by a natural individual right is the police power. Here, too, governments can claim to exercise that power "by right," when they can, from the still problematic consideration of delegation in the original position. But unlike in the case of eminent domain, individuals do have a police power to delegate: it is what John Locke called the Executive Power that each of us has in the state of nature, the power to secure our rights.[49] Thus, while government's exercise of the police power "by right" may be problematic from a consideration of delegation—and with the federal government it is problematic for the additional reason that the Framers delegated very few police powers to it—the power itself, unlike the eminent domain power, is not problematic—provided, of course, that its exercise remains within the bounds of the undergirding individual right.

In summary, a governmental power can be justified only if it has been delegated (with the caveat noted above); it springs from an underlying individual power; and its scope is no broader than that of the underlying power. Insofar as they meet those tests, therefore, the police power of the states and the limited police power of the federal government are justified. More problematic are delegated powers that enjoy no underlying individual counterpart—such as the power of eminent domain; and powers that do enjoy an underlying individual counterpart but that have not been delegated—such as many of the federal government's modern police powers.[50] Finally, enjoying no justification whatever are powers that are neither delegated nor reflective of underlying individual powers.

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48. For an excellent discussion of this point, see RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985) (examining the rule of first possession, labor theory, and contract and common usage theories and their relationship to property rights).

49. JOHN LOCKE, *The Second Treatise of Government*, § 13, *in* TWO TREATISES OF GOVERNMENT (Peter Laslett ed., 1960) (1698).

50. Many federal "police powers" are rationalized, of course, under modern interpretations of the Commerce Clause. In fact, just that kind of move is at issue in *United States v. Lopez*, 2 F.3d 1342 (5th Cir.), *reh'g* and *reh'g en banc denied*, 9 F.3d 105 (1993), now before the Supreme Court, No. 93-1260 (filed Feb. 2, 1994; argued Nov. 8, 1994), which presents the question of whether Congress has the power, under the Commerce Clause, to enact the 1990 Gun-Free School Zones Act, or whether that Act instead reflects simply a naked assertion of an unenumerated police power. *See* Glenn Harlan Reynolds, *Kids, Guns, and the Commerce Clause: Is the Court Ready for Constitutional Government?*, Cato Policy Analysis No. 216 (Cato Inst., Oct. 10, 1994) (arguing that the Supreme Court should "hold Congress to its constitutionally enumerated powers" and strike down the Gun-Free School Zones Act as unconstitutional).

Regrettably, such powers exist today at all levels of government. To determine whether the forfeiture power is among them, the underlying police powers of individuals must be determined.

IV. RIGHTS AND REMEDIES

It is a common misconception that state-of-nature theory presupposes that a state of nature, whatever its description, in fact existed. No such presupposition is necessary, for state-of-nature theory of a kind that was common among America's founding generation is simply a thought experiment. It requires plumbing the depths of reason for first principles and then doing the casuistry that is necessary to draw a picture of the moral world—especially the world of rights, the exercise of which might lead to legitimate government.

As previously noted, thought experiments of just that kind—thinking about, as Locke put it, "[t]he True Original, Extent, and End of Civil-Government"[51]—led to our American experiment in ordered liberty. And liberty indeed was at the center of the picture the Founders drew, as our founding documents make clear. This is especially true of the Declaration of Independence, where the outcome of the Founders' thinking is stated most succinctly.[52] Because the implications of the picture the Founders sketched in that document have particular bearing on the forfeiture issue, it will be useful to draw them out more fully here.

After placing us squarely in the reason-based natural law tradition—with its "self-evident" truths of right and wrong, which serve as a model for positive law—the Declaration sets forth a premise of moral equality, defined by rights to "life, liberty, and the pursuit of happiness,"[53] from which all else follows. Implying that no one has rights that are superior to those of anyone else, that premise both launches and limits the ensuing argument, for it enables the assertion of rights in the name of equality, yet limits such assertions by that very equality. Moreover, in thus defining equality through the language of rights, and reducing rights to the generic "life, liberty, and the pursuit of happiness," the Declaration reminds us of Locke's insight that all rights, however described, can be reduced to the single idea, broadly understood, of property: "Lives, Liberties and Estates, which I call by the general Name,

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51. *See* LOCKE, *supra* note 49, at 170 (original title page of TWO TREATISES OF CIVIL GOVERNMENT).

52. *See generally* CARL L. BECKER, THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS (1922).

53. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

Property."[54] Indeed, what are our rights to life, liberty, speech, religion, association, and so on if not rights to things that are, in the end, ours? And what are violations of those rights if not takings of things that belong to us?[55]

That insight from Locke, which was common among the Founders,[56] proves especially helpful once the casuistry begins. For if possession is the root of title and entitlement,[57] then we have a relatively substantial tool not only for giving content to the premise of equal rights but for tracing out the world of rights and sorting out justified from unjustified claims about rights. The first step in that process, however, is to draw a distinction between general and special rights, a distinction that exhausts the world of rights and correlative obligations.[58] General or natural rights are those we are born with. Good against the world, we hold them simply as members of the human race.[59] Essentially, they are rights to be free, to plan and live our own lives by our own values, provided only that in doing so we respect the equal rights of others to do the same. Special rights, by contrast, are created in time, as we work our way through life. They arise in two basic ways: through voluntary association, as a result of promises or contracts; or through forced association, as a result of torts or crimes. When such voluntary or forced events occur, general rights and obligations are alienated and new, special rights and obligations are created. Held only by the parties to the particular events that bring them into being, these rights are "special" to those parties.

The content of general rights is determined by the scope of our entitlements—the scope of that to which we hold title, quite literally,

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54. LOCKE, *supra* note 49, § 123.

55. The propertarian foundations of the theory of rights are developed more fully in Roger Pilon, *Ordering Rights Consistently: Or What We Do and Do Not Have Rights To*, 13 GA. L. REV. 1171 (1979).

56. *See, e.g.*, James Madison, *Property*, 1 NAT'L GAZETTE, Mar. 29, 1792, at 174, *reprinted in* 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 1829-1836, at 478 (1884) ("[A]s a man is said to have a right to his property, he may be equally said to have a property in his rights.").

57. *See* Richard A. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221 (1979).

58. On the distinction between general and special rights, see H.L.A. Hart, *Are There Any Natural Rights?*, *in* POLITICAL PHILOSOPHY (Anthony Quinton ed., 1967). On the correlativity of rights and obligations, see WESLEY N. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING (1964) (originally published in 23 YALE L.J. 16 (1913) and 26 YALE L.J. 710 (1916-17)).

59. For a more expansive discussion see Roger Pilon, *A Theory of Rights: Toward Limited Government* (unpublished Ph.D. dissertation, University of Chicago), drawing in part upon GEWIRTH, *supra* note 40.

including our lives and liberties.[60] In doing the casuistry here it is important to notice that rights reach only to those things that are held free and clear, not to things that are merely "enjoyed" at the pleasure of others—others who hold rights over what, in the end, belongs to them.[61] By contrast, the content of those special rights that arise through promise or contract can be as varied as the parties agree to make it. Here too the rights can be reduced to property, but the titles that can be exchanged through such voluntary associations are limited only by the rights of third parties.

We come, then, to those special rights and obligations that arise through forced association—torts and crimes—and to the foundations, if any, of forfeiture law.[62] Here, the principle of equality plays a particularly important role in the casuistry, but it does so at two levels. First, in the uncomplicated case in which *A* hits (or takes from) *B*, the principle tells us that the prior moral equality between the parties has been disturbed—the rights of *B* have been violated, the obligations of *A* have been forgone. If rights are to have any force, the wrong must be remedied, the moral equality reset. The logic of rights is thus the logic of equilibrium, which voluntary association preserves (absent fraud),[63] but forced association upsets.

To violate a right, then, is to create and incur an obligation to make one's victim whole again, an obligation to right the wrong, to restore the equilibrium between the parties. But by the logic of equality it is also to alienate a right in oneself to that property that is necessary to make one's victim whole; to create a right in one's victim to that property; and to extinguish an obligation in one's victim to not take that property. Thus does the world of rights and obligations change by the commission of a

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60. Note that general rights are equal only at the generic level of description—life, liberty, property, security, freedom from trespass, etc. At the specific level of description, of course, holdings among individuals vary greatly. From that observation, however, it is a mistake to conclude that rights are unequal. In fact, any attempt to equalize "rights" by equalizing specifically described holdings would entail violations of generically described rights. *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 167-74 (1974).

61. Thus, when *A*'s addition to his home blocks *B*'s view, *A* does not "take" that view or otherwise violate *B*'s right because *B* never owned that view and hence never had a right to it to begin with. He merely "enjoyed" it at *A*'s pleasure (and might have bought it, had he wanted to, through the purchase of an easement).

62. The discussion that follows draws in part upon Roger Pilon, *Criminal Remedies: Restitution, Punishment, or Both?*, 88 ETHICS 348 (July 1978) (critiquing Randy E. Barnett, *Restitution: A New Paradigm of Criminal Justice*, 87 ETHICS 279 (July 1977)).

63. *Cf. infra* note 65.

tort or a crime; thus must it change again if the moral world is to be set right.

But what, specifically, is needed to set the moral world right? Here, the principle of equality comes in a second time, not in its formal application, as above, but in its substantive application. At this point, however, difficulties start to arise, for while the theory of rights can tell us when remedies are required and why they are required, it cannot tell us precisely what those remedies should be—beyond the formal conclusion that they must right the wrong, make the victim whole, and restore the status quo. What the theory calls for, of course, is some redistribution between the parties that will remedy the forced redistribution that was brought about by the tort or crime in the first place. But what redistribution? Clearly, the parties need to place a value on the loss, which the wrongdoer must "pay"—whatever form that payment takes. But what if the parties dispute the value of the loss or the form of payment? Although we can "reason" about values, disputes about values, unlike most disputes about rights,[64] are not resolved by recourse to principles of reason. For in the end, as economists have long understood, values are subjective.

Notice that voluntary associations also involve redistribution. But there the parties themselves, relying on their own subjective preferences, determine the equality of any proposed redistribution.[65] If they fail to agree, no redistribution takes place and they simply walk away. Here, however, there is no walking away: the redistribution has already occurred, through force; if justice is to be done, a second redistribution is needed to undo or remedy the first. Obviously, wrongdoers have an incentive to value the losses they cause low; victims have an incentive to value the losses they suffer high. Yet between them, again, there is no difference of principle, resolvable by reason, only a difference of assessment, about which reasonable people can disagree.

How, then, is the problem to be resolved, given that it must be resolved if justice is to be done? The traditional answer, which this essay follows, is to introduce third-party forced adjudication, a device that seems

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64. There are four classic areas in which the theory of rights comes to its principled end and values must be introduced to complete the theory: remedies (as here); nuisance and endangerment (where the question is just where to draw the line between rights of active use and rights of quiet use); and enforcement (where the question is, as discussed below, what one may do to others in the name of enforcing one's rights when one is uncertain about who violated those rights).

65. That is the way it looks from a third-party perspective. In truth, however, the redistribution or exchange takes place only because each party values what the other has more than he values what he has. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 11 (2d ed. 1972).

inescapable if the promise of the theory of rights is to be realized.[66] Notice, however, that the introduction of that device makes no change in the basic moral picture, for the question remains one of determining just what the wrongdoer is obligated to do and what the victim has a right to insist be done—or a right to do himself under his police power in the state of nature. Thus, a neutral adjudicator—made necessary by the subjectivity of valuation—in no way alters the moral relations that arise as a result of a tort or crime.

If an adjudication is to be justified, however, that third party, whether it be a judge, a jury, or a legislature setting a range of sanctions, cannot abandon reason simply because reason has come to its principled end. For there is still "reasoning," even about values, as easy cases make clear. Thus, if the principle of reason to be applied is that the remedy must equal the wrong, as measured by the holdings that were redistributed by the tort or crime, it is no reasonable application of that principle, other things being equal, to require *A* to give *B* $100 as a remedy for his having taken $10 from *B* by mistake. To be sure, the present value of the $100 may be less to *B* than the past value of the $10, but if that is the case—if other things are not equal—that fact can be factored into the remedy. As easy cases like this demonstrate, then, reasoning about values may not be perfect—owing to the subjectivity of valuation—but it is not impossible either. The basic principle, in fact, is clear: the remedy must equal the wrong, as measured by the holdings that were redistributed by the tort or crime. Insofar as possible, the wrongdoer must make the victim whole—not more than whole, not less than whole either. That is the wrongdoer's obligation, to which the victim has a right—and a police power to enforce.

In the above scenario, then, few would disagree that $10 is the right remedy—other things being equal—and $100 the wrong remedy, for the value of the holding redistributed by the tort (the conversion) is easily objectified. As we move away from easy cases, however, applying the principle of equality becomes increasingly difficult. What is the right remedy, for example, if *A* takes the $10 intentionally, or hits *B*, or takes *B*'s limb or life by accident, or negligently, recklessly, or intentionally? In such cases, the principle that the remedy must equal the wrong, measured by the holdings the wrong redistributed, continues to operate, but its application becomes more difficult because the valuation of the redistributed holdings is increasingly subjective. Crimes are not mere torts, for example. By virtue of the *mens rea* element they are affronts to

66. Although some argue that forced third-party adjudication can be avoided by resort to ostracism, boycott, and other such "passive" sanctions, rights will not be enforced in given cases under such arrangements. *See, e.g.*, BRUCE L. BENSON, THE ENTERPRISE OF LAW: JUSTICE WITHOUT THE STATE 357-64 (1990).

the dignity of the victim, which belongs to him. By using his victim, the criminal takes his victim's dignity, which is worth something. Mere money damages may not reach that element of the wrong. What are money damages to a rape victim, for example, especially if the victim or rapist or both are wealthy? The idea that a murderer, by his act, has alienated his own right to life has a long history in moral theory. It is perhaps the "easy" case at the other end of a continuum that begins with the easy case discussed above. Along that continuum, however, are countless other cases that require careful assessment of just what was taken and what now must be returned or restored or done if rights are to be respected and enforced through remedies for their violation.[67]

The search for principled remedies is often not easy, therefore, but it is not impossible either, provided it remains principled—informed by equality, as measured by the holdings the wrong redistributed. Clearly, as those holdings become more difficult to discern or measure, remedies that purport to be based on them become more difficult to sustain. Still, the basic idea of grounding the remedy in the wrong to be remedied must be the guide. And that applies to public as well as to private remedies. The discussion thus far of private wrongs, including intentional or criminal wrongs, has focused on holdings taken from the victim by the wrongful act, which is only proper in a moral and legal system grounded on the rights of the individual. But private wrongs have public implications too, some of which involve rights. Robbers, rapists, and murderers take not only from their victims, after all, but from the community as well—by creating fear in the community, which lessens the liberty that belongs to all and might otherwise be enjoyed.[68] Although it is difficult to measure that loss, it is nonetheless real. The loss to society calls for a remedy, therefore, in addition to any that is due the victim. That remedy can take any number of forms, of course, but it must have some reasonable relation to the loss that gives rise to it.[69]

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67. Practical problems aside, notice that the right to punish belongs in the first instance to individuals. Notice also that when arguing from first principles, remedies are justified with reference to wrong done to victims, not with reference to such consequentialist reasons as deterrence.

68. *See* Nozick, *supra* note 60, at 65-71.

69. Notice that a remedial theory rooted in first principles does not ask whether a remedy is civil or criminal, remedial or punitive. Rather, if the victim of the wrong is entitled to be made whole, then the only question is what will do that. In the case of simple torts, money damages may. But as *mens rea* elements intensify, punishment may also be justified to remedy the losses that result from those elements, even when the victims are members of the public. Thus, punishment too is "remedial." Not only does it flow from the wrong, but it is aimed at remedying the wrong.

As we move farther afield, however, serious problems start to arise, nowhere more clearly than in the case of crimes without claimants—so-called victimless crimes. One seeming variation of this is not problematic: when public safety laws are violated by acts like running a stop light, members of the public are victims, as just discussed, whether or not any individual is injured. Thus, identifiable rights have been violated, rights that find their roots in the theory of rights, and remedies are in order. But true crimes without claimants—"victimless crimes" —are not crimes in the ordinary sense, for no one, private or public, can make a credible claim that the acts criminalized violate his rights. To be sure, people who drive under the influence of alcohol or drugs endanger others and thus violate their rights. But driving under the influence is not an act typically prohibited by victimless-crime legislation. Rather, such legislation prohibits things like growing, making, selling, distributing, or using certain substances, the properties of which are known to all who participate in those activities and endanger none who do not participate. There simply are no rights, private or public, that such activities violate.[70] On the contrary, and accordingly, those activities are performed "by right."

When such activities are criminalized, however, the task of crafting principled remedies is made impossible, for there is no victim to come forward, no wrong from which to derive a remedy. Because such legislation is not grounded in the theory of rights—indeed, is contrary to that theory—there are no holdings that the "crime" redistributed, no holdings to serve as the basis for a principled remedy. Remedies for simple torts seek to make the victim whole by returning what was taken, insofar as sanctions on wrongdoers can do that. Remedies for torts with a *mens rea* element (of whatever degree, including criminal) seek the same end, usually by including some punishment to address that element insofar as it took the victim's dignity. And remedies for wrongs against the public—including wrongs with no identifiable, individual victims—seek also to make such public victims whole by punishing wrongdoers for taking the public's safety. But here, there are no victims, individual or public. Thus, there is no loss to serve as a measure for any remedy. What we see, then, is baseless remedies—indeed, remedies for nothing. It is not surprising then, that such remedies are so wildly varied, for in the

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70. It is no objection to that conclusion to point to the crime and the third-party victims that are associated with the drug business, for most of that crime is a function not of the business but of the illegality of the business. When the alcohol business was illegal, there too we had crime and third-party victims. *See* DUKE & GROSS, *supra* note 39, at 103-21; *see also* Steven Wisotsky, *A Society of Suspects: The War on Drugs and Civil Liberties*, Cato Policy Analysis No. 180 (Cato Inst., Oct. 2, 1992) (describing the War on Drugs as a war on the Bill of Rights).

end they reflect little more than moral outrage at unpopular behavior. The history of alcohol prohibition in America demonstrates the point. Modern drug prohibition is repeating that history.

Turning finally to the procedural side of the theory of rights, two preliminary points need to be made. First, it is misleading to think of two discrete, separately grounded bodies of rights, one substantive, the other procedural. Rather, those rights we call "procedural"—whether invoked by plaintiffs or officials on one side, or defendants on the other—are simply derived from our substantive rights—in particular, from our basic right to be free. Thus, before anyone can rightly interfere with that freedom—even to secure his or another's rights—he must have sufficient reason, whether it be to arrest, to search, to seize, to charge, or to do any of the many other things that are done in the name of procedure. Second, at this point another basic state-of-nature theory problem arises, for just as victims in a state of nature tend to place a high value on their losses, so too they tend to believe, when faced with uncertain search costs, that the suspect in hand is in fact the wrongdoer. Here too, then, neutral third-party adjudicators are necessary if justice is to be done. For the idea is not simply to find the right remedy but to exact it from the right person, which means that some wrongs will go unremedied in order to prevent other wrongs.[71]

Just what constitutes sufficient reason to interfere with another's freedom—the substantive part of procedural justice—is not a simple matter, of course. In fact, the issue is more difficult than determining just what constitutes the right remedy for a substantive wrong, once liability has been established, for there is no equivalent of redistributed holdings to serve as a measure. Instead, the issue is one of proof before the neutral adjudicator, and of how much evidence will be sufficient at each step of the proceeding to justify yet another intrusion on the freedom of the defendant. In general, the elements of the substantive wrong should shape the process, with the aim being to get to the truth of the matter with a minimum of intrusion. Given that at least the defendant knows the truth of the matter, however, an English rule regarding procedural costs, expanded to cover all procedures, is better than the American rule. For if the loser pays all such costs, not only will inadequate complaints and prosecutions and meritless defenses be discouraged but, more to the point, the proper parties will be kept whole.

Other issues of procedural justice—especially those that pertain directly to forfeiture—are considered below, following a discussion of the substantive side of forfeiture. For the present, having derived remedies

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71. Procedural justice in the state of nature is explored in Nozick, *supra* note 60, at Part I.

from the theory of rights, it must be determined how forfeiture fits into that picture of justified and unjustified remedies.

V. FORFEITURE

In a free society, as we have seen, individuals may pursue their own ends by right, provided only that in the process they not take what belongs to others, including members of the public. The purpose of remedies in such a society is to secure rights, insofar as possible, by ensuring that those who violate them return what they have taken. As a remedy, therefore, forfeiture must find whatever justification it enjoys in that rationale and that rationale alone: it must be part of a remedial scheme aimed at securing rights by restoring a pre-violation status quo.

Stated most generally, legitimate or justified remedies *are* forfeitures: to require a wrongdoer to restore the status quo by returning what his action has taken is to require him to "forfeit" those holdings that are necessary to that end. But while all justified remedies are forfeitures, not all forfeitures are justified remedies.[72] In fact, when not justified, forfeitures are themselves rights violations: they take what belongs to the person required to make the forfeiture. The central question, then, is which forfeitures are justified?

Clearly, the most easily justified forfeitures are those that involve the return of ill-gotten goods—the fruits of crime. As outlined above, however, that conclusion needs to be generalized beyond the obvious examples, for all rights can be reduced to property; thus, all right violations—tortious, criminal, or contractual—can be characterized as forced transfers from the victim to the wrongdoer.[73] In pursuing his ends, for example, a tortfeasor imposes his costs on others, thereby achieving his ends (if he does) at no or lower cost to himself. The victim's "expenditures" need to be returned. Similarly, a person who fails to perform a contractual obligation keeps that good to himself; it or its equivalent needs to be forfeited to the other party. Obviously, the variations are many, but making the victim whole, through forfeiture by the wrongdoer, is the aim, even when the specific goods taken from the victim may have been lost or transferred to third parties and substitute goods are now required. Only in the rare case of "unique goods" should forfeiture be imposed on third-party transferees—and only after just

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72. *See supra* Part II.

73. Notice that even contractual wrongs—fraud, breach, and so forth—fit properly under the tort/crime model, for they take (through misrepresentation, withholding, etc.) what belongs to others. However unconventional that analysis may seem, it captures the element of unilateral force that is present, in one way or another, in all contractual wrongs.

compensation from the wrongdoer—for forfeiture should not result in new victims. The "relation-back" doctrine[74] is thus completely inconsistent with the theory of rights. It looks at things from the perspective of the state, not from the perspective of the individual the state was established to protect.

The same analysis applies to what might be thought of as the "softer" goods that are transferred when rights are violated—not such things as pain and suffering, which are very real, but the affronts to dignity and public safety that accompany intentional or criminal wrongs and, to a lesser extent, wrongs that result from reckless and even negligent behavior. Again, the criminal or reckless actor derives a benefit by imposing a cost on his victim. Thus, the damages, fine, or other form of punishment that follows is properly seen as a forfeiture of that gain, aimed at making the victim or society whole. Whether the forfeiture is "punitive" as well as "remedial" is not the point. Rather, the point is to make the victim whole with remedies that reach the whole of the wrong, even its "softer" side. Thus, insofar as "punitive" forfeitures remedy all and only such wrongs, they are justified under an ill-gotten-goods rationale. Note, however, that such forfeitures can reach no further than the wrong they are intended to remedy. Properly grounded and thus limited, therefore, forfeiture is perfectly consistent with the Eighth Amendment's prohibition of "excessive fines." Forfeitures that reach beyond that grounding, however, become excessive. Thus, the theory of rights—with its foundations in property, broadly understood—provides a basis for defining "excessive."

Beyond this limited application, however, it is difficult to find any substantive rationale for forfeiture. In a word, what more could a victim want—individual or societal—than to be made whole? There is, to be sure, some latitude in the idea of being made whole, but modern forfeiture law is not about exploiting that latitude with sharp bargaining about the "true" costs of the wrongs for which forfeiture is sought. No, it is about reaching well beyond any well-grounded forfeiture law. Thus, it is about contraband, most of which should not be considered contraband in the first place. (Were Mr. Alexander's sexually explicit magazines violating anyone's rights?) And even more it is about the "instrumentalities" of crime, including those things that "facilitate" crime, which include virtually anything that can be remotely connected to a crime. (Was Mr. Austin's body shop violating anyone's rights?) What is forgotten, once victims have been made whole, is that the additional things that are forfeited—beyond the legitimate forfeitures—*belong* to people. Take them, without sufficient reason, and another wrong has been committed.

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74. *See supra* note 15 and accompanying text.

On the procedural side, modern forfeiture law fares no better, although it is difficult at times to tell whether a given doctrine is substantive or procedural. Thus, *in rem* forfeiture, based on the ancient substantive fiction that the property commits the wrong, follows from process against the property. In such cases the underlying "personification" and "taint" doctrines are simply too fantastic to require much rebuttal: obviously, only people are capable of actionable wrongs. If those baseless doctrines were abandoned, the innocent-owner defense would be rendered unnecessary. In short, nothing in that approach finds any foundation whatever in the theory of rights. There are times, of course, when seizure is necessary to preserve goods or evidence. And there are times when *in rem* methods of obtaining jurisdiction are necessary, but that is an entirely different matter: such methods simply enable a plaintiff or prosecutor to reach the kind of thing—a person—that alone can be a wrongdoer. Those methods are perfectly consistent with the theory of rights, not contrary to it.

In all cases, however, the burdens and standards of proof should be shaped, as noted above, by the elements of the alleged substantive wrong. Thus, *in rem* jurisdiction may allow seizure, but not forfeiture. To obtain forfeiture as a remedy, the plaintiff or prosecutor must continue to carry the burdens of proof and persuasion until sufficient evidence has been adduced to convince the adjudicator. In general, whereas a probable cause standard of proof may be sufficient for an *in rem* jurisdictional seizure, it hardly suffices for forfeiture of title. Before title is transferred by force of law, the reasons for doing so should be established by a preponderance of the evidence—in the case of "hard" losses, at least, which may be easier to prove. In the case of "soft" losses, which may be more difficult to prove, but where sanctions may reach the wrongdoer himself, proof of loss should be by a higher standard, regardless of whether the case is styled "civil" or "criminal." When punishment is justified as a remedy to make either individuals or the public whole, we must ensure not only that we have the right wrongdoer but that the requisite *mens rea* and loss of dignity that justify that remedy are proven.

VI. CONCLUSION

Most of modern American asset forfeiture law, in theory and in practice, flies in the face of common standards of justice. Ordinary intuition tells us that. Systematic analysis confirms it, and tells us why. Those parts of forfeiture law that cannot be justified—the larger parts, as just outlined—should be abandoned. Rooted in pre-modern authoritarianism, forfeiture looks at the world from the perspective of the state, then asks what needs to be done to bring about certain public ends, such as the reduction of crime, the end of drug use, whatever. Lost or

ignored in the process, too often, is the individual and his rights, which is inexcusable in a society dedicated to the individual.

Rather than assume the perspective of the state, then attempt to chip away forfeiture's more offensive features, this essay has approached forfeiture from the other direction, from the perspective of the individual. Rooted in post-modern libertarianism, this approach, which is the American approach, does not aim at the public good. Rather, it attends to private goods, indirectly, by securing private rights, from which both private and public goods follow.

Like Prohibition before it, the War on Drugs that drives most of forfeiture law and practice today is a paradigmatic example of public policy in pursuit of public ends, all but oblivious to the rights of private individuals. Public policy of that kind *uses* people for public ends—today to eradicate drugs, which we cannot even keep out of our prisons, tomorrow to fight tobacco, or disease, or whatever. Those who look at the world in such a way, through public eyes, have lost touch with America's roots as a nation. We need to return to those roots, not to revise forfeiture law but to rethink it from the ground up.

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