

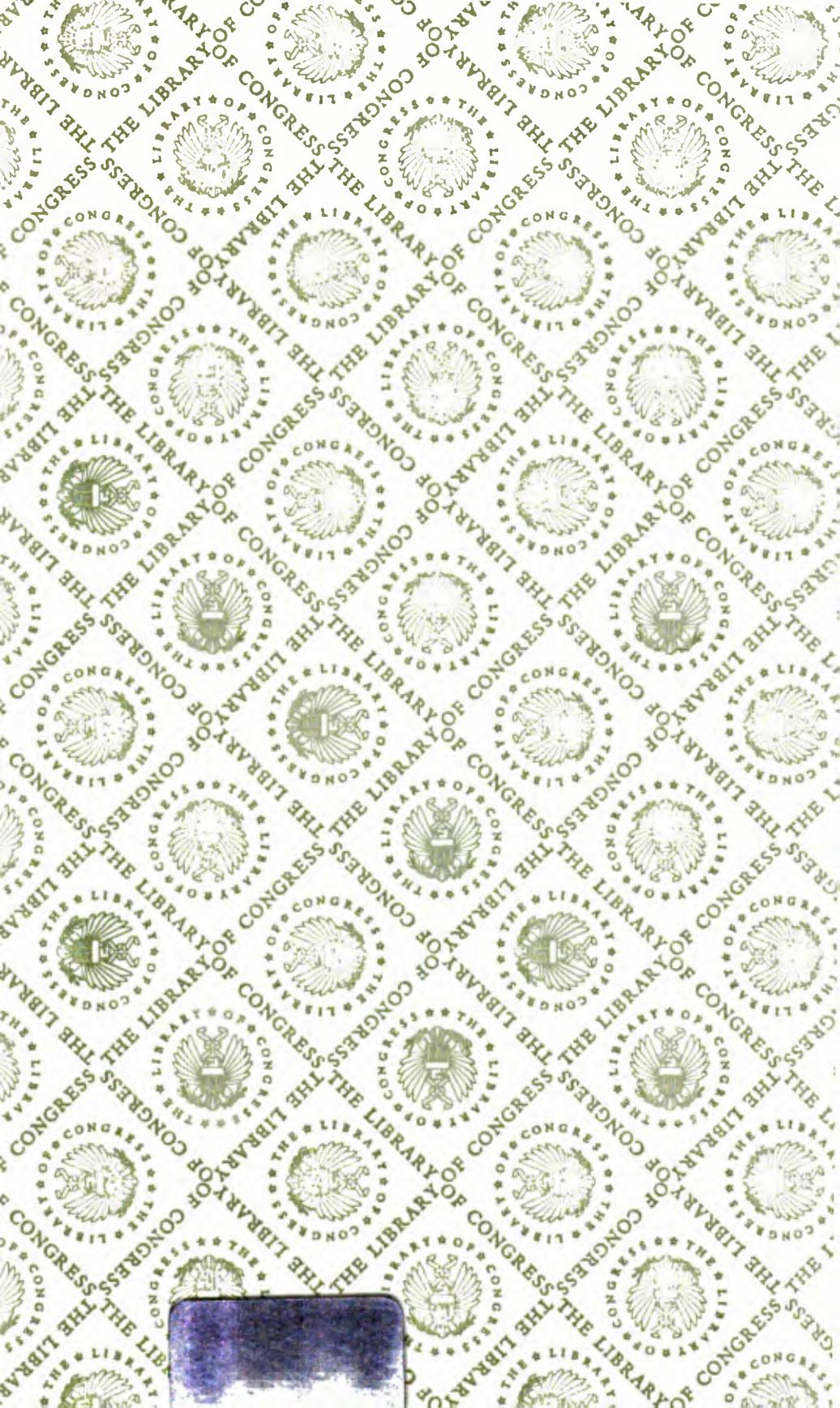
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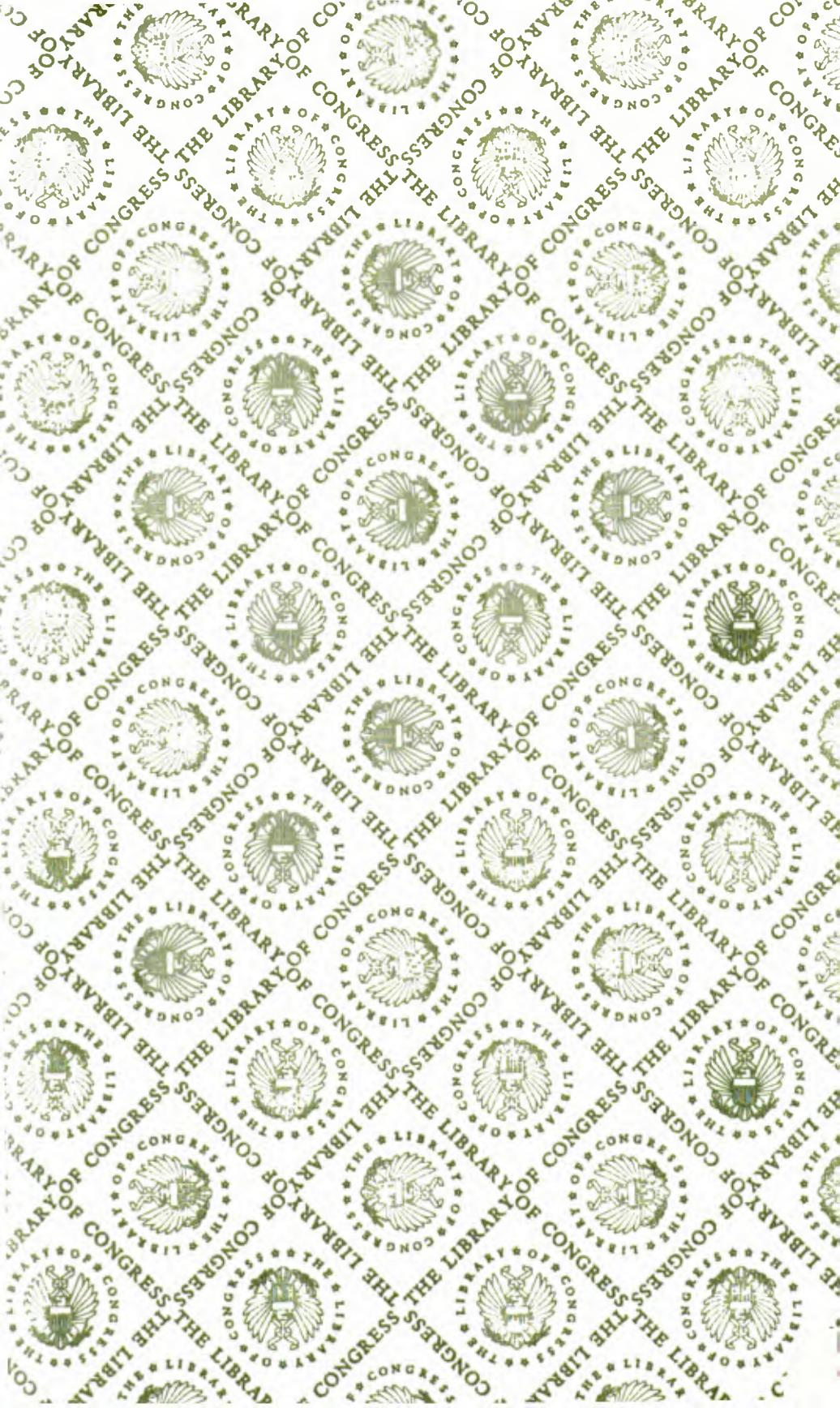
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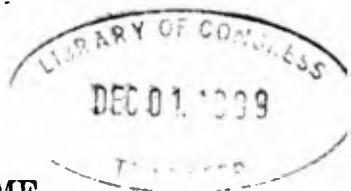




# REFORMING ASSET FORFEITURE LAWS

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**HEARING**  
BEFORE THE  
SUBCOMMITTEE ON CRIME  
OF THE  
COMMITTEE ON THE JUDICIARY  
HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTH CONGRESS

FIRST SESSION

ON

**H.R. 1745**

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SEPTEMBER 18, 1997

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**Serial No. 112**



Printed for the use of the Committee on the Judiciary

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# CONTENTS

## HEARING DATE

September 18, 1997 .....		Page 1
--------------------------	--	-----------

## TEXT OF BILL

H.R. 1745 .....		2
-----------------	--	---

## OPENING STATEMENT

McCollum, Hon. Bill, a Representative in Congress from the State of Florida, and chairman, Subcommittee on Crime .....		1
---	--	---

## WITNESSES

Blanton, Jan P., Director, Treasury Executive Office for Asset Forfeiture .....		174
Cassella, Stefan D., Assistant Chief, Asset Forfeiture and Money Laundering Section, Department of Justice .....		148
Edwards, E.E. (Bo), Senior Partner, E.E. Edwards and Associates, National Association of Criminal Defense Lawyers .....		192

## LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING

Blanton, Jan P., Director, Treasury Executive Office for Asset Forfeiture: Prepared statement .....		176
Cassella, Stefan D., Assistant Chief, Asset Forfeiture and Money Laundering Section, Department of Justice: Prepared statement .....		151
Edwards, E.E. (Bo), Senior Partner, E.E. Edwards and Associates, National Association of Criminal Defense Lawyers: Prepared statement .....		197

## APPENDIXES

Appendix 1.—Letter from Americans For Tax Reform .....		274
Appendix 2.—Material submitted by J. David Pobjecky, P.A., Winter Haven, FL .....		277



# REFORMING ASSET FORFEITURE LAWS

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THURSDAY, SEPTEMBER 18, 1997

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON CRIME,  
COMMITTEE ON JUDICIARY,  
*Washington, DC.*

The subcommittee met, pursuant to call, at 10:07 a.m. in Room 2237, Rayburn House Office Building, Hon. Bill McCollum [Chairman of the Subcommittee] presiding.

Present: Representatives Bill McCollum, Steven Schiff, Stephen E. Buyer, Steve Chabot, Bob Barr, Asa Hutchinson, George W. Gekas, Howard Coble, Charles E. Schumer, Sheila Jackson-Lee, Martin T. Meehan, Robert Wexler, Steven R. Rothman.

Staff Present: Paul McNulty, Chief Counsel; Nicole Nason, Counsel; Kara Norris, Staff Assistant; David Yassky, Minority Counsel.

## OPENING STATEMENT OF CHAIRMAN MCCOLLUM

Mr. McCOLLUM. This hearing is called to order. I want to welcome our witnesses today. We have a very important hearing on criminal asset forfeiture. There have been some proposed legislative changes to the criminal asset forfeiture issue that we want to address, and hopefully will be addressed by our witnesses today. Some of the legislation includes the Criminal Asset Forfeiture Act of 1997 and the criminal forfeiture provisions in H.R. 1745, the Forfeiture Act of 1997.

[Bill H.R. 1745 follows.]

105TH CONGRESS  
1ST SESSION

# H. R. 1745

To reform asset forfeiture laws.

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## IN THE HOUSE OF REPRESENTATIVES

MAY 22, 1997

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

---

## A BILL

To reform asset forfeiture laws.

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

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the Forfeiture Act of 1997.

5 **SEC. 2. TABLE OF CONTENTS.**

### TITLE I—ADMINISTRATIVE FORFEITURES

- Sec. 101. Time for filing claim; waiver of cost bond.
- Sec. 102. Jurisdiction and venue.
- Sec. 103. Judicial review of administrative forfeitures.
- Sec. 104. Judicial forfeiture of real property.
- Sec. 105. Preservation of arrested real property.
- Sec. 106. Amendment to Federal Tort Claims Act exceptions.
- Sec. 107. Prejudgment interest.
- Sec. 108. Seizure warrant requirement.

## TITLE II—JUDICIAL FORFEITURES

- Sec. 201. Trial procedure for civil forfeiture.
- Sec. 202. Uniform innocent owner defense.
- Sec. 203. Stay of civil forfeiture case.
- Sec. 204. Application of forfeiture procedures.
- Sec. 205. Civil investigative demands.
- Sec. 206. Access to records in bank secrecy jurisdictions.
- Sec. 207. Access to other records.
- Sec. 208. Disclosure of grand jury information to Federal prosecutors.
- Sec. 209. Currency forfeitures.

## TITLE III—PROPERTY SUBJECT TO FORFEITURE

- Sec. 301. Forfeiture of proceeds of Federal offenses.
- Sec. 302. Uniform definition of proceeds.
- Sec. 303. Forfeiture of firearms used in crimes of violence and felonies.
- Sec. 304. Forfeiture of proceeds traceable to facilitating property in drug cases.
- Sec. 305. Forfeiture for alien smuggling.
- Sec. 306. Forfeiture of proceeds of certain foreign crimes.
- Sec. 307. Forfeiture of property used to facilitate foreign drug crimes.
- Sec. 308. Forfeiture for violations of sections 6050I and 1960.
- Sec. 309. Criminal forfeiture for money laundering conspiracies.
- Sec. 310. Archeological Resources Protection Act.
- Sec. 311. Forfeiture of the instrumentalities of terrorism, telemarketing fraud and other offenses.
- Sec. 312. Forfeiture of vehicles used for gun running.
- Sec. 313. Forfeiture of criminal proceeds transported in interstate commerce.
- Sec. 314. Forfeiture of proceeds of Federal Food, Drug, and Cosmetic Act violations.
- Sec. 315. Forfeiture for food stamp fraud.
- Sec. 316. Forfeiture for odometer tampering offenses.

## TITLE IV—MISCELLANEOUS FORFEITURE AMENDMENTS

- Sec. 401. Use of forfeited funds to pay restitution to crime victims and regulatory agencies.
- Sec. 402. Enforcement of foreign forfeiture judgment.
- Sec. 403. Minor and technical amendments relating to 1992 Forfeiture Amendments.
- Sec. 404. Civil forfeiture of coins and currency in confiscated gambling devices.
- Sec. 405. Drug paraphernalia technical amendments.
- Sec. 406. Authorization to share forfeited property with cooperating foreign governments.
- Sec. 407. Forfeiture of counterfeit paraphernalia.
- Sec. 408. Closing of loophole to defeat forfeiture through bankruptcy.
- Sec. 409. Statute of limitations for civil forfeiture actions.
- Sec. 410. Assets forfeiture fund and property disposition.
- Sec. 411. Clarification of 21 U.S.C. 877.
- Sec. 412. Certificate of reasonable cause.
- Sec. 413. Conforming Treasury and Justice funds.
- Sec. 414. Disposition of property forfeited under Customs laws.
- Sec. 415. Technical amendments relating to obliterated motor vehicle identification numbers.
- Sec. 416. Fugitive disentitlement.
- Sec. 417. Admissibility of foreign business records.

Sec. 418. Destruction or removal of property to prevent seizure.

Sec. 419. Prospective application.

#### TITLE V—CRIMINAL FORFEITURE

Sec. 501. Uniform procedures for criminal forfeiture.

Sec. 502. Use of criminal forfeiture as an alternative to civil forfeiture.

Sec. 503. Federal Rules of Criminal Procedure.

Sec. 504. Pretrial restraint of substitute assets.

Sec. 505. Repatriation of property placed beyond the jurisdiction of the court.

Sec. 506. Hearings on Pretrial restraining orders; assets needed to pay attorneys fees.

Sec. 507. Criminal seizure warrants.

Sec. 508. Standard of proof for criminal forfeiture.

Sec. 509. Discovery procedure for locating forfeited assets.

Sec. 510. Collection of criminal forfeiture judgment.

Sec. 511. Appeals in criminal forfeiture cases.

Sec. 512. Nonabatement of forfeiture when defendant dies pending appeal.

Sec. 513. Standing of third parties to contest criminal forfeiture orders.

Sec. 514. Motion and discovery procedures for ancillary hearings.

Sec. 515. Intervention by the defendant in the ancillary proceeding.

Sec. 516. In personam judgments.

Sec. 517. Right of third parties to contest forfeiture of substitute assets.

Sec. 518. Forfeitable property transferred to third parties.

Sec. 519. Forfeiture of third party interests in criminal cases.

Sec. 520. Severance of jointly held property.

Sec. 521. Victim restitution.

Sec. 522. Delivery of property to the Marshals Service.

## 1 TITLE I—ADMINISTRATIVE FORFEITURES

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

3 (a) IN GENERAL.—Section 608 of the Tariff Act of  
4 1930 (19 U.S.C. 1608) is amended to read as follows:

#### 5 “§ 608. Seizures; claims; judicial condemnation

6 “(a) Any person claiming seized property may file a  
7 claim with the appropriate customs officer at any time  
8 after the seizure: *Provided*, That such claim must be filed  
9 not later than 30 days after the final publication of notice  
10 of seizure. The claim shall be signed by the claimant under  
11 penalty of perjury and shall contain a brief statement of

1 the nature and extent of the claimant's ownership interest  
2 in the property and how and when it was acquired.

3       “(b) Any claim filed pursuant to subsection (a) shall  
4 include the posting of a bond to the United States in the  
5 sum of \$5,000 or 10 percent of the value of the claimed  
6 property, whichever is lower, but not less than \$250, with  
7 sureties to be approved by the customs officer with whom  
8 the claim is filed. No bond shall be required, however, if  
9 the property is seized by the Attorney General and con-  
10 sists of currency or other monetary instruments, or if the  
11 claim is filed in forma pauperis with all supporting infor-  
12 mation as required by the seizing agency. The Attorney  
13 General and the Secretary of the Treasury, with respect  
14 to matters within their respective jurisdiction, shall have  
15 the authority to waive or reduce the bond requirement in  
16 any additional category of cases where he or she deter-  
17 mines that the posting of a bond is not required in the  
18 interests of justice.

19       “(c) Upon the filing of a claim pursuant to this sec-  
20 tion, the customs officer shall transmit the claim, with a  
21 duplicate list and description of the articles seized, to the  
22 United States attorney for a district in which a forfeiture  
23 action could be filed pursuant to section 1355(b) of title  
24 28, United States Code, who shall proceed to a condemna-  
25 tion of the merchandise or other property in the manner

1 prescribed in the Supplemental Rules for Certain Admi-  
2 ralty and Maritime Claims.”

3 (b) CONFORMING AMENDMENT.—Section 609 of the  
4 Tariff Act of 1930 (19 U.S.C. 1609) is amended by strik-  
5 ing “twenty” and inserting “30”.

6 **SEC. 102. JURISDICTION AND VENUE.**

7 (a) TRANSMITTAL TO THE UNITED STATES ATTOR-  
8 NEY.—Section 610 of the Tariff Act of 1930 (19 U.S.C.  
9 1610) is amended by striking “the district in which the  
10 seizure was made” and inserting “a district in which a  
11 forfeiture action could be filed pursuant to section 1355(b)  
12 of title 28, United States Code”.

13 (b) ADMIRALTY RULES.—The Supplemental Rules  
14 for Certain Admiralty and Maritime Claims are amend-  
15 ed—

16 (1) in rule E(3), by inserting the following at  
17 the end of paragraph (a): “This provision shall not  
18 apply in forfeiture cases governed by 28 U.S.C.  
19 1355 or any other statute providing for service of  
20 process outside of the district.”; and

21 (2) in rule C(2), by inserting the following after  
22 “that it is within the district or will be during the  
23 pendency of the action.”: “If the property is located  
24 outside of the district, the complaint shall state the

1 statutory basis for the court's exercise of jurisdiction  
2 over the property".

3 **SEC. 103. JUDICIAL REVIEW OF ADMINISTRATIVE FORFEIT-**  
4 **URES.**

5 Section 609 of the Tariff Act of 1930 (19 U.S.C.  
6 1609) is amended by adding the following new subsection:

7 "(d)(1) Where no timely claim to the seized property  
8 is filed, and a declaration of forfeiture is entered pursuant  
9 to this section by the seizing agency, the declaration shall  
10 be final and not subject to judicial review under any other  
11 provision of law except as follows: If a claimant, upon the  
12 filing of an action to set aside a declaration of forfeiture  
13 under this section, establishes by a preponderance of the  
14 evidence (A) that the seizing agency failed to take reason-  
15 able steps to provide the claimant with notice of the for-  
16 feiture, and (B) that the claimant had no actual notice  
17 of the forfeiture proceeding within the period for filing a  
18 claim, the district court shall order that the declaration  
19 of forfeiture be set aside pending forfeiture proceedings  
20 in accordance with sections 602 et seq.

21 "(2) The following shall be considered sufficient, but  
22 not necessary, to satisfy the requirement of taking reason-  
23 able steps to provide notice of the forfeiture:

1           “(A) sending, by mail or commercial carrier,  
2 notice of the forfeiture to the place where the claim-  
3 ant resides at the time the notice is sent;

4           “(B) serving notice of the forfeiture on the  
5 claimant’s attorney of record in the forfeiture case  
6 or in a related criminal case.

7           “(3) An action to set aside a declaration of forfeiture  
8 under this section must be filed within 2 years of the last  
9 date of publication of notice of the forfeiture of the prop-  
10 erty.”

11 **SEC. 104. JUDICIAL FORFEITURE OF REAL PROPERTY.**

12           Section 610 of the Tariff Act of 1930 (19 U.S.C.  
13 1610) is amended by adding at the end the following sen-  
14 tence. “Notwithstanding any other provision of law, all  
15 forfeitures of real property and interests in real property  
16 shall proceed as judicial forfeitures as provided in this sec-  
17 tion.”

18 **SEC. 105. PRESERVATION OF ARRESTED REAL PROPERTY.**

19           Rule E of the Supplemental Rules for Certain Admi-  
20 nistrative and Maritime Claims is amended by adding the fol-  
21 lowing new subsection:

22           “(10) PRESERVATION OF PROPERTY.—When-  
23 ever property is attached or arrested pursuant to the  
24 provisions of Rule E(4)(b) that permit the marshal  
25 or other person having the warrant to execute the

1 process without taking actual possession of the prop-  
2 erty, and the owner or occupant of the property is  
3 thereby permitted to remain in possession, the court,  
4 on the motion of any party or on its own motion,  
5 shall enter any order necessary to preserve the value  
6 of the property, its contents, and any income derived  
7 therefrom, and to prevent the destruction, removal  
8 or diminution in value of such property, contents  
9 and income. If the order is made necessary by exi-  
10 gent circumstances, or if the order would not inter-  
11 fere with the owner or occupant's use or enjoyment  
12 of the property, it may be entered ex parte. Other-  
13 wise the order may be entered only after notice and  
14 an opportunity to be heard."

15 **SEC. 106. AMENDMENT TO FEDERAL TORT CLAIMS ACT EX-**  
16 **CEPTIONS.**

17 Section 2680(c) of title 28, United States Code, is  
18 amended to read as follows:

19 "(c) Any claim arising in respect of the assessment  
20 or collection of any tax or customs duty, or the detention  
21 of any goods, merchandise, or other property by any law  
22 enforcement officer performing any official law enforce-  
23 ment function, except that the provisions of this chapter  
24 and section 1346(b) of this title shall apply to any claim  
25 based on the loss of, or negligent destruction or injury to,

1 goods, merchandise, or other tangible property while in the  
2 possession, custody or control of any law enforcement  
3 agency, if the property was seized for the purpose of for-  
4 feiture and is neither forfeited nor the subject of a pending  
5 forfeiture proceeding. For purposes of this subsection, the  
6 definition of "law enforcement officer" in subsection (h)  
7 shall apply."

8 **SEC. 107. PRE-JUDGMENT INTEREST.**

9 (a) **IN GENERAL.**—Section 2465 of title 28, United  
10 States Code, is amended by—

11 (1) designating the present matter as sub-  
12 section (a); and

13 (2) inserting the following new subsection:

14 "(b) **INTEREST.**—Upon entry of judgment for the  
15 claimant in any proceeding to condemn or forfeit property  
16 seized or arrested under any Act of Congress, the United  
17 States shall be liable for post-judgment interest as set  
18 forth in section 1961 of this title. The United States shall  
19 not be liable for pre-judgment interest, except that in  
20 cases involving currency or other negotiable instruments,  
21 the United States shall disgorge to the claimant any funds  
22 representing interest actually paid to the United States  
23 from the date of seizure or arrest of the property that  
24 resulted from the investment of the property in an inter-  
25 est-bearing account or instrument. The United States

1 shall not be required to disgorge the value of any intangi-  
2 ble benefits nor make any other payments to the claimant  
3 not specifically authorized by this subsection.”

4 (b) **EFFECTIVE DATE.**—The amendment made by  
5 subsection (a) shall apply to any judgment entered after  
6 the date of enactment of this Act.

7 **SEC. 108. SEIZURE WARRANT REQUIREMENT.**

8 (a) **IN GENERAL.**—Section 981(b) of title 18, United  
9 States Code, is amended to read as follows—

10 “(b)(1) Any property subject to forfeiture to the  
11 United States under this section may be seized by the At-  
12 torney General. In addition, in the case of property in-  
13 volved in a violation investigated by the Secretary of the  
14 Treasury or the United States Postal Service, the property  
15 may also be seized by the Secretary of the Treasury or  
16 the Postal Service, respectively.

17 “(2) Seizures pursuant to this section shall be made  
18 pursuant to a warrant obtained in the same manner as  
19 provided for a search warrant under the Federal Rules  
20 of Criminal Procedure, except that a seizure may be made  
21 without a warrant, if—

22 “(A) a complaint for forfeiture has been filed in  
23 the district court and the court has issued an arrest  
24 warrant in rem pursuant to the Supplemental Rules  
25 for Certain Admiralty and Maritime Claims;

1           “(B) the seizure is made pursuant to a lawful  
2           arrest or search, or if there is probable cause to be-  
3           lieve that the property is subject to forfeiture and  
4           another exception to the Fourth Amendment war-  
5           rant requirement would apply; or

6           “(C) the property was lawfully seized by a state  
7           or local law enforcement agency and has been trans-  
8           ferred to a Federal agency in accordance with State  
9           law.”

10          “(3) Notwithstanding the provisions of rule 41(a),  
11          Federal Rules of Criminal Procedure, a seizure warrant  
12          may be issued pursuant to this subsection by a judicial  
13          officer in any district in which a forfeiture action against  
14          the property may be filed under section 1355(b) of title  
15          28, United States Code, and executed in any district in  
16          which the property is found. Any motion for the return  
17          of property seized under this section shall be filed in the  
18          district in which the seizure warrant was issued.

19          “(4) In the event of a seizure pursuant to paragraph  
20          (2) of this subsection, proceedings under subsection (d)  
21          of this section or an applicable criminal forfeiture statute  
22          shall be instituted as soon as practicable, taking into ac-  
23          count the status of any criminal investigation to which the  
24          seizure may be related.

1       “(5) If any person is arrested or charged in a foreign  
2 country in connection with an offense that would give rise  
3 to the forfeiture of property in the United States under  
4 this section or under the Controlled Substances Act, the  
5 Attorney General may apply to any Federal judge or mag-  
6 istrate judge in the district where the property is located  
7 for an ex parte order restraining the property subject to  
8 forfeiture for not more than 30 days, except that the time  
9 may be extended for good cause shown at a hearing con-  
10 ducted in the manner provided in rule 43(e), Federal  
11 Rules of Civil Procedure. The application for the restrain-  
12 ing order shall set forth the nature and circumstances of  
13 the foreign charges and the basis for belief that the person  
14 arrested or charged has property in the United States that  
15 would be subject to forfeiture, and shall contain a state-  
16 ment that the restraining order is needed to preserve the  
17 availability of property for such time as is necessary to  
18 receive evidence from the foreign country or elsewhere in  
19 support of probable cause for the seizure of the property  
20 under this subsection.

21       “(6) Any owner of property seized pursuant to this  
22 section may obtain release of the property pending resolu-  
23 tion of the forfeiture action upon payment of a substitute  
24 res in an amount equal to the appraised value of the prop-  
25 erty, unless the seized property—

1           “(A) is contraband,

2           “(B) is evidence of a violation of the law,

3           “(C) by reason of design or other characteristic,  
4           is particularly suited for use in illegal activities, or

5           “(D) is likely to be used to commit additional  
6           criminal acts if returned to the owner.

7 The substitute res must be in the form of a traveler’s  
8 check, money order, cashier’s check or irrevocable letter  
9 of credit made payable to the seizing agency. If such sub-  
10 stitute res is provided, the court or in the case of adminis-  
11 trative forfeiture, the seizing agency, shall have jurisdic-  
12 tion to proceed with the forfeiture of the substitute res  
13 in lieu of the property. If, at the conclusion of the forfeit-  
14 ure proceeding, the property is declared forfeited, the  
15 owner shall surrender the property and recover the sub-  
16 stitute res, unless the Attorney General or the seizing  
17 agency elects to retain the substitute res in lieu of the  
18 property.”

19           (b) DRUG FORFEITURES.—Section 511(b) of the  
20 Controlled Substances Act (21 U.S.C. 881(b)) is amended  
21 to read as follows:

22           “(b) Any property subject to forfeiture to the United  
23 States under this section may be seized by the Attorney  
24 General in the manner set forth in section 981(b) of title  
25 18, United States Code.

1           “(e) CONFORMING AMENDMENT.—Section 518(d) of  
2 the Controlled Substances Act (21 U.S.C. 888(d)) is re-  
3 pealed.”

## 4           **TITLE II—JUDICIAL FORFEITURES**

### 5           **SEC. 201. TRIAL PROCEDURE FOR CIVIL FORFEITURE.**

6           (a) IN GENERAL.—Chapter 46 of title 18, United  
7 States Code, is amended by inserting the following new  
8 section:

#### 9           **“§ 987. Judicial forfeiture proceedings**

10           “(a) COMPLAINT.—The Attorney General may file a  
11 civil forfeiture complaint in the manner set forth in the  
12 Supplemental Rules for Certain Admiralty and Maritime  
13 Claims. In cases where the applicable law authorizes the  
14 institution of civil and criminal forfeiture proceedings in  
15 connection with an offense, the Attorney General shall  
16 have the discretion to determine whether to file a civil  
17 complaint under this section, a criminal complaint, indict-  
18 ment or information including a forfeiture count in accord-  
19 ance with the applicable criminal forfeiture statute, or  
20 both civil and criminal actions.

21           “(b) TIME FOR FILING COMPLAINT.—(1) If property  
22 is seized and a claim is filed pursuant to section 608 of  
23 the Tariff Act of 1930 (19 U.S.C. 1608), or if the seizure  
24 is referred to the Attorney General pursuant to section  
25 610 (19 U.S.C. 1610), the Attorney General shall deter-

1 mine as soon as practicable whether a forfeiture action  
2 should be instituted.

3       “(2) If the Attorney General determines not to insti-  
4 tute a forfeiture action, he or she shall so advise the seiz-  
5 ing agency. A decision not to institute a forfeiture action  
6 shall not preclude the seizing agency from transferring or  
7 returning the seized property to a State or local law en-  
8 forcement authority for appropriate forfeiture action in ac-  
9 cordance with State law. Nor shall a decision not to insti-  
10 tute a forfeiture action imply that the action of the seizing  
11 agency in seizing the property was in any way improper.

12       “(3) If the Attorney General determines that a for-  
13 feiture action should be instituted, he or she shall institute  
14 such action as soon as practicable, taking into account the  
15 status of any criminal investigation to which the forfeiture  
16 action may be related.

17       “(c) CLAIM AND ANSWER.—A claim and answer to  
18 a civil forfeiture complaint shall be filed in accordance  
19 with rule C of the Supplemental Rules for Certain Admi-  
20 ralty and Maritime Claims and shall set forth the nature  
21 and extent of the claimant’s ownership interest in the  
22 property, the time and circumstances of the claimant’s ac-  
23 quisition of the interest in the property, and any addi-  
24 tional facts supporting the claimant’s standing to file a  
25 claim challenging the forfeiture action.

1       “(d) **STANDING.**—If the Government, at the time of  
2 trial or at any time prior to trial, files a motion to dismiss  
3 the claim for lack of standing, the court shall conduct a  
4 hearing, in the manner provided in rule 43(e), Federal  
5 Rules of Civil Procedure, and shall determine whether the  
6 claimant has established, by a preponderance of the evi-  
7 dence, that he or she has the requisite ownership interest  
8 in the property, as defined in section 983(c), to challenge  
9 the forfeiture action. If the court determines that a claim-  
10 ant lacks standing, it shall dismiss the claim with preju-  
11 dice and enter a final judgment as to that claimant.

12       “(e) **BURDEN OF PROOF.**—At trial in a civil forfeit-  
13 ure case, the Government shall have the initial burden of  
14 proving that the property is subject to forfeiture by a pre-  
15 ponderance of the evidence. If the Government proves that  
16 the property is subject to forfeiture, the claimant shall  
17 have the burden of proving by a preponderance of the evi-  
18 dence that he or she has an interest in the property that  
19 is not forfeitable under section 983 of this title. If the  
20 Government’s theory of forfeiture is that the property fa-  
21 cilitated the commission of a criminal offense, the Govern-  
22 ment must establish that there was a substantial connec-  
23 tion between the property and the offense.

24       “(f) **AFFIRMATIVE DEFENSES.**—The claimant shall  
25 set forth all affirmative defenses, including constitutional

1 defenses, in his or her answer, as provided in rule 8, Fed-  
2 eral Rules of Civil Procedure, and shall comply with dis-  
3 covery requests regarding such defenses in advance of  
4 trial.

5       “(g) MOTION TO SUPPRESS SEIZED EVIDENCE.—At  
6 any time after a claim and answer are filed, a claimant  
7 with standing to contest the seizure of the property may  
8 move to suppress such property in accordance with the  
9 normal rules regarding the suppression of evidence. If the  
10 claimant prevails on such motion, the property shall not  
11 be admitted into evidence as to that claimant at the for-  
12 feiture trial. However, a finding that property should be  
13 suppressed shall not bar the forfeiture of the property  
14 based on evidence obtained independently before or after  
15 the seizure.

16       “(h) USE OF HEARSAY AT PRE-TRIAL HEARINGS.—  
17 At any pre-trial hearing under this section, the court may  
18 accept and consider hearsay otherwise inadmissible under  
19 the Federal Rules of Evidence. The court shall not require  
20 the government to reveal the identity of any confidential  
21 informant at a pre-trial hearing if there are sufficient indi-  
22 cia of reliability regarding such testimony to allow the  
23 statement of such informant to be related by a law en-  
24 forcement officer.

1       “(i) **ADVERSE INFERENCES.**—The assertion by the  
2 claimant of any fifth amendment privilege against com-  
3 pelled testimony in the course of the forfeiture proceeding,  
4 including pre-trial discovery, shall give rise to an adverse  
5 inference regarding the matter on which such privilege is  
6 asserted. The Government may rely on such adverse infer-  
7 ence in support of its burden to establish the forfeitability  
8 of the property and in response to any affirmative defense.  
9 However, the government may not rely solely on such ad-  
10 verse inferences to satisfy its burden of proof.

11       “(j) **STIPULATIONS.**—Notwithstanding the claimant’s  
12 offer to stipulate to the forfeitability of the property, the  
13 Government shall be entitled to present evidence to the  
14 finder of fact on that issue before the claimant presents  
15 any evidence in support of any affirmative defense.

16       “(k) **PRESERVATION OF PROPERTY SUBJECT TO**  
17 **FORFEITURE.**—The court, before or after the filing of a  
18 forfeiture complaint and on the application of the Govern-  
19 ment, may:

20               “(1) enter any restraining order or injunction  
21 pursuant to section 413(3) of the Controlled Sub-  
22 stances Act (21 U.S.C. 853(e));

23               “(2) require the execution of satisfactory per-  
24 formance bonds;

25               “(3) create receiverships;

1           “(4) appoint conservators, custodians, apprais-  
2           ers, accountants or trustees; or

3           “(5) take any other action to seize, secure,  
4           maintain, or preserve the availability of property  
5           subject to forfeiture under this section.

6           “(1) **RELEASE OF PROPERTY TO PAY CRIMINAL DE-**  
7 **FENSE COSTS.—**

8           “(1) A person charged with a criminal offense  
9           may apply for the release of property seized for for-  
10          feiture to pay the necessary expenses of the person’s  
11          criminal defense. Such application shall be filed with  
12          the court where the forfeiture proceeding is pending.

13          “(2) When an application is filed pursuant to  
14          paragraph (1), the burden shall first be upon the ap-  
15          plicant to establish that he has no access to other  
16          assets adequate for the payment of criminal defense  
17          counsel, and that the interest in property to be re-  
18          leased is not subject to any claim other than the for-  
19          feiture. The Government shall have an opportunity  
20          to cross-examine the applicant and any witnesses he  
21          or she may present on this issue.

22          “(3) If the court determines that the applicant  
23          has met the requirements set forth in paragraph (2),  
24          the court shall hold a probable cause hearing at  
25          which the applicant shall have the burden of proving

1 the absence of probable cause for the forfeiture of  
2 the property. If the court finds that there is no  
3 probable cause for the forfeiture, it shall order the  
4 release of the assets for which probable cause is  
5 lacking. Otherwise, it shall dismiss the application.  
6 The court shall not consider any affirmative defenses  
7 to the forfeiture at the probable cause hearing.

8 “(m) EXCESSIVE FINES.—At the conclusion of the  
9 trial and following the entry of a verdict of forfeiture, the  
10 claimant may petition the court to determine whether the  
11 excessive fines clause of the eighth amendment applies,  
12 and if so, whether forfeiture is excessive. The claimant  
13 shall have the burden of establishing that a forfeiture is  
14 excessive by a preponderance of the evidence at a hearing  
15 conducted in the manner provided in rule 43(e), Federal  
16 Rules of Civil Procedure, by the court without a jury. If  
17 the court determines that the forfeiture is excessive, it  
18 shall adjust the forfeiture to the extent necessary to avoid  
19 the Constitutional violation.

20 “(n) APPLICABILITY.—This section shall apply to any  
21 judicial forfeiture action brought pursuant to this title, the  
22 Controlled Substances Act, or the Immigration and Natu-  
23 ralization Act of 1952. Section 615 of the Tariff Act of  
24 1930 (19 U.S.C. 1615) shall not apply to forfeitures under

1 this section, nor shall this section apply to forfeitures  
2 under the customs laws.

3       “(o) ABATEMENT.—A civil forfeiture action or judg-  
4 ment under this or any other provision of federal law shall  
5 not abate because of the death of any person.”

6       (b) REBUTTABLE PRESUMPTIONS.—Section 981 of  
7 title 18, United States Code, is amended by adding the  
8 following new subsection:

9       “(k) REBUTTABLE PRESUMPTIONS.—(1) At the trial  
10 of an action brought pursuant to subsection (a)(1)(B),  
11 there is a presumption, governed by Rule 301 of the Fed-  
12 eral Rules of Evidence, that the property is subject to for-  
13 feiture if the United States establishes, by a preponder-  
14 ance of the evidence, that such property was acquired dur-  
15 ing a period of time when the person who acquired the  
16 property was engaged in an offense against a foreign na-  
17 tion described in subsection (a)(1)(B) or within a reason-  
18 able time after such period, and there was no likely source  
19 for such property other than such offense.

20       “(2) At the trial of an action brought pursuant to  
21 subsection (a)(1)(A), there is a presumption, governed by  
22 rule 301 of the Federal Rules of Evidence, that the prop-  
23 erty was involved in a violation of section 1956 or 1957  
24 of this title if the United States establishes, by a prepon-  
25 derance of the evidence, any three of the following factors:

1           “(A) the property constitutes or is traceable to  
2 more than \$10,000 that has been or was intended  
3 to be transported, transmitted or transferred to or  
4 from a major drug-transit country, a major illicit  
5 drug producing country, or a major money launder-  
6 ing country, as those terms are determined pursuant  
7 to sections 481(e) and 490(h) of the Foreign Assist-  
8 ance Act of 1961 (22 U.S.C. 2291(e) and 2291j(h));

9           “(B) the transaction giving rise to the forfeit-  
10 ure occurred in part in a foreign country whose bank  
11 secrecy laws have rendered the United States unable  
12 to obtain records relating to the transaction by judi-  
13 cial process, treaty or executive agreement;

14           “(C) a person more than minimally involved in  
15 the transaction giving rise to the forfeiture action (i)  
16 has been convicted in any State, Federal, or foreign  
17 jurisdiction of a felony involving money laundering  
18 or the manufacture, importation, sale or distribution  
19 of a controlled substance, or (ii) is a fugitive from  
20 prosecution for such offense; or

21           “(D) the transaction giving rise to the forfeit-  
22 ure action was conducted by, to or through a shell  
23 corporation not engaged in any legitimate business  
24 activity in the United States.

1       “(3) For the purposes of this paragraph, ‘shell cor-  
2 poration’ means any corporation that does not conduct  
3 any ongoing and significant commercial or manufacturing  
4 business or any other form of commercial operation.

5       “(4) The enumeration of presumptions in this sub-  
6 section shall not preclude the development of other judi-  
7 cially created presumptions.”

8       (c) CONFORMING AMENDMENT.—Section 274(b)(5)  
9 of the Immigration and Naturalization Act (8 U.S.C.  
10 1324(b)(5)) is amended—

11           “(1) by striking “the burden of proof shall lie  
12 upon such claimant, except that probable cause shall  
13 be first shown for the institution of such suit or ac-  
14 tion. In determining whether probable cause exists,”;  
15 and

16           “(2) by adding at the end the following sen-  
17 tence: “The procedures set forth in chapter 46 of  
18 title 18, United States Code, shall govern judicial  
19 forfeiture actions under this section.”

20       (d) CHAPTER ANALYSIS.—The chapter analysis for  
21 chapter 46 of title 18, United States Code, is amended  
22 by inserting the following at the appropriate place:

“987. Judicial forfeiture proceedings.”

1 **SEC. 202. UNIFORM INNOCENT OWNER DEFENSE.**

2 (a) **IN GENERAL.**—Chapter 46 of title 18, United  
3 States Code, is amended by inserting after section 982 the  
4 following new section:

5 **“§ 983. Innocent owners**

6 “(a) An innocent owner’s interest in property shall  
7 not be forfeited in any judicial action under any civil for-  
8 feiture provision of this title, the Controlled Substances  
9 Act, or the Immigration and Naturalization Act of 1952.

10 “(b)(1) With respect to a property interest in exist-  
11 ence at the time the illegal act giving rise to forfeiture  
12 took place, a person is an innocent owner if he or she es-  
13 tablishes, by a preponderance of the evidence—

14 “(A) that he or she did not know that the prop-  
15 erty was being used or was likely to be used in the  
16 commission of such illegal act, or

17 “(B) that upon learning that the property was  
18 being used or was likely to be used in the commis-  
19 sion of such illegal act, he or she promptly did all  
20 that reasonably could be expected to terminate or to  
21 prevent such use of the property.

22 “(2) With respect to a property interest acquired  
23 after the act giving rise to the forfeiture took place, a per-  
24 son is an innocent owner if he or she establishes, by a  
25 preponderance of the evidence, that he or she acquired the  
26 property as a bona fide purchaser for value who at the

1 time of the purchase did not know and was reasonably  
2 without cause to believe that the property was subject to  
3 forfeiture. A purchaser is "reasonably without cause to be-  
4 lieve that the property was subject to forfeiture" if, in  
5 light of the circumstances, the purchaser did all that rea-  
6 sonably could be expected to ensure that he or she was  
7 not acquiring property that was subject to forfeiture.

8       “(3) Notwithstanding any provision of this section,  
9 no person may assert an ownership interest under this sec-  
10 tion in contraband or other property that it is illegal to  
11 possess. In addition, except as set forth in paragraph (2),  
12 no person may assert an ownership interest under this sec-  
13 tion in the illegal proceeds of a criminal act, irrespective  
14 of state property law.

15       “(c) For the purposes of this section—

16               “(1) an “owner” is a person with an ownership  
17 interest in the specific property sought to be for-  
18 feited, including but not limited to a lien, mortgage,  
19 recorded security device or valid assignment of an  
20 ownership interest. An owner does not include: (A)  
21 a person with only a general unsecured interest in,  
22 or claim against, the property or estate of another  
23 person; (B) a bailee; (C) a nominee who exercises no  
24 dominion or control over the property; or (D) a ben-  
25 efiary of a constructive trust; and

1           “(2) a person shall be considered to have known  
2           that his or her property was being used or was likely  
3           to be used in the commission of an illegal act if the  
4           government establishes the existence of facts and  
5           circumstances that should have created a reasonable  
6           suspicion that the property was being or would be  
7           used for an illegal purpose.

8           “(d) If the court determines, in accordance with this  
9           section, that an innocent owner had a partial interest in  
10          property otherwise subject to forfeiture, or a joint tenancy  
11          or tenancy by the entirety in such property, the court shall  
12          enter an appropriate order (1) severing the property; (2)  
13          transferring the property to the government with a provi-  
14          sion that the government compensate the innocent owner  
15          to the extent of his or her ownership interest once a final  
16          order of forfeiture has been entered and the property has  
17          been reduced to liquid assets, or (3) permitting the inno-  
18          cent owner to retain the property subject to a lien in favor  
19          of the government to the extent of the forfeitable interest  
20          in the property. To effectuate the purposes of this sub-  
21          section, a joint tenancy or tenancy by the entireties shall  
22          be converted to a tenancy in common by order of the  
23          court, irrespective of state law.

24          “(e) If the person asserting a defense under sub-  
25          section (b)(1) or (b)(2) is a financial institution, as de-

1 fined in section 20 of this title, there shall be a presump-  
2 tion, governed by rule 301 of the Federal Rules of Evi-  
3 dence, that the institution acted "reasonably" if the insti-  
4 tution establishes that it followed rigorous and regular in-  
5 ternal procedures relating to the approval of any loan or  
6 the acquisition of any property interest in accordance with  
7 the standards for due diligence in the lending industry.  
8 The presumption shall not apply if the government estab-  
9 lishes that the financial institution had notice that the  
10 property was subject to forfeiture before it acquired any  
11 interest in the property."

12 (b) STRIKING SUPERSEDED PROVISIONS.—(1) Sec-  
13 tion 981(a) of title 18, United States Code, is amended  
14 by—

15 (A) striking subsection (a)(2) and renumbering  
16 any subsections added by this Act accordingly; and

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

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

23 (3) Sections 2254(a) (2) and (3) of title 18, United  
24 States Code, are amended by striking ", except that" and  
25 all that follows, each time it appears.

1 (c) CONFORMING AMENDMENT.—The chapter analy-  
2 sis for chapter 46 of title 18, United States Code, is  
3 amended by inserting the following at the appropriate  
4 place:

“983. Innocent owners.”

5 **SEC. 203. STAY OF CIVIL FORFEITURE CASE.**

6 (a) IN GENERAL.—Section 981(g) of title 18, United  
7 States Code, is amended to read as follows:

8 “(g)(1) Upon the motion of the United States, the  
9 court shall stay the civil forfeiture proceeding if it deter-  
10 mines that civil discovery or trial could adversely affect  
11 the government’s ability to conduct a related criminal in-  
12 vestigation or the prosecution of a related criminal case.

13 “(2) Upon the motion of a claimant, the court shall  
14 stay the civil forfeiture proceeding with respect to that  
15 claimant if it determines that the claimant is the subject  
16 of a related criminal investigation or case, that the claim-  
17 ant has standing to assert a claim in the civil forfeiture  
18 proceeding, and that continuation of the forfeiture pro-  
19 ceeding may infringe upon the claimant’s right against  
20 self-incrimination in the related investigation or case.

21 “(3) With respect to the impact of civil discovery de-  
22 scribed in paragraphs (1) and (2), the court may deter-  
23 mine that a stay is unnecessary if a protective order limit-  
24 ing discovery would protect the interest of one party with-  
25 out unfairly limiting the ability of the opposing party to

1 pursue the civil case. In no case, however, shall the court  
2 impose a protective order as an alternative to a stay if  
3 the effect of such protective order would be to allow one  
4 party to pursue discovery while the other party was sub-  
5 stantially unable to do so.

6       “(4) For the purposes of this subsection, “a related  
7 criminal case” and “a related criminal investigation”  
8 mean an actual prosecution or investigation in progress  
9 at the time the request for the stay is made. In determin-  
10 ing whether a criminal case or investigation is “related”  
11 to a civil forfeiture proceeding, the court shall consider  
12 the degree of similarity between the parties, witnesses,  
13 facts and circumstances involved in the two proceedings  
14 without requiring an identity with respect to any one or  
15 more factors.

16       “(5) Any presentation to the court under this sub-  
17 section that involves an on-going criminal investigation  
18 shall be made by the Government *ex parte* and under seal.

19       “(6) Whenever a civil forfeiture proceeding is stayed  
20 pursuant to this subsection, the court shall enter any  
21 order necessary to preserve the value of the property or  
22 to protect the rights of lienholders or other persons with  
23 an interest in the property while the stay is in effect.

24       “(7) A determination by the court that the claimant  
25 has standing to request a stay pursuant to paragraph (2)

1 shall apply only to the provisions of this subsection and  
2 shall not preclude the Government from objecting to the  
3 claimant's standing to the time of trial in accordance with  
4 Section 987(d) of this title.

5       “(8) An order imposing a stay pursuant to this sub-  
6 section shall expire in 180 days unless the court deter-  
7 mines, at the end of such time period, that there are com-  
8 pelling reasons why the stay should be continued. An order  
9 renewing a stay shall be reviewed by the court every 90  
10 days unless the parties agree that such review is unneces-  
11 sary.”

12       (b) DRUG FORFEITURES.—Section 511(i) of the Con-  
13 trolled Substances Act (21 U.S.C. 881(i)) is amended to  
14 read as follows:

15       “(i) The provisions of section 981(g) of title 18, Unit-  
16 ed States Code, regarding the stay of the civil forfeiture  
17 proceeding shall apply to forfeitures under this section.”

18       (c) GUIDELINES.—Within 180 days after the effec-  
19 tive date of this section, the Attorney General and the Sec-  
20 retary of the Treasury shall jointly promulgate guidelines  
21 governing the preservation of the value of property subject  
22 to forfeiture in a case that has been stayed pursuant to  
23 section 511(i) of the Controlled Substances Act (21 U.S.C.  
24 881(i)) or section 981(g) of title 18, United States Code.  
25 The guidelines shall take into account the interests of both

1 the Government and the claimant in avoiding the deprecia-  
 2 tion, destruction or dissipation of the property pending  
 3 conclusion of the forfeiture proceeding.

4 **SEC. 204. APPLICATION OF FORFEITURE PROCEDURES.**

5 (a) **IN GENERAL.**—Chapter 46 of title 18, United  
 6 States Code, is amended by adding the following section:

7 **“§ 988. Application of forfeiture procedures**

8 “(a) **CIVIL FORFEITURES.**—Whenever a statute in  
 9 this title provides for the civil forfeiture of property with-  
 10 out specifying the procedures governing a judicial forfeit-  
 11 ure action, the provisions of this chapter relating to civil  
 12 forfeitures shall apply.

13 “(b) **CRIMINAL FORFEITURES.**—Whenever a statute  
 14 in this title provides for the criminal forfeiture of property  
 15 without specifying the procedures governing such forfeit-  
 16 ures, the provisions of this chapter relating to criminal for-  
 17 feitures shall apply.”

18 (b) **CONFORMING AMENDMENT.**—The chapter analy-  
 19 sis for Chapter 46, of title 18, United States Code, is  
 20 amended by adding the following:

“988. Application of Forfeiture Procedures.”

21 **SEC. 205. CIVIL INVESTIGATIVE DEMANDS.**

22 (a) **IN GENERAL.**—Chapter 46 of title 18, United  
 23 States Code, is amended by adding at the end of the fol-  
 24 lowing new section:

1 **“§ 985. Civil investigative demands**

2 “(a) For the purpose of conducting an investigation  
3 in contemplation of any civil forfeiture proceedings, the  
4 Attorney General may—

5 “(1) administer oaths and affirmations;

6 “(2) take evidence; and

7 “(3) by subpoena, summon witnesses and re-  
8 quire the production of any books, papers, cor-  
9 respondence, memoranda, or other records which the  
10 Attorney General deems relevant or material to the  
11 inquiry. Such subpoena may require the attendance  
12 of witnesses and the production of any such records  
13 from any place in the United States at any place in  
14 the United States designated by the Attorney Gen-  
15 eral.

16 “(b) Except as provided in this section, the proce-  
17 dures and limitations that apply to civil investigative de-  
18 mands in subsections (g), (h), and (j) of section 1968 of  
19 title 18, United States Code, shall apply with respect to  
20 civil investigative demands issued under this subsection.  
21 Process required by such subsections of section 1968 to  
22 be served upon ‘the custodian’ shall be served on the At-  
23 torney General. Failure to comply with an order of the  
24 court to enforce such demand shall be punishable as civil  
25 or criminal contempt.

1       “(c) In the case of a civil investigative demand for  
2 which the return date is less than 5 days after the date  
3 of service, no person shall be found in contempt for failure  
4 to comply by the return date if such person files a petition  
5 under subsection (b) not later than 5 days after the date  
6 of service.

7       “(d) A civil investigative demand may be issued pur-  
8 suant to this section in furtherance of an investigation di-  
9 rected toward the forfeiture of an asset at any time up  
10 to the filing of a civil forfeiture complaint with respect  
11 to that asset, except that no demand relating to a given  
12 asset may be served upon any person who files a claim  
13 to that asset pursuant to section 1608 of title 19, United  
14 States Code, once such claim is filed. Once a given asset  
15 is made the subject of a civil forfeiture complaint, all fur-  
16 ther discovery regarding the forfeiture of that asset shall  
17 proceed in accordance with the Federal Rules of Civil Pro-  
18 cedure. Investigation relating to the forfeiture of assets  
19 not subject to a claim or to a forfeiture complaint may  
20 proceed pursuant to this section at any time.

21       “(e) In this section, ‘Attorney General’ means any at-  
22 torney for the Government employed by the Department  
23 of Justice as defined by rule 54(c) of the Federal Rules  
24 of Criminal Procedure, and shall not include an attorney,

1 agent or other employee of any agency of the Depart-  
2 ment.”

3 (b) CONFORMING AMENDMENT.—The chapter analy-  
4 sis for chapter 46 of title 18, United States Code is  
5 amended by adding the following at the appropriate place:

“985. Civil investigative demands.”

6 (c) OBSTRUCTION OF CIVIL INVESTIGATIVE DE-  
7 MAND.—Section 1505 of title 18, United States Code, is  
8 amended by inserting “section 985 of this title or” before  
9 “the Anti-trust Civil Process Act”.

10 (d) RIGHT TO FINANCIAL PRIVACY ACT AMEND-  
11 MENT.—Section 1120(b)(1)(A) of the Right to Financial  
12 Privacy Act (12 U.S.C. 3420(b)(1)(A)) is amended by in-  
13 serting “or civil investigative demand” after “a grand jury  
14 subpoena”.

15 (e) FAIR CREDIT REPORTING ACT AMENDMENT.—  
16 Paragraph (1) of section 604 of the Fair Credit Reporting  
17 Act (15 U.S.C. 1681b) is amended by striking “or” and  
18 inserting “, or a civil investigative demand” after “grand  
19 jury”.

20 **SEC. 206. ACCESS TO RECORDS IN BANK SECRECY JURIS-**  
21 **DICTIONS**

22 Section 986 of title 18, United States Code, is  
23 amended by adding the following new subsection:

1 "ACCESS TO RECORDS LOCATED ABROAD

2 "(d) In any civil forfeiture case, or in any ancillary  
3 proceeding in any criminal forfeiture case governed by sec-  
4 tion 413(n) of the Controlled Substances Act (21 U.S.C.  
5 853(n)), where—

6 "(1) financial records located in a foreign coun-  
7 try may be material (A) to any claim or to the abil-  
8 ity of the government to respond to such claim, or  
9 (B) in a civil forfeiture case, to the Government's  
10 ability to establish the forfeitability of the property;  
11 and

12 "(2) it is within the capacity of the claimant to  
13 waive his or her rights under such secrecy laws, or  
14 to obtain the records him or herself, so that the  
15 records can be made available,

16 the refusal of the claimant to provide the records in re-  
17 sponse to a discovery request or take the action necessary  
18 otherwise to make the records available shall result in the  
19 dismissal of the claim with prejudice. This subsection shall  
20 not affect the claimant's rights to refuse production on  
21 the basis of any privilege guaranteed by the Constitution  
22 or Federal laws of the United States."

23 **SEC. 207. ACCESS TO OTHER RECORDS.**

24 Section 6103(i)(1) of the Internal Revenue Code (26  
25 U.S.C. 6103(i)(1)) is amended—

1 (1) in subparagraph (A)(i) by inserting “or re-  
 2 lated civil forfeiture” after “enforcement of a specifi-  
 3 cally designated Federal criminal statute”; and

4 (2) in subparagraph (B)(iii) by inserting “or  
 5 civil forfeiture investigation or proceeding” after  
 6 “Federal criminal investigation or proceeding”.

7 **SEC. 208. DISCLOSURE OF GRAND JURY INFORMATION TO**  
 8 **FEDERAL PROSECUTORS.**

9 Section 3322(a) of title 18, United States Code, is  
 10 amended—

11 (1) by striking “civil forfeiture under section  
 12 981 of title 18, United States Code, of property de-  
 13 scribed in section 981(a)(1)(C) of such title” and in-  
 14 serting “any civil forfeiture provision of Federal  
 15 law”; and

16 (2) by striking “concerning a banking law viola-  
 17 tion”.

18 **SEC. 209. CURRENCY FORFEITURES.**

19 Section 511 of the Controlled Substances Act (21  
 20 U.S.C. 881) is amended by inserting the following new  
 21 subsection:

22 **“CURRENCY FORFEITURES**

23 **“(m) At the trial of an action brought pursuant to**  
 24 **subsection (a)(6), if the Government establishes by a pre-**  
 25 **ponderance of the evidence that the property subject to**  
 26 **forfeiture—**

1           “(1) is currency or other monetary instruments  
2           that was found in close proximity to a measurable  
3           quantity of any controlled substance; or

4           “(2) is currency or other monetary instruments  
5           in excess of \$10,000 that was being transported at  
6           an airport or other port of entry, on an interstate  
7           highway, or on the coastal waters of the United  
8           States, and the person in possession of the property  
9           disclaims knowledge or ownership of the property, or  
10          offers an explanation for his or her possession of the  
11          property that is false,

12 there shall be a presumption, governed by rule 301 of the  
13 Federal Rules of Evidence, that the property is the pro-  
14 ceeds of a violation of the Controlled Substances Act. As  
15 provided in rule 301 of the Federal Rules of Evidence,  
16 the burden of proof shall at all times be on the United  
17 States to establish that the property is subject to forfeit-  
18 ure.”

19           **TITLE III—PROPERTY SUBJECT TO**  
20   **FORFEITURE**

21           **SEC. 301. FORFEITURE OF PROCEEDS OF FEDERAL OF-**  
22   **FENSES.**

23           (a) **CIVIL FORFEITURE.**—Section 981(a)(1) of title  
24 18, United States Code, is amended—

1 (1) in subparagraph (C) by striking “of section  
2 215” and all that follows up to the period and in-  
3 sserting “of any offense in this title or a conspiracy  
4 to commit such offense”; and

5 (2) by striking subparagraphs (D), (E) and  
6 (F).

7 (b) **CRIMINAL FORFEITURE.**—Section 982(a) of title  
8 18, United States Code, is amended—

9 (1) in paragraph (2), by striking “violate—”  
10 and subparagraphs (A) and (B) and inserting “vio-  
11 late any offense in this title,”; and

12 (2) by striking paragraphs (3), (4), (5) and the  
13 first paragraph (6), enacted by Public Law 104-  
14 191.

15 **SEC. 302. UNIFORM DEFINITION OF “PROCEEDS”.**

16 (a) **CIVIL FORFEITURE.**—Section 981(a) of title 18,  
17 United States Code, is amended—

18 (1) in paragraph (1), by striking “gross re-  
19 ceipts” and “gross proceeds” wherever those terms  
20 appear and inserting “proceeds”; and

21 (2) by adding the following after paragraph (2):

22 “(3) In this section, ‘proceeds’ means any and  
23 all property of any kind obtained, directly or indi-  
24 rectly, at any time as the result of the commission  
25 of the offense giving rise to forfeiture, and any prop-

1 erty traceable thereto. 'Proceeds' is not limited to  
2 the net gain or profit realized from the commission  
3 of the offense."

4 (b) **CRIMINAL FORFEITURE.**—Section 982 of title 18,  
5 United States Code, is amended—

6 (1) in subsection (a), by striking "gross re-  
7 cepts" and "gross proceeds" wherever those terms  
8 appear and inserting "proceeds"; and

9 (2) by adding the following paragraph to the  
10 end of subsection (b):

11 "(3) In this section, 'proceeds' means any and  
12 all property of any kind obtained, directly or indi-  
13 rectly, at any time as the result of the commission  
14 of the offense giving rise to forfeiture, and any prop-  
15 erty traceable thereto. Where the offense involves a  
16 scheme, a conspiracy, or a pattern of criminal activ-  
17 ity, 'proceeds' includes any and all property obtained  
18 from the entire course of conduct constituting such  
19 scheme, conspiracy, or pattern. 'Proceeds' is not lim-  
20 ited to the net gain or profit realized from the com-  
21 mission of the offense."

22 (c) **CONTROLLED SUBSTANCES.**—(1) Section 511 of  
23 the Controlled Substances Act (21 U.S.C. 881) is amend-  
24 ed by adding the following new subsection:



1 **SEC. 303. FORFEITURE OF FIREARMS USED IN CRIMES OF**  
2 **VIOLENCE AND FELONIES.**

3 (a) **CIVIL FORFEITURE.**—Section 981(a)(1) of title  
4 18, United States Code, is amended by inserting after sub-  
5 paragraph (C) the following:

6 “(D) Any firearm (as defined in section  
7 921(a)(3) of this title) used or intended to be  
8 used to commit or to facilitate the commission  
9 of any crime of violence (as defined in section  
10 16 of this title) or any felony under Federal  
11 law.”

12 (b) **CRIMINAL FORFEITURE.**—Section 982(a) of title  
13 18, United States Code, is amended by inserting after sub-  
14 paragraph (2) the following:

15 “(3) The court, in imposing a sentence on a  
16 person convicted of any crime of violence (as defined  
17 in section 16 of this title) or any felony under Fed-  
18 eral law, shall order that the person forfeit to the  
19 United States any firearm (as defined in section  
20 921(a)(3) of this title) used or intended to be used  
21 to commit or to facilitate the commission of the of-  
22 fense.”

23 (c) **DISPOSAL OF FORFEITED PROPERTY.**—Section  
24 981(c) of title 18, United States Code, is amended by add-  
25 ing at the end the following sentence: “Any firearm for-  
26 feited pursuant to subsection (a)(1)(D) or section

1 982(a)(3) of this title shall be disposed of by the seizing  
2 agency in accordance with law.”

3 (d) **AUTHORITY TO FORFEIT PROPERTY UNDER**  
4 **SECTION 924(d).**—Section 924(d) of title 18, United  
5 States Code, is amended by adding the following new  
6 paragraph:

7 “(4) Whenever any firearm is subject to forfeit-  
8 ure under this section because it was involved in or  
9 used in a violation of subsection (c), the Secretary  
10 of the Treasury shall have the authority to seize and  
11 forfeit, in accordance with the procedures of the ap-  
12 plicable forfeiture statute, any property otherwise  
13 forfeitable under the laws of the United States that  
14 was involved in or derived from the crime of violence  
15 or drug trafficking crime described in subsection (c)  
16 in which the forfeited firearm was used or carried.”

17 (e) **120-DAY RULE FOR ADMINISTRATIVE FORFEIT-**  
18 **URE.**—Section 924(d)(1) of title 18, United States Code,  
19 is amended by adding the following after the last sentence:  
20 “If the Government institutes an administrative forfeiture  
21 action within the 120-day period, and a claim is then filed  
22 that requires that a judicial forfeiture action be filed in  
23 Federal court, the Government must file the judicial ac-  
24 tion within 120 days of the filing of the claim. The time  
25 during which any related criminal indictment or informa-

1 tion is pending shall not be counted in calculating either  
2 of the 120-day periods referred to in this subsection.”

3 **SEC. 304. FORFEITURE OF PROCEEDS TRACEABLE TO FA-**  
4 **CILITATING PROPERTY IN DRUG CASES.**

5 (a) **CONVEYANCES.**—Section 511(a)(4) of the Con-  
6 trolled Substances Act (21 U.S.C. 881(a)(4)) is amend-  
7 ed—

8 (1) by inserting “, and any property traceable  
9 to such conveyances” after “property described in  
10 paragraph (1), (2), or (9)”;

11 (2) in subparagraph (A) by inserting “, and no  
12 property traceable to such conveyance,” before  
13 “shall be forfeited”; and

14 (3) in subparagraphs (B) and (C) by inserting  
15 “and no property traceable to such conveyance” be-  
16 fore “shall be forfeited”.

17 (b) **REAL PROPERTY.**—Section 511(a)(7) of the Con-  
18 trolled Substances Act (21 U.S.C. 881(a)(7)) is amended  
19 by inserting “, and any property traceable to such prop-  
20 erty” after “one year’s imprisonment”.

21 (c) **NEGOTIABLE INSTRUMENTS AND SECURITIES.**—  
22 Section 511(a)(6) of the Controlled Substances Act (21  
23 U.S.C. 881(a)(6)) is amended by inserting “, and any  
24 property traceable to such property” after “this sub-  
25 chapter” the second time it appears.

1 **SEC. 305. FORFEITURE FOR ALIEN SMUGGLING.**

2 (a) **CRIMINAL FORFEITURE AUTHORITY.**—Section  
3 982(a) of title 18, United States Code, is amended—

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

6 (2) by inserting “sections 274(a), 274A(a)(1)  
7 or 274A(a)(2) of the Immigration and Nationality  
8 Act of 1952 (8 U.S.C. 1324(a), 1324A(a)(1) and  
9 1324A(a)(2)),” before “section 1425” the first time  
10 it appears;

11 (3) in subparagraph (A)(i), by striking “sub-  
12 section (a)” and inserting “the offense”; and

13 (4) in subparagraph (A)(ii) (I) and (II), by  
14 striking “subsection (a)” through “of this title” and  
15 inserting “the offense”.

16 (b) **CIVIL FORFEITURE.**—Section 274(b) of the Im-  
17 migration and Nationality Act of 1952 (8 U.S.C. 1324(b))  
18 is amended—

19 (1) by amending paragraphs (1) and (2) to  
20 read as follows:

21 “(b) **SEIZURE AND FORFEITURE.**—(1) The following  
22 property shall be subject to seizure and forfeiture:

23 “(A) any conveyance, including any vessel, vehi-  
24 cle, or aircraft, which has been or is being used in  
25 the commission of a violation of subsection (a); and



1 **SEC. 307. FORFEITURE OF PROPERTY USED TO FACILITATE**  
2 **FOREIGN DRUG CRIMES.**

3 Section 981(a)(1)(B) of title 18, United States Code,  
4 is amended by inserting “, or any property used to facili-  
5 tate an offense described in subparagraph (i)” at the end  
6 before the period.

7 **SEC. 308. FORFEITURE FOR VIOLATIONS OF SECTION 6050I**  
8 **AND 1960.**

9 (a) Sections 981(a)(1)(A) and 982(a)(1) of title 18,  
10 United States Code, are amended by inserting “, or of sec-  
11 tion 6050I of the Internal Revenue Code of 1986 (26  
12 U.S.C. 6050I)” after “of title 31”.

13 (b) Section 981(a)(1)(A) of title 18, United States  
14 Code, is amended by striking “or 1957” and inserting “,  
15 1957 or 1960”.

16 **SEC. 309. CRIMINAL FORFEITURE FOR MONEY LAUNDER-**  
17 **ING CONSPIRACIES.**

18 Section 982(a)(1) of title 18, United States Code, is  
19 amended by inserting “, or a conspiracy to commit any  
20 such offense” after “of this title”.

21 **SEC. 310. ARCHAEOLOGICAL RESOURCES PROTECTION**  
22 **ACT.**

23 Section 8(b) of the Archaeological Resources Protec-  
24 tion Act of 1979 (16 U.S.C. 470gg(b)) is amended by—

25 (1) inserting “all proceeds derived directly or  
26 indirectly from such violation or any property trace-

1     able thereto," before "and all vehicles" in the un-  
2     numbered paragraph;

3             (2) inserting "proceeds," before "vehicles" in  
4     paragraph (3); and

5             (3) inserting the following at the end of the  
6     subsection: "If a forfeiture count is included within  
7     an indictment in accordance with the Federal Rules  
8     of Criminal Procedure, and the defendant is con-  
9     victed of the offense giving rise to the forfeiture, the  
10    forfeiture may be ordered as part of the criminal  
11    sentence in accordance with the procedures for  
12    criminal forfeitures in chapter 46 of title 18, United  
13    States Code. Otherwise, the forfeiture shall be civil  
14    in nature in accordance with the procedures for civil  
15    forfeiture in said chapter 46 of title 18."

16 **SEC. 311. FORFEITURE OF INSTRUMENTALITIES OF TER-**  
17                   **RORISM, TELEMARKETING FRAUD, AND**  
18                   **OTHER OFFENSES.**

19             (a) **CIVIL FORFEITURE.**—Section 981(a)(1) of title  
20 18, United States Code, is amended by adding the follow-  
21 ing subparagraphs:

22                   “(E)(i) Any computer, photostatic reproduction  
23                   machine, electronic communications device or other  
24                   material, article, apparatus, device or thing made,  
25                   possessed, fitted, used or intended to be used on a

1 continuing basis to commit a violation of sections  
2 513, 514, 1028 through 1032, and 1341, 1343 and  
3 1344 of this title, or a conspiracy to commit such of-  
4 fense, and any property traceable to such property.

5 “(ii) Any conveyance used on two or more occa-  
6 sions to transport the instrumentalities used in the  
7 commission of a violation of sections 1028 and 1029  
8 of this title, or a conspiracy to commit such offense,  
9 and any property traceable to such conveyance.

10 “(F) Any conveyance, chemicals, laboratory  
11 equipment, or other material, article, apparatus, de-  
12 vice or thing made, possessed, fitted, used or in-  
13 tended to be used to commit—

14 “(i) an offense punishable under Chapter  
15 113B of this title (relating to terrorism);

16 “(ii) a violation of the National Firearms  
17 Act (26 U.S.C. chapter 53);

18 “(iii) a violation of any of the following  
19 sections of the federal explosives laws: sub-  
20 sections (a) (1) and (3), (b) through (d), and  
21 (h)(1) of section 842, and subsections (d)  
22 through (m) of section 844; or

23 “(iv) any other offense enumerated in sec-  
24 tion 2339A(a) of this title;

1 or a conspiracy to commit any such offense, and any  
2 property traceable to such property.”

3 (b) CRIMINAL FORFEITURE.—Section 982(a) of title  
4 18, United States Code, is amended by inserting the fol-  
5 lowing new paragraph:

6 “(4)(A) The court, in imposing a sentence on a  
7 person convicted of a violation of sections 513, 514,  
8 1028 through 1032, and 1341, 1343 and 1344 of  
9 this title, or a conspiracy to commit such offense,  
10 shall order the person to forfeit to the United States  
11 any computer, photostatic reproduction machine,  
12 electronic communications device or other material,  
13 article, apparatus, device or thing made, possessed,  
14 fitted, used or intended to be used to commit such  
15 offense, and any property traceable to such property.

16 “(B) The court, in imposing a sentence on a  
17 person convicted of a violation of section 1028 or  
18 1029 of this title, or a conspiracy to commit such of-  
19 fense, shall order the person to forfeit to the United  
20 States any conveyance used on two or more occa-  
21 sions to transport the instrumentalities used to com-  
22 mit such offense, and any property traceable to such  
23 conveyance.

24 “(5) The court, in imposing a sentence on a  
25 person convicted of—

1           “(A) an offense punishable under chapter  
2           113B of this title (relating to terrorism);

3           “(B) a violation of the National Firearms  
4           Act (26 U.S.C. chapter 53);

5           “(C) a violation of any of the following sec-  
6           tions of the Federal explosives laws: subsections  
7           (a) (1) and (3), (b) through (d), and (h)(1) of  
8           section 842, and subsections (d) through (m) of  
9           section 844; or

10          “(D) any other offense enumerated in sec-  
11          tion 2339A(a) of this title;

12          or a conspiracy to commit any such offense, shall  
13          order the person to forfeit to the United States any  
14          conveyance, chemicals, laboratory equipment, or  
15          other material, article, apparatus, device or thing  
16          made, possessed, fitted, used or intended to be used  
17          to commit such offense, and any property traceable  
18          to such property.”

19   **SEC. 312. FORFEITURE OF VEHICLES USED FOR GUN RUN-**  
20                                   **NING.**

21          (a) **CIVIL FORFEITURE.**—Section 981(a)(1) of title  
22   18, United States Code, is amended by adding the follow-  
23   ing subparagraph:

24           “(G)(i) Any conveyance used or intended to be  
25          used to commit a gun running offense, or conspiracy

1 to commit such offense, and any property traceable  
2 to such property.

3 (ii) For the purposes of this section, a gun run-  
4 ning offense is a violation of any of the following  
5 sections of this title involving five or more firearms:  
6 section 922(i) (transporting stolen firearms); section  
7 924(g) (travel with a firearm in furtherance of rack-  
8 eteering); section 924(k) (stealing a firearm); and  
9 section 924(m) (interstate travel to promote fire-  
10 arms trafficking).

11 (b) **CRIMINAL FORFEITURE.**—Section 982(a) of title  
12 18, United States Code, is amended by inserting the fol-  
13 lowing new paragraph:

14 “(6) The court, in imposing a sentence on a  
15 person convicted of a gun running offense, as de-  
16 fined in section 981(a)(1)(G), or a conspiracy to  
17 commit such offense, shall order the person to forfeit  
18 to the United States any conveyance used or in-  
19 tended to be used to commit such offense, and any  
20 property traceable to such conveyance.”

21 **SEC. 318. FORFEITURE OF CRIMINAL PROCEEDS TRANS-**  
22 **PORTED IN INTERSTATE COMMERCE.**

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

1       “(d)(1) Any proceeds distributed or intended to be  
2 distributed in violation of subsection (a)(1) or a conspiracy  
3 to commit such violation, or any property traceable to such  
4 property, is subject to forfeiture to the United States in  
5 accordance with the procedures set forth in section 981  
6 of this title.

7       “(2) The court, in imposing sentence on a person con-  
8 victed of an offense in violation of subsection (a)(1) or  
9 a conspiracy to commit such offense, shall order that the  
10 person forfeit to the United States any proceeds distrib-  
11 uted or intended to be distributed in the commission of  
12 such offense, or any property traceable to such property,  
13 in accordance with the procedures set forth in section 982  
14 of this title.”

15 **SEC. 314. FORFEITURES OF PROCEEDS OF FEDERAL FOOD,**  
16 **DRUG, AND COSMETIC ACT VIOLATIONS.**

17       Chapter 9 of title 21, United States Code, is amended  
18 by adding the following two new sections:

19 **“§ 311. Civil forfeiture of proceeds of Federal Food,**  
20 **Drug, and Cosmetic Act Violations**

21       “(a) Any property, real or personal, that constitutes,  
22 or is derived from or is traceable to the proceeds obtained  
23 directly or indirectly from a criminal violation of, or a con-  
24 spiracy to commit a criminal violation of, a provision of  
25 the Federal Food, Drug, and Cosmetic Act (21 U.S.C.

1 301–395) shall be subject to judicial forfeiture to the  
2 United States.

3       “(b) The provisions of chapter 46 of title 18, United  
4 States Code, relating to civil forfeitures shall extend to  
5 a seizure or forfeiture under this section, insofar as appli-  
6 cable and not inconsistent with the provisions hereof, ex-  
7 cept that such duties as are imposed upon the Secretary  
8 of the Treasury under chapter 46 shall be performed with  
9 respect to seizures and forfeitures under this section by  
10 such officers, agents, or other persons as may be author-  
11 ized or designated for that purpose by the Secretary of  
12 Health and Human Services.

13 **“§312. Criminal forfeiture of proceeds of Federal**  
14 **Food, Drug, and Cosmetic Act violations**

15       “(a) Any person convicted of a violation of, or a con-  
16 spiracy to violate, a provision of the Federal Food, Drug,  
17 and Cosmetic Act (21 U.S.C. 301–395) shall forfeit to the  
18 United States, irrespective of any provision of State law,  
19 any property constituting, or derived from, any proceeds  
20 the person obtained, directly or indirectly, as the result  
21 of such violation. The court, in imposing sentence on such  
22 person, shall order that the person forfeit to the United  
23 States all property described in this subsection.

24       “(b) Property subject to forfeiture under this section,  
25 any seizure and disposition thereof, and any administra-

1 tive or judicial proceeding in relation thereto, shall be gov-  
2 erned by the provisions of section 413 of the Comprehen-  
3 sive Drug Abuse Prevention and Control Act of 1970 (21  
4 U.S.C. 853), except for subsection 413(d) which shall not  
5 apply to forfeitures under this section.”

6 **SEC. 315. FORFEITURE FOR FOOD STAMP FRAUD.**

7 Section 15 of the Food Stamp Act of 1977 (7 U.S.C.  
8 2024) is amended by adding at the end the following new  
9 subsection:

10 “(i) **CIVIL FORFEITURE.**—

11 “(1) Any property, real or personal—

12 “(A) used in a transaction or attempted  
13 transaction, to commit or to facilitate the com-  
14 mission of a violation (other than a mis-  
15 demeanor) of subsection (b) or (c), or

16 “(B) constituting, derived from, or trace-  
17 able to proceeds of a violation of subsection (b)  
18 or (c), shall be subject to forfeiture to the Unit-  
19 ed States.

20 “(2) The provisions of chapter 46 of title 18,  
21 relating to civil forfeitures shall extend to a seizure  
22 or forfeiture under this subsection, insofar as appli-  
23 cable and not inconsistent with the provisions of this  
24 subsection, except that such duties as are imposed  
25 upon the Secretary of the Treasury under chapter

1 46 shall be performed with respect to seizures and  
 2 forfeitures under this section by such officers,  
 3 agents, and other persons as may be designated for  
 4 that purpose by the Secretary of Agriculture.”

5 **SEC. 316. FORFEITURE FOR ODOMETER TAMPERING OF-**  
 6 **FENSES.**

7 (a) **CRIMINAL FORFEITURE.**—Section 982(a)(5) of  
 8 title 18, United States Code, is amended—

9 (1) by striking “or” at the end of subparagraph  
 10 (D);

11 (2) by inserting “or” after the semicolon at the  
 12 end of sub-paragraph (E);

13 (3) by inserting the following after sub-para-  
 14 graph (E), as amended:

15 “(F) section 32703 of title 49, United  
 16 States Code (motor vehicle odometer tamper-  
 17 ing);”; and

18 (4) by adding the following after the last pe-  
 19 riod: “If the conviction was for a violation described  
 20 in subparagraph (F), the court shall also order the  
 21 forfeiture of any vehicles or other property involved  
 22 in the commission of the offense.”

23 (b) **CIVIL FORFEITURE.**—Section 981(a)(1)(F) of  
 24 title 18, United States Code, is amended—

25 (1) by striking “or” at the end of clause (iv);

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

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

5 “(vi) section 32703 of title 49, United  
6 States Code (motor vehicle odometer tamper-  
7 ing).”; and

8 (4) by adding the following after the last pe-  
9 riod: “In the case of a violation described in clause  
10 (vi), any vehicles or other property involved in the  
11 commission of the offense shall also be subject to  
12 forfeiture.”

13 **TITLE IV—MISCELLANEOUS FORFEITURE**  
14 **AMENDMENTS**

15 **SEC. 401. USE OF FORFEITED FUNDS TO PAY RESTITUTION**  
16 **TO CRIME VICTIMS AND REGULATORY AGEN-**  
17 **CIES.**

18 Section 981 of title 18, United States Code, is  
19 amended—

20 (1) by amending subsection (e)(6) to read as  
21 follows:

22 “(6) as restoration to any victim of the offense  
23 giving rise to the forfeiture, including, in the case of  
24 a money laundering offense, any offense constituting  
25 the underlying specified unlawful activity; or”;

1           (2) in subsections (e) (3), (4) and (5), by strik-  
 2           ing “in the case of property referred to in subsection  
 3           (a)(1)(C)” and inserting “in the case of property  
 4           forfeited in connection with an offense resulting in  
 5           a pecuniary loss to a financial institution or regu-  
 6           latory agency”; and

7           (3) in subsection (e)(7), by striking “in the case  
 8           of property referred to in subsection (a)(1)(D)” and  
 9           inserting “in the case of property forfeited in con-  
 10          nection with an offense relating to the sale of assets  
 11          acquired or held by any Federal financial institution  
 12          or regulatory agency, or person appointed by such  
 13          agency, as receiver, conservator or liquidating agent  
 14          for a financial institution”.

15 **SEC. 402. ENFORCEMENT OF FOREIGN FORFEITURE JUDG-**  
 16 **MENT.**

17           (a) **IN GENERAL.**—Chapter 163 of title 28, United  
 18 States Code, is amended by inserting the following new  
 19 section:

20 **“§ 2466. Enforcement of foreign forfeiture judgment**

21           “(a) **DEFINITIONS.**—As used in this section—

22                   “(1) ‘Foreign nation’ shall mean a country that  
 23                   has become a party to the United Nations Conven-  
 24                   tion Against Illicit Traffic in Narcotic Drugs and  
 25                   Psychotropic Substances (hereafter ‘the United Na-

1 tions Convention') or a foreign jurisdiction with  
2 which the United States has a treaty or other formal  
3 international agreement in effect providing for mu-  
4 tual forfeiture assistance.

5 "(2) 'Value based confiscation judgment' shall  
6 mean a final order of a foreign nation compelling a  
7 defendant, as a consequence of his or her criminal  
8 conviction for an offense described in article 3, para-  
9 graph 1, of the United Nations Convention, to pay  
10 a sum of money representing the proceeds of such  
11 offense, or property the value of which corresponds  
12 to such proceeds.

13 "(b) REVIEW BY ATTORNEY GENERAL.—A foreign  
14 nation seeking to have its value based confiscation judg-  
15 ment registered and enforced by a United States district  
16 court under this section must first submit a request to  
17 the Attorney General or his or her designee. Such request  
18 shall include:

19 "(1) a summary of the facts of the case and a  
20 description of the criminal proceeding which resulted  
21 in the value-based confiscation judgment;

22 "(2) certified copies of the judgment of convic-  
23 tion and value-based confiscation judgment;

24 "(3) an affidavit or sworn declaration establish-  
25 ing that the defendant received notice of the pro-

1       ceedings in sufficient time to enable him or her to  
2       defend against the charges that the value-based  
3       confiscation judgment rendered is in force and is not  
4       subject to appeal;

5               “(4) an affidavit or sworn declaration that all  
6       reasonable efforts have been undertaken to enforce  
7       the value-based confiscation judgment against the  
8       defendant’s property, if any, in the foreign country;  
9       and

10              “(5) such additional information and evidence  
11       as may be required by the Attorney General or his  
12       or her designee.

13       The Attorney General or his or her designee, in consulta-  
14       tion with the Secretary of State or his or her designee,  
15       shall determine whether to certify the request, and such  
16       decision shall be final and not subject to either judicial  
17       review or review under the Administrative Procedures Act,  
18       5 U.S.C. 551 et seq.

19              “(c) JURISDICTION AND VENUE.—Where the Attor-  
20       ney General or his or her designee certifies a request  
21       under subsection (b), the foreign nation may file a civil  
22       proceeding in United States district court seeking to en-  
23       force the foreign value based confiscation judgment as if  
24       the judgment had been entered by a court in the United  
25       States. In such a proceeding, the foreign nation shall be

1 the plaintiff and the person against whom the value-based  
2 confiscation judgment was entered shall be the defendant.  
3 Venue shall lie in the district court for the District of Co-  
4 lumbia or in any other district in which the defendant or  
5 the property that may be the basis for satisfaction of a  
6 judgment under this section may be found. The district  
7 court shall have personal jurisdiction over a defendant re-  
8 siding outside of the United States if the defendant is  
9 served with process in accordance with rule 4 of the Fed-  
10 eral Rules of Civil Procedure.

11 “(d) ENTRY AND ENFORCEMENT OF JUDGMENT.—

12 (1) Except as provided in paragraph (2), the district court  
13 shall enter such orders as may be necessary to enforce  
14 the value-based confiscation judgment on behalf of the for-  
15 eign nation where it finds that all of the following require-  
16 ments have been met:

17 “(A) the value-based confiscation judgment  
18 was rendered under a system which provides  
19 impartial tribunals or procedures compatible  
20 with the requirements of due process of law;

21 “(B) the foreign court had personal juris-  
22 diction over the defendant;

23 “(C) the foreign court had jurisdiction over  
24 the subject matter;

1           “(D) the defendant in the proceedings in  
2           the foreign court received notice of the proceed-  
3           ings in sufficient time to enable him or her to  
4           defend; and

5           “(E) the judgment was not obtained by  
6           fraud.

7 Process to enforce a judgment under this section will be  
8 in accordance with rule 69(a) of the Federal Rules of Civil  
9 Procedure.

10       “(e) FINALITY OF FOREIGN FINDINGS.—Upon a  
11 finding by the district court that the conditions set forth  
12 in subsection (d) have been satisfied, the court shall be  
13 bound by the findings of facts insofar as they are stated  
14 in the foreign judgment of conviction and value-based  
15 confiscation judgment.

16       “(f) CURRENCY CONVERSION.—Insofar as a value  
17 based confiscation judgment requires the payment of a  
18 sum of money, the rate of exchange in effect at time when  
19 the suit to enforce is filed by the foreign nation shall be  
20 used in calculating the amount stated in the judgment  
21 submitted for registration.”

22       (b) CONFORMING AMENDMENT.—The chapter analy-  
23 sis for chapter 163, title 28, United States Code, is  
24 amended by inserting the following at the end:

“2466. Enforcement of foreign forfeiture judgment”

1 **SEC. 403. MINOR AND TECHNICAL AMENDMENTS RELATING**  
2 **TO 1992 FORFEITURE AMENDMENTS.**

3 (a) **CRIMINAL FORFEITURE.**—Section 982(b) of title  
4 18, United States Code, is amended in subsection (b)(2),  
5 by striking “The substitution” and inserting “With re-  
6 spect to a forfeiture under subsection (a)(1), the substi-  
7 tution”.

8 (b) **FUNGIBLE PROPERTY.**—Section 984 of title 18,  
9 United States Code, is amended—

10 (1) by striking subsection (a) and redesignating  
11 the remaining subsections as (a), (b), and (c), re-  
12 spectively;

13 (2) by amending subsection (b) (as redesign-  
14 ated) to read as follows:

15 “(b) The provisions of this section may be invoked  
16 only if the action for forfeiture was commenced by a sei-  
17 zure or an arrest in rem within two years of the offense  
18 that is the basis for the forfeiture.”;

19 (3) by amending subsection (c)(1) (as redesign-  
20 ated) to read as follows:

21 “(c)(1) Subsection (a) shall not apply to an action  
22 against funds held by a financial institution in an inter-  
23 bank account unless the account holder knowingly engaged  
24 in the offense that is the basis for the forfeiture.”;

25 (4) by adding the following new paragraph to  
26 subsection (c) (as redesignated):

1           “(3) As used in this subsection, a ‘financial in-  
2           stitution’ includes a foreign bank, as defined in  
3           paragraph 7 of section 1(b) of the International  
4           Banking Act of 1978.”; and

5           (5) by adding the following new subsection:

6           “(d) Nothing in this section is intended to limit the  
7           ability of the Government to forfeit property under any  
8           statute where the property involved in the offense giving  
9           rise to the forfeiture or property traceable thereto is avail-  
10          able for forfeiture.”

11          (c) **SUBPOENAS FOR BANK RECORDS.**—Section  
12 986(a) of title 18, United States Code, is amended by—

13           (1) striking “section 1956, 1957 or 1960 of  
14           this title, section 5322 or 5324 of title 31, United  
15           States Code” and inserting “section 981 of this  
16           title”; and

17           (2) striking the last sentence.

18          (d) **CIVIL MONEY LAUNDERING ENFORCEMENT.**—  
19 Section 1956(b) of title 18, United States Code, is amend-  
20 ed—

21           (1) by redesignating the present matter as  
22           paragraph (1), and the present paragraphs (1) and  
23           (2) as subparagraphs (A) and (B), respectively; and

24           (2) by inserting the following new paragraphs:

1           “(2) For purposes of adjudicating an action  
2 filed or enforcing a penalty ordered under this sec-  
3 tion, the district courts shall have jurisdiction over  
4 any foreign person, including any financial institu-  
5 tion registered in a foreign country, that commits an  
6 offense under subsection (a) involving a financial  
7 transaction that occurs in whole or in part in the  
8 United States; *Provided*, That service of process  
9 upon such foreign person is made under the Federal  
10 Rules of Civil Procedure or the laws of the country  
11 where the foreign person is found.

12           “(3) The court may issue a pretrial restraining  
13 order or take any other action necessary to ensure  
14 that any bank account or other property held by the  
15 defendant in the United States is available to satisfy  
16 a judgment under this section.”

17       (e) DEFINITION OF FINANCIAL INSTITUTION.—Sec-  
18 tion 5312(a)(2) of title 31, United States Code, is amend-  
19 ed by redesignating subparagraphs (Y) and (Z) as (Z) and  
20 (AA), respectively, and by inserting the following new sub-  
21 paragraph after subparagraph (X):

22           “(Y) a bail bondsman;”.

23       (f) Section 981(d) of title 18, United States Code,  
24 is amended by striking “sale of this section” and inserting  
25 “sale of such property.”

1 **SEC. 404. CIVIL FORFEITURE OF COINS AND CURRENCY IN**  
2 **CONFISCATED GAMBLING DEVICES.**

3 Section 7 of Public Law 81-906 (15 U.S.C. 1177)  
4 is amended—

5 (1) by inserting “Any coin or currency con-  
6 tained in any gambling device at the time of its sei-  
7 zure pursuant to the preceding sentence shall also be  
8 seized and forfeited to the United States.” after the  
9 first sentence; and

10 (2) in the last sentence, by inserting “, coins,  
11 or currency” after “gambling devices”.

12 **SEC. 405. DRUG PARAPHERNALIA TECHNICAL AMEND-**  
13 **MENTS.**

14 (a) Section 511(a)(10) of the Controlled Substances  
15 Act (21 U.S.C. 881(a)(10)) is amended by striking “857  
16 of this title” and inserting “422 of this subchapter (21  
17 U.S.C. 863)”.

18 (b) Section 422 of the Controlled Substances Act (21  
19 U.S.C. 863) is amended:

20 (1) by deleting subsection (c); and

21 (2) by redesignating subsections (d), (e), and

22 (f) to be subsections (c), (d), and (e).

1 **SEC. 406. AUTHORIZATION TO SHARE FORFEITED PROP-**  
2 **ERTY WITH COOPERATING FOREIGN GOV-**  
3 **ERNMENTS.**

4 (a) **IN GENERAL.**—Section 981(i)(1) of title 18,  
5 United States Code, is amended by striking “this chapter”  
6 and inserting “any provision of Federal law”.

7 (b) **CONFORMING AMENDMENT.**—Section 511(c)(1)  
8 of the Controlled Substances Act is amended by striking  
9 “; or” and all of subparagraph (E) and inserting a period.

10 **SEC. 407. FORFEITURE OF COUNTERFEIT PARAPHERNALIA.**

11 Section 492 of title 18, United States Code, is  
12 amended—

13 (1) by striking the third and fourth undesig-  
14 nated paragraphs;

15 (2) by designating the remaining paragraphs as  
16 subsections (a) and (b);

17 (3) by adding the following new subsections:

18 “(c) For the purposes of this section, the provisions  
19 of the customs laws relating to the seizure, summary and  
20 judicial forfeiture, condemnation of property for violation  
21 of the customs laws, the disposition of such property or  
22 the proceeds from the sale of such property, the remission  
23 or mitigation of such forfeitures, and the compromise of  
24 claims (19 U.S.C. 1602 et seq.), insofar as they are appli-  
25 cable and not inconsistent with the provisions of this sec-  
26 tion, shall apply to seizures and forfeitures incurred, or

1 alleged to have been incurred, under this section, except  
2 that the duties as are imposed upon the customs officer  
3 or any other person with respect to the seizure and forfeit-  
4 ure of property under the customs laws shall be performed  
5 with respect to seizures and forfeitures of property under  
6 this section by such officers, agents, or other persons as  
7 may be authorized or designated for that purpose by the  
8 Secretary of the Treasury.

9       “(d) All seizures and civil judicial forfeitures pursu-  
10 ant to subsection (a) shall be governed by the procedures  
11 set forth in chapter 46 of this title pertaining to civil for-  
12 feitures. The Attorney General shall have sole responsibil-  
13 ity for disposing of petitions for remission or mitigation  
14 with respect to property involved in a judicial forfeiture  
15 proceeding.

16       “(e) A court in sentencing a person for a violation  
17 of this chapter or of sections 331–33, 335, 336, 642, or  
18 1720 of this title, shall order the person to forfeit the  
19 property described in subsection (a) in accordance with the  
20 procedures set forth in section 982 of this title.”; and

21             (4) in subsection (b), as so designated by this  
22 section, by striking “fined not more than \$100” and  
23 inserting “fined under this title”.

1 **SEC. 408. CLOSING OF LOOPHOLE TO DEFEAT CRIMINAL**  
2 **FORFEITURE THROUGH BANKRUPTCY.**

3 Section 413(a) of the Controlled Substances Act (21  
4 U.S.C. 853(a)) is amended by inserting “, or of any bank-  
5 ruptcy proceeding instituted after or in contemplation of  
6 a prosecution of such violation” after “shall forfeit to the  
7 United States, irrespective of any provision of State law”.

8 **SEC. 409. STATUTE OF LIMITATIONS FOR CIVIL FORFEIT-**  
9 **URE ACTIONS.**

10 (a) **IN GENERAL.**—Section 621 of the Tariff Act of  
11 1930 (19 U.S.C. 1621) is amended by inserting “, or in  
12 the case of forfeiture, within five years after the time when  
13 the involvement of the property in the alleged offense was  
14 discovered” after “within five years after the time when  
15 the alleged offense was discovered”.

16 (b) **FIRREA CASES.**—Section 981(a) of title 18,  
17 United States Code, is amended by adding at the end a  
18 new paragraph, as follows:

19 “(3) An action seeking the forfeiture of prop-  
20 erty described in subparagraph (a)(1)(C) arising out  
21 of an offense affecting a financial institution or the  
22 conservator or receiver of a financial institution may  
23 be commenced not later than ten years after the dis-  
24 covery of the involvement of the property in the act  
25 giving rise to the forfeiture. This paragraph shall  
26 apply to any forfeiture action not barred by the expi-



1 (b) DISPOSAL OF FORFEITED PROPERTY.—Section  
2 524(c)(8) of title 28, United States Code, as redesignated  
3 by this section, is amended to read as follows:

4 “(8) Following the completion of procedures for  
5 the forfeiture of property pursuant to any law en-  
6 forced or administered by the Department, the At-  
7 torney General, under such terms and conditions as  
8 the Attorney General shall specify, is authorized to:

9 “(A) destroy the property if it is unsuit-  
10 able for public use or sale, or uneconomical to  
11 market;

12 “(B) transfer the property to any  
13 lienholder (including taxing authorities) or  
14 mortgagee in lieu of the compromise and pay-  
15 ment of a valid lien or mortgage against the  
16 property;

17 “(C) disburse all or part of an amount for-  
18 feited as restoration to any victim of the offense  
19 giving rise to the forfeiture, or any other of-  
20 fense that was part of the same scheme, con-  
21 spiracy, or pattern of criminal activity, includ-  
22 ing, in the case of a money laundering offense,  
23 any offense constituting the underlying speci-  
24 fied unlawful activity, in accordance with the  
25 relevant forfeiture statute;

1           “(D) dispose of the property by public sale  
2           or any other commercially feasible means; or re-  
3           quest the General Services Administration to  
4           take custody of the property and to dispose of  
5           it in accordance with law;

6           “(E) place the property into official use or  
7           transfer the property to any other federal agen-  
8           cy for official use;

9           “(F) transfer the property to foreign gov-  
10          ernments pursuant to section 981(i) of title 18,  
11          United States Code;

12          “(G) transfer the property, or the net pro-  
13          ceeds of sale of the property, to State or local  
14          law enforcement agencies that participated di-  
15          rectly in any of the acts that led to the seizure  
16          or forfeiture of the property, in accordance with  
17          section 981(e) of title 18, United States Code;  
18          section 511(e)(3) of the Controlled Substances  
19          Act (21 U.S.C. 881(e)(3)); or any other provi-  
20          sion of law pertaining to the equitable sharing  
21          of forfeited property;

22          “(H) transfer real or personal property  
23          that is uneconomical to store, maintain, or mar-  
24          ket to a State or local government agency for  
25          use to support drug abuse treatment, drug and

1 crime prevention and education, housing, job  
2 skills, and other community-based public health  
3 and safety programs, upon agreement by the  
4 recipient government to accept liability for the  
5 compromise or settlement of any mortgages,  
6 liens, petitions or other claims against the prop-  
7 erty;

8 “(I) make any other disposition authorized  
9 by law; and

10 “(J) warrant clear title to any subsequent  
11 purchaser or transferee of such property.

12 The Attorney General shall make due provision for  
13 the property rights of innocent persons in disposing  
14 of forfeited property. Election of the method of dis-  
15 position is solely within the discretion of the Attor-  
16 ney General. Final orders of judgment for damages  
17 arising from any warranty of title by the Attorney  
18 General shall be satisfied pursuant to section 1304  
19 of title 31, United States Code, in the same manner  
20 and to the same extent as other judgments for dam-  
21 ages. A decision by the Attorney General pursuant  
22 to this subsection shall not be subject to review.”

23 (c) DEPOSIT FROM SETTLEMENT IN LIEU OF FOR-  
24 FEITURE.—Section 524(c)(4)(A) of title 28, United States

1 Code, is amended by inserting “, or from any settlement  
2 in lieu of forfeiture,” before “under any law”.

3 (d) DEPOSITS INTO THE FUND.—Section  
4 524(c)(4)(B) of title 28, United States Code, is amended  
5 by inserting “, and all amounts representing reimburse-  
6 ment or recovery of costs paid by the Fund” immediately  
7 prior to the semicolon.

8 (e) PAYMENT OF FOREIGN JUDGMENTS.—Section  
9 524(c)(1) of title 28, United States Code, is amended by  
10 inserting the following new subparagraph (J) immediately  
11 following subparagraph (I):

12 “(J) at the discretion of the Attorney Gen-  
13 eral, payments to return forfeited property re-  
14 patriated to the United States by a foreign gov-  
15 ernment or others acting at the direction of a  
16 foreign government, and interest earned on  
17 such property, subject to the following condi-  
18 tions:

19 “(i) a final foreign judgment entered  
20 against a foreign government or those act-  
21 ing at its direction, which foreign judgment  
22 was based on the measures, such as sei-  
23 zure and repatriation of property, that re-  
24 sulted in deposit of the funds into the  
25 Fund;

1           “(ii) such foreign judgment was en-  
2           tered and presented to the Attorney Gen-  
3           eral within five years of the date that the  
4           property was repatriated to the United  
5           States;

6           “(iii) the foreign government or those  
7           acting at its direction vigorously defended  
8           its actions under its own laws; and

9           “(iv) the amount of the disbursement  
10          does not exceed the amount of funds de-  
11          posited to the Fund, plus interest earned  
12          on such funds pursuant to section  
13          524(c)(5) of title 28 United States Code,  
14          less any awards and equitable shares paid  
15          by the Fund to the foreign government or  
16          those acting at its direction in connection  
17          with a particular case.”.

18          (f) **EXCESS SURPLUS FUNDS.**—Section 524(c)(7) of  
19          title 28, United States Code, as redesignated by this sec-  
20          tion, is amended by deleting all versions of subparagraph  
21          “(E)” and inserting the following in place thereof:

22          “(E) Subject to the notification procedures contained  
23          in section 605 of Public Law 103–317, and after satisfy-  
24          ing the transfer requirement in subparagraph (B) of this  
25          paragraph, any excess unobligated balance remaining in

1 the Fund on September 30, 1996, and on September 30  
2 of each fiscal year thereafter, shall be available to the At-  
3 torney General, without fiscal year limitation, for any Fed-  
4 eral law enforcement, litigative/prosecutive, and correc-  
5 tional activities, or any other authorized purpose of the  
6 Department of Justice. Any Amounts provided pursuant  
7 to this subparagraph may be used under authorities avail-  
8 able to the organization receiving the funds.”

9 (g) REMISSION AND MITIGATION.—Section  
10 524(c)(1)(E) of title 28, United States Code, is amended  
11 to read as follows:

12 “(E) disbursements authorized in connec-  
13 tion with remission or mitigation procedures or  
14 other actions pursuant to the Attorney Gen-  
15 eral’s statutory authority relating to property  
16 forfeited under any law enforced or adminis-  
17 tered by the Department of Justice;”

18 **SEC. 411. CLARIFICATION OF SECTION 877 OF TITLE 21,**  
19 **UNITED STATES CODE.**

20 Section 507 of the Controlled Substances Act (21  
21 U.S.C. 877) is amended to add at the end the following  
22 sentence: “This section does not apply to any findings,  
23 conclusions, rulings, decisions, or declarations of the At-  
24 torney General, or any designee of the Attorney General,

1 relating to the seizure, forfeiture, or disposition of for-  
 2 feited property brought under this subchapter.”

3 **SEC. 412. CERTIFICATE OF REASONABLE CAUSE.**

4 Section 2465 of title 28, United States Code, is  
 5 amended—

6 (1) by striking “property seized” and inserting  
 7 “property seized or arrested”; and

8 (2) by striking “seizure” each time it appears  
 9 and inserting “seizure or arrest”.

10 **SEC. 413. CONFORMING TREASURY AND JUSTICE FUNDS.**

11 (a) Section 9703(c) of title 31, United States Code,  
 12 is amended by striking “subsection (g)(2)” and inserting  
 13 “subsection (g)(1)” and by deleting “in excess of  
 14 \$10,000,000 for a fiscal year.”

15 (b) Section 9703(g) of title 31, United States Code,  
 16 is amended—

17 (1) in paragraph (1), by striking “subsection  
 18 (a)(1)” and inserting “subsections (a)(1) and (c);  
 19 and

20 (2) in paragraph (2), by striking “subsections  
 21 (a)(2) and (c)” and inserting “subsection (a)(2)”.

22 (c) **DEPOSIT FROM SETTLEMENT IN LIEU OF FOR-**  
 23 **FEITURE.**—Section 9703(d) of title 31, United States  
 24 Code, is amended by inserting “or from any settlement

1 in lieu of forfeiture," before "under any law" each time  
2 it appears.

3 (d) Subsection 524(c)(6) of title 28, United States  
4 Code, is amended by adding the following sentence to the  
5 end thereof: "Amounts transferred by the Secretary of  
6 Treasury pursuant to section 9703 of title 31, or by the  
7 Postmaster General pursuant to section 2003 of title 39,  
8 shall be available to the Attorney General for Federal law  
9 enforcement and criminal prosecution purposes of the De-  
10 partment of Justice."

11 **SEC. 414. DISPOSITION OF PROPERTY FORFEITED UNDER**  
12 **CUSTOMS LAWS.**

13 Section 616A of the Tariff Act of 1930 (19 U.S.C.  
14 1616a) is amended—

15 (1) by adding the following new paragraph to  
16 subsection (c):

17 "(4) Whenever property is civilly or criminally  
18 forfeited by or for the United States Customs Serv-  
19 ice, including administrative forfeiture under the  
20 provisions of this title, the Secretary of the Treasury  
21 may dispose of the property in accordance with law,  
22 including—

23 "(A) by selling the property through any  
24 commercially feasible means, provided that the

1 property is not required to be destroyed by law  
2 and is not harmful to the public; or

3 “(B) by requesting the General Services  
4 Administration to take custody of the property  
5 and to dispose of it in accordance with law.”;  
6 and

7 (2) by amending the title of the section to read  
8 as follows: “**RETENTION, TRANSFER, OR DIS-**  
9 **POSITION OF FORFEITED PROPERTY”.**

10 **SEC. 415. TECHNICAL AMENDMENTS RELATING TO OBLIT-**  
11 **ERATED MOTOR VEHICLES IDENTIFICATION**  
12 **NUMBERS.**

13 Section 512 of title 18, United States Code, is  
14 amended—

15 (1) in subsection (b), by inserting “and the pro-  
16 visions of chapter 46 of this title relating to civil ju-  
17 dicial forfeitures” before “shall apply”; and

18 (2) in subsection (a)(1), by striking “does not  
19 know” and all that follows up to the semicolon and  
20 inserting “is an innocent owner as defined in section  
21 983 of this title”.

22 **SEC. 416. FUGITIVE DISENTITLEMENT.**

23 (a) **IN GENERAL.**—Chapter 163 of title 28, United  
24 States Code, is amended by inserting the following new  
25 section:

1 **§ 2467. Fugitive disentitlement**

2        “Any person who, in order to avoid criminal prosecu-  
3 tion, purposely leaves the jurisdiction of the United States,  
4 declines to enter or reenter the United States to submit  
5 to its jurisdiction, or otherwise evades the jurisdiction of  
6 the court where a criminal case is pending against the per-  
7 son, may not use the resources of the courts of the United  
8 States in furtherance of a claim in any related civil forfeit-  
9 ure action or a claim in third-party proceedings in any  
10 related criminal forfeiture action.”

11       (b) CONFORMING AMENDMENT.—The chapter analy-  
12 sis for chapter 163 of title 28, United States Code, is  
13 amended by inserting the following at the end:

“2467. Fugitive disentitlement.”

14 **SEC. 417. ADMISSIBILITY OF FOREIGN BUSINESS RECORDS.**

15       (a) IN GENERAL.—Chapter 163 of title 28, United  
16 States Code, is amended by adding at the end the follow-  
17 ing new section:

18 **§ 2468. Foreign records**

19       “(a) In a civil proceeding in a court of the United  
20 States, including civil forfeiture proceedings and proceed-  
21 ings in the United States Claims Court and the United  
22 States Tax Court, a foreign record of regularly conducted  
23 activity, or copy of such record, obtained pursuant to an  
24 official request, shall not be excluded as evidence by the  
25 hearsay rule of a foreign certification, also obtained pursu-

1 ant to the same official request or subsequent official re-  
2 quest that adequately identifies such foreign record, at-  
3 tests that—

4 “(1) such record was made, at or near the time  
5 of the occurrence of the matters set forth, by (or  
6 from information transmitted by) a person with  
7 knowledge of those matters;

8 “(2) such record was kept in the course of a  
9 regularly conducted business activity;

10 “(3) the business activity made such a record  
11 as a regular practice; and

12 “(4) if such record is not the original, such  
13 record is a duplicate of the original;

14 unless the source of information or the method or cir-  
15 cumstances of preparation indicate lack of trust-  
16 worthiness.

17 “(b) A foreign certification under this section shall  
18 authenticate such record or duplicate.

19 “(c) As soon as practicable after a responsive plead-  
20 ing has been filed, a party intending to offer in evidence  
21 under this section a foreign record of regularly conducted  
22 activity shall provide written notice of that intention to  
23 each other party. A motion opposing admission in evidence  
24 of such record shall be made by the opposing party and  
25 determined by the court before trial. Failure by a party

1 to file such motion before trial shall constitute a waiver  
2 of objection to such record or duplicate, but the court for  
3 cause shown may grant relief from the waiver.

4 “(d) As used in this section, the term—

5 “(1) ‘foreign record of regularly conducted ac-  
6 tivity’ means a memorandum, report, record, or data  
7 compilation, in any form, of acts, events, conditions,  
8 opinions, or diagnoses, maintained in a foreign coun-  
9 try;

10 “(2) ‘foreign certification’ means a written dec-  
11 laration made and signed in a foreign country by the  
12 custodian of a record of regularly conducted activity  
13 or another qualified person, that if falsely made,  
14 would subject the maker to criminal penalty under  
15 the law of that country;

16 “(3) ‘business’ includes business, institution,  
17 association, profession, occupation, and calling of  
18 every kind whether or not conducted for profit; and

19 “(4) ‘official request’ means a letter rogatory, a  
20 request under an agreement, treaty or convention, or  
21 any other request for information or evidence made  
22 by a court of the United States or an authority of  
23 the United States having law enforcement respon-  
24 sibility, to a court or other authority of a foreign  
25 country.”

1 (b) CONFORMING AMENDMENT.—The chapter analy-  
2 sis for chapter 163 of title 28, United States Code, is  
3 amended by inserting the following at the end:

“2468. Foreign records.”

4 **SEC. 418. DESTRUCTION OR REMOVAL OF PROPERTY TO**  
5 **PREVENT SEIZURE.**

6 (a) Section 2232(a) of title 18, United States Code,  
7 is amended by—

8 (1) inserting “or seizure” after “Physical inter-  
9 ference with search”;

10 (2) inserting “, including seizure for forfeit-  
11 ure,” after “after seizure”;

12 (3) striking “searches and seizures” after “au-  
13 thorized to make” and inserting “searches or sei-  
14 zures”;

15 (4) striking “or” after “wares,”; and

16 (5) inserting “, or other property, real or per-  
17 sonal,” after “merchandise.”

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

20 (1) inserting “or seizure” after “Notice of  
21 search”;

22 (2) striking “searches and seizures” after “au-  
23 thorized to make” and inserting “searches or sei-  
24 zures”;

1           (3) inserting “, including seizure for forfeit-  
2           ure,” after “likely to make a search or seizure”; and

3           (4) inserting “real or personal,” after “mer-  
4           chandise or other property,”.

5 **SEC. 419. PROSPECTIVE APPLICATION**

6           (a) **IN GENERAL.**—Unless otherwise specified in this  
7 section or in another provision of this Act, all amendments  
8 in this Act shall apply to forfeiture proceedings com-  
9 menced on or after the effective date of this Act.

10          (b) **ADMINISTRATIVE FORFEITURES.**—All amend-  
11 ments in this Act relating to seizures and administrative  
12 forfeitures shall apply to seizures and forfeitures occurring  
13 on or after the sixtieth day after the effective date of this  
14 Act.

15          (c) **CIVIL JUDICIAL FORFEITURES.**—All amendments  
16 in this Act relating to the judicial procedures applicable  
17 once a civil forfeiture complaint is filed by the government  
18 shall apply to all cases in which the forfeiture complaint  
19 is filed on or after the sixtieth day after the effective date  
20 of this Act.

21          (d) **CRIMINAL FORFEITURE.**—All amendments in  
22 this Act relating to the procedures applicable in criminal  
23 forfeiture cases shall apply to cases in which the indict-  
24 ment or information is filed on or after the effective date  
25 of this Act.

1 (e) **SUBSTANTIVE LAW.**—All amendments in this Act  
2 expanding substantive forfeiture law to make property  
3 subject to civil or criminal forfeiture which was not pre-  
4 viously subject to forfeiture shall apply to offenses occur-  
5 ring on or after the effective date of this Act.

6 **TITLE V—CRIMINAL FORFEITURE**

7 **SEC. 501. UNIFORM PROCEDURES FOR CRIMINAL FORFEIT-**  
8 **URE**

9 (a) **IN GENERAL.**—Section 982(b)(1) of title 18,  
10 United States Code, is amended to read as follows:

11 “(b)(1) The forfeiture of property under this section,  
12 including any seizure and disposition of the property and  
13 any related administrative or judicial proceeding, shall be  
14 governed by the provisions of section 413 of the Com-  
15 prehensive Drug Abuse Prevention and Control Act of  
16 1970 (21 U.S.C. 853), except for subsection 413(d) which  
17 shall not apply to forfeitures under this section.”

18 (b) **RICO.**—Section 1963 of title 18, United States  
19 Code, is amended by repealing subsections (b) through  
20 (m) and inserting the following after subsection (a):

21 “(b) The forfeiture of property under this section, in-  
22 cluding any seizure and disposition of the property and  
23 any related administrative or judicial proceeding, shall be  
24 governed by the provisions of section 413 of the Com-  
25 prehensive Drug Abuse Prevention and Control Act of

1           (1) by striking paragraphs (1), (2) and (3) and  
2 inserting the following:

3           “(1) The court, in imposing sentence on any  
4 person convicted of a violation of subsection (b) or  
5 (c), shall order, in addition to any other sentence  
6 imposed under this section and irrespective of any  
7 provision of State law, that the person forfeit to the  
8 United States—

9           “(A) any of such person’s property used in  
10 a transaction or attempted transaction, to com-  
11 mit or to facilitate the commission of such vio-  
12 lation (other than a misdemeanor); and

13           (B) any property, real or personal, con-  
14 stituting, derived from, or traceable to any pro-  
15 ceeds such person obtained directly or indirectly  
16 as a result of such violation.

17           “(2) All property subject to forfeiture under  
18 this subsection, any seizure and disposition thereof,  
19 and any proceeding relating thereto, shall be gov-  
20 erned by section 413 of the Comprehensive Drug  
21 Abuse Prevention and Control Act of 1970 (21  
22 U.S.C. 853, with the exception of subsection (d)  
23 which shall not apply to forfeitures under this sec-  
24 tion.”; and

1           (2) by redesignating paragraph (4) as para-  
2 graph (3).

3           (h) **IMMIGRATION OFFENSES.**—The second para-  
4 graph (6) of subsection 982(a) of title 18, United States  
5 Code, is amended by striking “(A)” and all of subpara-  
6 graph (B).

7 **SEC. 502. USE OF CRIMINAL FORFEITURE AS AN ALTER-**  
8 **NATIVE TO CIVIL FORFEITURE.**

9           Section 2461 of title 28, United States Code, is  
10 amended by adding the following subsection:

11           “(c) Whenever a forfeiture of property is authorized  
12 in connection with a violation of an Act of Congress, and  
13 any person is charged in an indictment or information  
14 with such violation but no specific statutory provision is  
15 made for criminal forfeiture upon conviction, the govern-  
16 ment may include the forfeiture in the indictment or infor-  
17 mation in accordance with the Federal Rules of Criminal  
18 Procedure, and upon conviction, the court shall order the  
19 forfeiture of the property in accordance with the proce-  
20 dures set forth in section 413 of the Comprehensive Drug  
21 Abuse Prevention and Control Act of 1970 (21 U.S.C.  
22 853).”

1 **SEC. 503. FEDERAL RULES OF CRIMINAL PROCEDURE.**

2 (a) **IN GENERAL.**—The Federal Rules of Criminal  
3 Procedure are amended by inserting the following new rule  
4 after rule 32.1:

5 **§ 32.2 Criminal forfeiture**

6 “(a) **INDICTMENT AND INFORMATION.**—No judgment  
7 of forfeiture may be entered in a criminal proceeding un-  
8 less the indictment or the information alleges that the de-  
9 fendant or defendants have an interest in property that  
10 is subject to forfeiture in accordance with the applicable  
11 statute.

12 “(b) **HEARING AND ENTRY OF PRELIMINARY ORDER**  
13 **OF FORFEITURE AFTER VERDICT.**—Within 10 days of en-  
14 tering a verdict of guilty or accepting a plea of guilty or  
15 nolo contendere on any count in the indictment or infor-  
16 mation for which criminal forfeiture is alleged, the court  
17 must determine what property is subject to forfeiture be-  
18 cause of its relationship to the offense. The determination  
19 may be based on evidence already in the record, including  
20 any written plea agreement, or on evidence adduced at a  
21 post-trial hearing. If the court finds that property is sub-  
22 ject to forfeiture, it must enter a preliminary order direct-  
23 ing the forfeiture of whatever interest each defendant may  
24 have in the property, without determining what that inter-  
25 est may be. A determination of the extent of each defend-  
26 ant’s interest in the property will be deferred until any

1 third party claiming an interest in the property has peti-  
2 tioned the court pursuant to statute for consideration of  
3 the claim. If no such petition is timely filed, the property  
4 is presumed to be the property of the defendant or defend-  
5 ants and is forfeited in its entirety.

6       “(c) **PRELIMINARY ORDER OF FORFEITURE.**—The  
7 entry of a preliminary order of forfeiture will authorize  
8 the Attorney General to seize the property subject to for-  
9 feiture, to conduct such discovery as the court may deem  
10 proper to facilitate the identification, location or disposi-  
11 tion of the property, and to commence proceedings consist-  
12 ent with any statutory requirements pertaining to third-  
13 party rights. At the time of sentencing (or at any time  
14 before sentencing if the defendant consents), the order of  
15 forfeiture becomes final as to the defendant, and must be  
16 made a part of the sentence and included in the judgment.  
17 The court may include in the order of forfeiture whatever  
18 conditions are reasonably necessary to preserve the prop-  
19 erty value pending any appeal.

20       “(d) **ANCILLARY PROCEEDINGS.**—(1) If, as pre-  
21 scribed by statute, a third party files a petition asserting  
22 an interest in the forfeited property, the court must con-  
23 duct an ancillary proceeding. In that proceeding, the court  
24 may entertain a motion to dismiss the petition for lack  
25 of standing, for failure to state a claim upon which relief

1 could be granted, or for any other ground. For purposes  
2 of the motion, all facts set forth in the petition must be  
3 assumed to be true.

4       “(2) If a motion referred to in paragraph (1) is de-  
5 nied, or if no such motion is made, the court may permit  
6 the parties to conduct discovery in accordance with the  
7 Federal Rules of Civil Procedures to the extent that the  
8 court determines such discovery to be necessary or desir-  
9 able to resolve factual issues before conducting an evi-  
10 dentiary hearing. At the conclusion of this discovery, ei-  
11 ther party may seek to have the court dispose of the peti-  
12 tion on a motion for summary judgment in the manner  
13 described in rule 56 of the Federal Rules of Civil Proce-  
14 dure.

15       “(3) At the conclusion of the ancillary proceeding, the  
16 court must enter a final order of forfeiture amending the  
17 preliminary order as necessary to take into account the  
18 disposition of any third-party petition.

19       “(4) If multiple petitions are filed in the same case,  
20 an order dismissing or granting fewer than all of the peti-  
21 tions is not appealable until all petitions are resolved, un-  
22 less the court determines that there is no just reason for  
23 delay and directs the entry of final judgment with respect  
24 to one or more but fewer than all of the petitions.

1       “(e) STAY OF FORFEITURE PENDING APPEAL.—If  
2 the defendant appeals from the conviction or order of for-  
3 feiture, the court may stay the order of forfeiture upon  
4 such terms as the court finds appropriate to ensure that  
5 the property remains available in case the conviction or  
6 order of forfeiture is vacated. But the stay will not delay  
7 the conduct of the ancillary proceeding or the determina-  
8 tion of the rights or interests of any third party. If the  
9 defendant’s appeal is still pending when the court deter-  
10 mines that the order of forfeiture must be amended to rec-  
11 ognize third party’s interest in the property, the court  
12 must amend the order of forfeiture but must refrain from  
13 directing the transfer of any property or interest to the  
14 third party until the defendant’s appeal is final, unless the  
15 defendant, in writing, consents to the transfer of the prop-  
16 erty or interest to the third party.

17       “(f) SUBSTITUTE PROPERTY.—If the applicable for-  
18 feiture statute authorizes the forfeiture of substitute prop-  
19 erty, the court may at any time entertain a motion by the  
20 Government to order forfeiture of substitute property. If  
21 the Government makes the requisite showing, the court  
22 must enter an order forfeiting the substitute property, or  
23 must amend an existing preliminary or final order to in-  
24 clude that property.”

1 (b) CONFORMING AMENDMENTS.—(1) Rules 7(c)(2),  
2 31(e), and 32(d)(2), Federal Rules of Criminal Procedure,  
3 are repealed.

4 (2) Rule 38(e), Federal Rules of Criminal Procedure,  
5 is amended by striking “3554,” and by striking “Criminal  
6 Forfeiture” in the heading.

7 (c) ORDER OF FORFEITURE.—Section 3554 of title  
8 18, United States Code, is amended—

9 (1) by striking “an offense described in section  
10 1962 of this title or in title II or III of the Com-  
11 prehensive Drug Abuse Prevention and Control Act  
12 of 1970” and inserting “an offense for which crimi-  
13 nal forfeiture is authorized”; and

14 (2) by inserting “pursuant to the Federal Rules  
15 of Criminal Procedure,” after “shall order,”.

16 **SEC. 504. PRE-TRIAL RESTRAINT OF SUBSTITUTE ASSETS.**

17 Section 413(e)(1) of the Controlled Substances Act  
18 (21 U.S.C. 853(e)(1)) is amended by striking “(a)” and  
19 inserting “(a) or (p)”.

20 **SEC. 505. REPATRIATION OF PROPERTY PLACED BEYOND**  
21 **THE JURISDICTION OF THE COURT.**

22 (A) ORDER OF FORFEITURE.—Section 413(p) of the  
23 Controlled Substance Act (21 U.S.C. 853(p)) is amended  
24 by inserting the following at the end: “In the case of prop-  
25 erty described in paragraph (3), the court may, in addi-

1 tion, order the defendant to return the property to the  
 2 jurisdiction of the court so that it may be seized and for-  
 3 feited.”

4 (b) PRE-TRIAL RESTRAINING ORDER.—Section  
 5 413(e) of the Controlled Substance Act (21 U.S.C. 853(e))  
 6 is amended by adding the following after paragraph (3):

7 “(4) Pursuant to its authority to enter a pre-trial re-  
 8 straining order under this section, including its authority  
 9 to restrain any property forfeitable as substitute assets,  
 10 the court may also order the defendant to repatriate any  
 11 property subject to forfeiture pending trial, and to deposit  
 12 that property in the registry of the court, or with the Unit-  
 13 ed States Marshals Service or the Secretary of the Treas-  
 14 ury, in an interest-bearing account. Failure to comply with  
 15 an order under this subsection, or an order to repatriate  
 16 property under subsection (p), shall be punishable as a  
 17 civil or criminal contempt of court, and may also result  
 18 in an enhancement of the sentence for the offense giving  
 19 rise to the forfeiture under the obstruction of justice provi-  
 20 sion of section 3C1.1 of the United States Sentencing  
 21 Guidelines.”

22 **SEC. 506. HEARINGS ON PRE-TRIAL RESTRAINING ORDERS;**  
 23 **ASSETS NEEDED TO PAY ATTORNEY'S FEES.**

24 Section 413(e) of the Controlled Substances Act (21  
 25 U.S.C. 853(e)) is amended—

1           (1) in paragraph (3), by adding the following  
2 after the period: "The court shall issue any protec-  
3 tive order necessary to prevent the premature disclo-  
4 sure of any ongoing law enforcement operation or in-  
5 vestigation or the identity of any witness at the  
6 hearing. In addition, in any case involving an ongo-  
7 ing investigation, the court shall permit the presen-  
8 tation of evidence in camera or under seal. Rule 65,  
9 Federal Rules of Civil Procedure, shall not apply to  
10 restraining orders issued under this subsection.";  
11 and

12           (2) by adding the following new paragraph:

13           “(5)(A) When property is restrained pre-trial  
14 subject to paragraph (1)(A), the court may, at the  
15 request of the defendant, hold a pre-trial hearing to  
16 determine whether the restraining order should be  
17 vacated or modified with respect to some or all of  
18 the restrained property because—

19           “(i) it restrains property that would not be  
20 subject to forfeiture even if all of the facts set  
21 forth in the indictment were established as true;

22           “(ii) it causes a substantial hardship to the  
23 moving party and less intrusive means exist to  
24 preserve the subject property for forfeiture; or

1           “(iii) the defendant establishes that he or  
2 she has no assets, other than the restrained  
3 property, available to exercise his or her con-  
4 stitutional right to retain counsel, and there is  
5 no probable cause to believe that the restrained  
6 property is subject to forfeiture.

7           “(B) If the defendant files a motion under sub-  
8 paragraph (A)(iii), the court shall require the de-  
9 fendant to establish that he has no access to other  
10 assets adequate for the payment of criminal defense  
11 counsel before conducting any probable cause in-  
12 quiry. The Government shall have an opportunity to  
13 cross-examine the defendant and any witnesses he or  
14 she may present on this issue. If the court deter-  
15 mines that the defendant has established that he has  
16 no access to other assets, it shall hold a hearing to  
17 determine whether there is probable cause for the  
18 forfeiture of the defendant’s property. If the court  
19 determines that no probable cause exists for the for-  
20 feiture of an asset, it shall modify the restraining  
21 order to the extent necessary to permit the defend-  
22 ant to use that asset to retain counsel.

23           “(C) In any hearing under this paragraph  
24 where probable cause is at issue, the court shall  
25 limit its inquiry to the existence of probable cause

1 for the forfeiture, and shall neither entertain chal-  
2 lenges to the validity of the indictment, nor require  
3 the Government to produce additional evidence re-  
4 garding the facts of the case to support the grand  
5 jury's finding of probable cause regarding the crimi-  
6 nal offense giving rise to the forfeiture. In all cases,  
7 the party requesting the modification of the restrain-  
8 ing order shall bear the burden of proof.

9 “(D) A person other than the defendant who  
10 has a legal interest in the restrained property may  
11 move to modify or vacate the restraining order for  
12 the reasons stated in subparagraph (A)(ii). In ac-  
13 cordance with subsection (k), however, such person  
14 may not object to a restraining order on grounds  
15 that may be asserted only in the ancillary hearing  
16 pursuant to subsection (n).

17 “(E) If the property restrained is subject to for-  
18 feiture as substitute assets, the court shall exempt  
19 from the restraining order assets needed to pay at-  
20 torneys fees, other necessary cost-of-living expenses,  
21 and expenses of maintaining the restrained assets.”.

22 **SEC. 507. CRIMINAL SEIZURE WARRANTS.**

23 Section 413(f) of the Controlled Substances Act (21  
24 U.S.C. 853(f)) is amended to read as follows:

1       “(f) Property subject to forfeiture under this section  
2 may be seized pursuant to section 981(b) of title 18,  
3 United States Code. If property subject to criminal forfeit-  
4 ure under this section is already in the custody of the  
5 United States or any agency thereof, it shall not be nec-  
6 essary to seize or restrain the property for the purpose  
7 of criminal forfeiture.”.

8 **SEC. 506. STANDARD OF PROOF FOR CRIMINAL FORFEIT-**  
9 **URE.**

10       Section 413 of the Controlled Substances Act (21  
11 U.S.C. 853) is amended by adding the following new sub-  
12 section after subsection (p):

13       “(q) **STANDARD OF PROOF.**—In any forfeiture action  
14 under this section, the party bearing the burden of proof  
15 shall be required to prove the matter at issue by a prepon-  
16 derance of the evidence.”.

17 **SEC. 506. DISCOVERY PROCEDURE FOR LOCATING FOR-**  
18 **FEITED ASSETS.**

19       (a) **POST-CONVICTION DISCOVERY.**—Section 413(m)  
20 of the Controlled Substances Act (21 U.S.C. 853(m)) is  
21 amended by—

22               (1) adding the following at the end before the  
23 period: “to the extent that the provisions of the rule  
24 are consistent with the purposes for which discovery  
25 is conducted under this subsection”; and

1 (2) adding the following additional sentence:

2 “Because this subsection applies only to matters oc-  
3 ccurring after the defendant has been convicted and  
4 his property has been declared forfeited, the provi-  
5 sions of rule 15 requiring the consent of the defend-  
6 ant and the presence of the defendant at the deposi-  
7 tion shall not apply.”

8 (b) **BANK RECORDS.**—Section 986 of title 18, United  
9 States Code, is amended—

10 (1) in subsection (a) by striking “in rem”; and

11 (2) in subsection (c) by inserting “or Criminal”  
12 after “Civil”.

13 **SEC. 510. COLLECTION OF CRIMINAL FORFEITURE JUDG-**  
14 **MENT.**

15 Section 413 of the Controlled Substances Act (21  
16 U.S.C. 853) is amended by adding the following sub-  
17 section after subsection (q):

18 “(r) **COLLECTION OF CRIMINAL FORFEITURE JUDG-**  
19 **MENT.**—In addition to the authority otherwise provided  
20 in this section, an order of forfeiture may be enforced—

21 “(1) in the manner provided for the collection  
22 and payment of fines in subchapter B of chapter  
23 229 of title 18, United States Code; or

24 “(2) in the same manner as a judgment in a  
25 civil action.”

1 **SEC. 511. APPEALS IN CRIMINAL FORFEITURE CASES.**

2 (a) **PRE-TRIAL DISMISSAL OF FORFEITURE**  
3 **COUNT.**—Section 3731 of title 18, United States Code,  
4 is amended in the first unnumbered paragraph by insert-  
5 ing “, or dismissing a forfeiture count in whole or in part,”  
6 after “order of a district court dismissing an indictment  
7 or information”.

8 (b) **REVIEW OF A SENTENCE.**—Section 3742 of title  
9 18, United States Code, is amended by inserting the fol-  
10 lowing new subsection:

11 “(i) **FORFEITURE ORDERS.**—The Government may  
12 file a notice of appeal in the district court of any decision,  
13 judgment, or order of a district court denying a forfeiture  
14 in whole or in part, or mitigating a forfeiture for constitu-  
15 tional reasons, except that no appeal shall lie where the  
16 double jeopardy clause of the United States Constitution  
17 prohibits further prosecution.”

18 **SEC. 512. NON-ABATEMENT OF FORFEITURE WHEN DE-**  
19 **FENDANT DIES PENDING APPEAL.**

20 Section 413 of the Controlled Substances Act (21  
21 U.S.C. 853) is amended by adding at the end the following  
22 new subsection:

23 “(s) **NONABATEMENT OF FORFEITURE ORDER.**—An  
24 order of forfeiture under this section shall not abate by  
25 reason of the death thereafter of any or all of the defend-  
26 ants or petitioners or potential petitioners.”

1 **SEC. 513. STANDING OF THIRD PARTIES TO CONTEST**  
2 **CRIMINAL FORFEITURE ORDERS.**

3 Section 413(n)(2) of the Controlled Substances Act  
4 (21 U.S.C. 853(n)(2)), is amended by designating the  
5 present matter as subparagraph (A) and by adding the  
6 following paragraphs at the end:

7 “(B) Notwithstanding any provision of this section,  
8 no person may assert a legal right, title or interest under  
9 this section in contraband or other property that it is ille-  
10 gal to possess. In addition, except as set forth in sub-  
11 section (n)(6)(B), no person may assert an ownership in-  
12 terest under this section in the illegal proceeds of a crimi-  
13 nal act, irrespective of State property law.

14 “(C) For the purposes of this section, a ‘legal inter-  
15 est’ includes, but is not limited to, a lien, mortgage, re-  
16 corded security device or valid assignment of an ownership  
17 interest. A ‘legal interest’ does not include: (i) a general  
18 unsecured interest in, or claim against, the property or  
19 estate of the defendant; (ii) a bailment; (iii) a possessory  
20 interest or title held by a nominee who exercises no domin-  
21 ion or control over the property; or (iv) a constructive  
22 trust.”

23 **SEC. 514. MOTION AND DISCOVERY PROCEDURES FOR AN-**  
24 **CILLARY HEARINGS.**

25 Section 413(n)(4) of the Controlled Substances Act  
26 (21 U.S.C. 853(n)(4)) is amended by designating the

1 present matter as subparagraph (A), and by inserting the  
2 following new subparagraphs:

3           “(B) Before conducting a hearing, the court  
4 may entertain a motion to dismiss the petition for  
5 lack of standing, for failure to state a claim upon  
6 which relief could be granted under this section, or  
7 for any other ground. For the purposes of such mo-  
8 tion, all facts set forth in the petition shall be as-  
9 sumed to be true.

10           “(C) If a motion referred to in subparagraph  
11 (B) is denied, or if no such motion is made, the  
12 court may, in its discretion, permit the parties to  
13 conduct discovery in accordance with the Federal  
14 Rules of Civil Procedure to the extent that the court  
15 determines such discovery to be necessary or desir-  
16 able to resolve factual issues before the hearing. At  
17 the conclusion of such discovery, either party may  
18 seek to have the court dispose of the petition on a  
19 motion for summary judgment in the manner de-  
20 scribed in rule 56 of the Federal Rules of Civil Pro-  
21 cedure.

22           “(D) Any order disposing of a petition pursuant  
23 to a motion or pursuant to a hearing on the merits  
24 of the claim shall be appealable in accordance with  
25 the Federal Rules of Appellate Procedure applicable

1 to civil cases. However, where multiple petitions are  
2 filed in the same case, an order dismissing or grant-  
3 ing fewer than all of the petitions shall not be ap-  
4 pealable until all petitions are resolved, unless the  
5 court expressly determines that there is no just rea-  
6 son for delay and directs the entry of final judgment  
7 with respect to one or more but fewer than all of the  
8 petitions.

9 “(E) The district court shall retain jurisdiction  
10 over a petition filed pursuant to this subsection not-  
11 withstanding any appeal filed by the defendant in  
12 the criminal case.”

13 **SEC. 515. INTERVENTION BY THE DEFENDANT IN THE AN-**  
14 **CILLARY PROCEEDING.**

15 Section 413(n) of the Controlled Substances Act (21  
16 U.S.C. 853(n)) is amended by adding the following after  
17 paragraph (7):

18 “(8) If the defendant has filed a timely appeal  
19 from a conviction under this section and the appeal  
20 is pending, any person filing a petition under this  
21 subsection shall serve a copy of the petition upon the  
22 defendant, and the defendant shall have a right to  
23 intervene in the ancillary proceeding with respect to  
24 the petition in accordance with rule 24 of the Fed-  
25 eral Rules of Civil Procedure solely for the purpose

1 of contesting the petitioner's alleged interest in the  
2 property ordered forfeited. The defendant shall have  
3 20 days from the date of service of the petition to  
4 intervene. If the defendant does not intervene within  
5 such time period, he or she shall have waived the  
6 right to challenge in any forum any adjudication of  
7 the petitioner's interest in the property pursuant to  
8 this subsection, regardless of the outcome of the ap-  
9 peal.

10 "(9) A hearing provided for in this subsection  
11 shall be limited to an adjudication of the validity of  
12 the petitioner's legal right, title or interest in the  
13 property ordered forfeited, and shall not provide a  
14 forum to relitigate the forfeitability of the prop-  
15 erty."

16 **SEC. 516. IN PERSONAM JUDGMENTS.**

17 Section 413(n)(1) of the Controlled Substances Act  
18 (21 U.S.C. 853(n)(1)) is amended by adding the following  
19 sentence at the end "To the extent that the order of for-  
20 feiture includes only an in personam money judgment  
21 against the defendant, or includes only property constitut-  
22 ing contraband, no proceeding under this subsection shall  
23 be necessary."

1 **SEC. 517. RIGHT OF THIRD PARTIES TO CONTEST FORFEIT-**  
2 **URE OF SUBSTITUTE ASSETS.**

3 (a) **IN GENERAL.**—Section 413(c) of the Controlled  
4 Substances Act (21 U.S.C. 853(c)), as amended by this  
5 Act, is further amended by—

6 (1) inserting the following after the first sen-  
7 tence: “All right, title and interest in property de-  
8 scribed in subsection (p) of this section vests in the  
9 United States at the time an indictment, informa-  
10 tion or bill of particulars specifically describing the  
11 property as substitute assets is filed.”; and

12 (2) by striking “Any such property that is sub-  
13 sequently transferred to a person other than the de-  
14 fendant” and inserting “Any property that is trans-  
15 ferred to a person other than the defendant after the  
16 United States’ interest in the property has vested  
17 pursuant to this subsection”.

18 (b) **CONFORMING AMENDMENT.**—Section 413(n)(6)  
19 of the Controlled Substances Act (21 U.S.C. 853(n)(6))  
20 is amended by adding at the end the following sentence:  
21 “In the case of substitute assets, the petitioner must show  
22 that his interest in the property existed at the time the  
23 property vested in the United States pursuant to sub-  
24 section (c), or that he subsequently acquired his interest  
25 in the property as a bona fide purchaser for value as pro-  
26 vided in this subsection.”

1 **SEC. 518. FORFEITABLE PROPERTY TRANSFERRED TO**  
2 **THIRD PARTIES.**

3 Section 413(c) of the Controlled Substances Act (21  
4 U.S.C. 853(c)), as amended by this Act, is further amend-  
5 ed by designating the present matter as paragraph (1) and  
6 adding the following new paragraph:

7 “(2) If, as provided in paragraph (1), property  
8 transferred to a transferee is ordered forfeited and  
9 the transferee fails to establish that he is a bona fide  
10 purchaser, but the transferee is unable, due to the  
11 transferee’s act or omission, to turn the property  
12 over to the United States, the transferee shall owe  
13 the United States a sum of money up to the value  
14 of the property transferred by the defendant, plus  
15 interest from the time of the transfer. Once the an-  
16 cillary proceedings regarding the transferee’s claim  
17 to be a bona fide purchaser are concluded, the dis-  
18 trict court that issued the order of forfeiture shall  
19 issue a judgment in favor of the United States and  
20 against the transferee for the amount of money to  
21 which the United States is entitled.”

22 **SEC. 519. FORFEITURE THIRD PARTY INTERESTS IN CRIMI-**  
23 **NAL CASES.**

24 (a) **IN GENERAL.**—Section 413 of the Controlled  
25 Substances Act (21 U.S.C. 853) is amended by adding the  
26 following after subsection (s):

1       “(t) FORFEITURE OF THIRD PARTY INTERESTS.—In  
2 lieu of filing a parallel civil forfeiture action, the govern-  
3 ment may seek the forfeiture of a third party’s interest  
4 in property subject to forfeiture under this section at the  
5 conclusion of the ancillary proceeding described in sub-  
6 section (n). Such proceeding shall be an in rem proceeding  
7 in which the third party shall first have the burden of es-  
8 tablishing a legal interest in the property pursuant to sub-  
9 section (n), after which the government shall have the bur-  
10 den of establishing the forfeitability of the third party’s  
11 interest in the manner provided for civil forfeitures in  
12 chapter 46, title 18, United States Code, and the third  
13 party shall have the burden of establishing an innocent  
14 owner defense pursuant to such chapter.”

15       (b) CONFORMING AMENDMENT.—Section 413(n)(6)  
16 of the Controlled Substances Act (21 U.S.C. 853(n)(6))  
17 is amended by adding “, unless the government notifies  
18 the court that it will seek to forfeit the petitioner’s interest  
19 pursuant to subsection (t)” after “in accordance with its  
20 determination”.

21 **SEC. 520. SEVERANCE OF JOINTLY HELD PROPERTY.**

22       Section 413 of the Controlled Substances Act (21  
23 U.S.C. 853) is amended by adding the following after sub-  
24 section (t):

1       “(u) SEVERANCE OF JOINTLY HELD PROPERTY.—  
2 If the court determines, pursuant to subsection (n) or (t),  
3 that a third party had a partial interest in property other-  
4 wise subject to forfeiture, or a joint tenancy or tenancy  
5 by the entirety in such property, the court shall enter an  
6 appropriate order (1) severing the property; (2) transfer-  
7 ring the property to the government with a provision that  
8 the government compensate the third party to the extent  
9 of his or her ownership interest once a final order of for-  
10 feiture has been entered and the property has been re-  
11 duced to liquid assets, or (3) permitting the third party  
12 to retain the property subject to a lien in favor of the Gov-  
13 ernment to the extent of the forfeitable interest in the  
14 property. To effectuate the purposes of this subsection, a  
15 joint tenancy or tenancy by the entireties shall be con-  
16 verted to a tenancy in common by order of the court, irre-  
17 spective of State law.”

18 **SEC. 521. VICTIM RESTITUTION.**

19       Section 413 of the Controlled Substances Act (21  
20 U.S.C. 853) is amended by adding at the end the following  
21 new subsection:

22       “(v) VICTIMS AND RESTITUTION.—

23               “(1) The defendant may not use property sub-  
24       ject to forfeiture under this section to satisfy an  
25       order of restitution. However, if there are identifi-

1 able victims entitled to restitution from the defend-  
2 ant, and the defendant has no assets other than the  
3 property subject to forfeiture with which to pay res-  
4 titution to the victims, the Government may move to  
5 dismiss the forfeiture allegations before entry of a  
6 judgment of forfeiture to allow the property to be  
7 used by the defendant to pay restitution in whatever  
8 manner the court determines to be appropriate if it  
9 grants the Government's motion.

10           “(2) If an order of forfeiture is entered pursu-  
11 ant to this section and the defendant has no assets  
12 other than the forfeited property to pay restitution  
13 to identifiable victims who are entitled to restitution,  
14 the Government shall restore the forfeited property  
15 to the victims pursuant to subsection (i)(1) once the  
16 ancillary proceeding under subsection (n) has been  
17 completed and the costs of the forfeiture action have  
18 been deducted. On the motion of the Government,  
19 the court may enter any order necessary to facilitate  
20 the distribution of the property under this sub-  
21 section.

22           “(3) For purposes of this subsection, a ‘victim’  
23 is a person other than a person with a legal right,  
24 title, or interest in the forfeited property sufficient  
25 to satisfy the standing requirements of subsection

1 (n)(2) who may nevertheless be entitled to restitu-  
2 tion from the forfeited funds pursuant to 28 CFR  
3 part 9.8. A person shall be considered a 'victim' if  
4 the person is the victim of the offense giving rise to  
5 the forfeiture, or of any offense that was part of the  
6 same scheme, conspiracy, or pattern of criminal ac-  
7 tivity, including in the case of a money laundering  
8 offense, any offense constituting the underlying  
9 specified unlawful activity.”.

10 **SEC. 522. DELIVERY OF PROPERTY TO THE MARSHALS**  
11 **SERVICE.**

12 Section 413(j) of the Controlled Substances Act (21  
13 U.S.C. 853(j)) is amended by inserting “, and rule C(5)  
14 of the Supplemental Rules for Certain Admiralty and Mar-  
15 itime Claims,” before “shall apply to a criminal forfeit-  
16 ure”.

**[ROUGH DRAFT]**

15 SEPTEMBER 1997/3PM

105TH CONGRESS  
1ST SESSION

**H. R. \_\_\_\_\_**

---

**IN THE HOUSE OF REPRESENTATIVES**

introduced the following bill; which was referred to the  
Committee on \_\_\_\_\_

---

**A BILL**

To make changes in criminal asset forfeiture proceedings.

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

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Criminal Asset Forfeit-  
5 ure Act of 1997".

6 **SEC. 2. TABLE OF CONTENTS.**

7 The table of contents for this Act is as follows:

Sec. 1. Short title.

Sec. 2. Table of contents.

## TITLE I—CRIMINAL FORFEITURE PROCEDURE

- Sec. 101. Uniform procedures for criminal forfeiture.  
 Sec. 102. Use of criminal forfeiture as an alternative to civil forfeiture.  
 Sec. 103. Federal Rules of Criminal Procedure.  
 Sec. 104. Pretrial restraint of substitute assets.  
 Sec. 105. Repatriation of property placed beyond the jurisdiction of the court.  
 Sec. 106. Hearings on pretrial restraining orders; assets needed to pay attorney's fees.  
 Sec. 107. Criminal seizure warrants.  
 [Sec. 108. Standard of proof for criminal forfeiture.]  
 Sec. 109. Discovery procedure for locating forfeited assets.  
 Sec. 110. Collection of criminal forfeiture judgment.  
 Sec. 111. Appeals by Government in criminal forfeiture cases.  
 Sec. 112. Nonabatement of forfeiture when defendant dies pending appeal.  
 Sec. 113. Standing of third parties to contest criminal forfeiture orders.  
 Sec. 114. Motion and discovery procedures for ancillary hearings.  
 Sec. 115. Intervention by the defendant in the ancillary proceeding.  
 Sec. 116. In personam judgments.  
 Sec. 117. Right of third parties to contest forfeiture of substitute assets.  
 Sec. 118. Forfeitable property transferred to third parties.  
 Sec. 119. Forfeiture of third party interests in criminal cases.  
 Sec. 120. Severance of jointly held property.  
 [Sec. 121. Victim restitution.]  
 Sec. 122. Delivery of property to the Marshals Service.

## TITLE II—PROPERTY SUBJECT TO CRIMINAL FORFEITURE

- Sec. 201. Criminal forfeiture of proceeds of Federal offenses.  
 Sec. 202. Uniform definition of "proceeds".  
 Sec. 203. Criminal forfeiture of firearms used in crimes of violence and felonies.  
 Sec. 204. Criminal forfeiture for alien smuggling.  
 Sec. 205. Criminal forfeiture for money laundering conspiracies.  
 Sec. 206. Criminal forfeiture of instrumentalities of terrorism, telemarketing fraud, and other offenses.  
 Sec. 207. Criminal forfeiture of vehicles used for gun running.  
 Sec. 208. Forfeiture of criminal proceeds transported in interstate commerce.  
 Sec. 209. Criminal forfeiture for odometer tampering offenses.

# TITLE I—CRIMINAL FORFEITURE PROCEDURE

## SEC. 101. UNIFORM PROCEDURES FOR CRIMINAL FORFEITURE.

- (a) IN GENERAL.—Section 982(b)(1) of title 18, United States Code, is amended to read as follows:
- “(b)(1) The forfeiture of property under this section, including any seizure and disposition of the property and

1 any related administrative or judicial proceeding, shall be  
2 governed by the provisions of section 413 of the Com-  
3 prehensive Drug Abuse Prevention and Control Act of  
4 1970 (21 U.S.C. 853), except for section 413(d) which  
5 shall not apply to forfeitures under this section.”.

6 (b) RICO.—Section 1963 of title 18, United States  
7 Code, is amended—

8 (1) by striking subsections (b) through (m); and

9 (2) by inserting after subsection (a) the follow-  
10 ing:

11 “(b) The forfeiture of property under this section, in-  
12 cluding any seizure and disposition of the property and  
13 any related administrative or judicial proceeding, shall be  
14 governed by the provisions of section 413 of the Com-  
15 prehensive Drug Abuse Prevention and Control Act of  
16 1970 (21 U.S.C. 853), except for section 413(d) which  
17 shall not apply to forfeitures under this section.”.

18 (c) OBSCENITY.—Section 1466 of title 18, United  
19 States Code, is amended—

20 (1) by striking subsections (b) through (n); and

21 (2) by inserting after subsection (a) the follow-  
22 ing:

23 “(b) The forfeiture of property under this section, in-  
24 cluding any seizure and disposition of the property and  
25 any related administrative or judicial proceeding, shall be

1 governed by the provisions of section 413 of the Com-  
2 prehensive Drug Abuse Prevention and Control Act of  
3 1970 (21 U.S.C. 853), except for section 413(d) which  
4 shall not apply to forfeitures under this section.”.

5 (d) CHILD PORNOGRAPHY.—Section 2253 of title 18,  
6 United States Code, is amended—

7 (1) by striking subsections (b) through (o); and

8 (2) by inserting after subsection (a) the follow-  
9 ing:

10 “(b) PROCEDURE.—The forfeiture of property under  
11 this section, including any seizure and disposition of the  
12 property and any related administrative or judicial pro-  
13 ceeding, shall be governed by the provisions of section 413  
14 of the Comprehensive Drug Abuse Prevention and Control  
15 Act of 1970 (21 U.S.C. 853), except for section 413(d)  
16 which shall not apply to forfeitures under this section.”.

17 (e) ESPIONAGE.—Section 794(d)(3) of title 18, Unit-  
18 ed States Code, is amended to read as follows:

19 “(3) The forfeiture of property under this section, in-  
20 cluding any seizure and disposition of the property and  
21 any related administrative or judicial proceeding, shall be  
22 governed by the provisions of section 413 of the Com-  
23 prehensive Drug Abuse Prevention and Control Act of  
24 1970 (21 U.S.C. 853), except for section 413(d) which  
25 shall not apply to forfeitures under this section.”.

1 (f) FIREARMS.—Section 3665 of title 18, United  
2 States Code, is amended—

3 (1) by redesignating the first unnumbered para-  
4 graph as subsection (a)(1);

5 (2) by redesignating the second unnumbered  
6 paragraph as subsection (a)(2); and

7 (3) by adding at the end the following new sub-  
8 section:

9 “(b) The forfeiture of property under this section, in-  
10 cluding any seizure and disposition of the property and  
11 any related administrative or judicial proceeding, shall be  
12 governed by the provisions of section 413 of the Com-  
13 prehensive Drug Abuse Prevention and Control Act of  
14 1970 (21 U.S.C. 853), except for section 413(d) which  
15 shall not apply to forfeitures under this section.”.

16 (g) IMMIGRATION OFFENSES.—The second para-  
17 graph (6) of section 982(a) of title 18, United States  
18 Code, is amended—

19 (1) by striking “(A)”;

20 (2) by redesignating clauses (i) and (ii) as sub-  
21 paragraphs (A) and (B), respectively;

22 (3) by redesignating subclauses (I) and (II) as  
23 clauses (i) and (ii), respectively;

24 (4) by striking “this subparagraph” and insert-  
25 ing “this subsection”; and

1 (5) by striking subparagraph (B).

2 **SEC. 102. USE OF CRIMINAL FORFEITURE AS AN ALTER-**  
3 **NATIVE TO CIVIL FORFEITURE.**

4 (a) IN GENERAL.—Section 2461 of title 28, United  
5 States Code, is amended by adding the following sub-  
6 section:

7 “(c) Whenever a forfeiture of property is authorized  
8 in connection with a violation of an Act of Congress, but  
9 no specific statutory provision is made for criminal forfeit-  
10 ure upon conviction, or the criminal forfeiture provisions  
11 contain no procedural provisions, the Government may in-  
12 clude the forfeiture in the indictment or information in  
13 accordance with the Federal Rules of Criminal Procedure  
14 and the procedures set forth in section 982 of title 18,  
15 United States Code, and upon conviction, the court shall  
16 order the forfeiture of the property.”

17 (b) ORDER OF FORFEITURE.—Section 3554 of title  
18 18, United States Code, is amended—

19 (1) by striking “an offense described in section  
20 1962 of this title or in title II or III of the Com-  
21 prehensive Drug Abuse Prevention and Control Act  
22 of 1970” and inserting “an offense for which crimi-  
23 nal forfeiture is authorized”; and

24 (2) by inserting “pursuant to the Federal Rules  
25 of Criminal Procedure,” after “shall order,”.

1 **SEC. 103. FEDERAL RULES OF CRIMINAL PROCEDURE.**

2 (a) IN GENERAL.—The Federal Rules of Criminal  
3 Procedure are amended by inserting the following new rule  
4 after Rule 32.1:

5 **“Rule 32.2. Criminal Forfeiture**

6 “(a) INDICTMENT OR INFORMATION. No judgment of  
7 forfeiture may be entered in a criminal proceeding unless  
8 the indictment or information alleges that a defendant has  
9 a possessory or legal interest in property that is subject  
10 to forfeiture in accordance with the applicable statute.

11 “(b) HEARING AND ENTRY OF PRELIMINARY ORDER  
12 OF FORFEITURE. As soon as practicable after entering a  
13 guilty verdict or accepting a plea of guilty or nolo  
14 contendere on any count in the indictment or information  
15 for which criminal forfeiture is alleged, the court must de-  
16 termine what property is subject to forfeiture because it  
17 is related to the offense. The determination may be based  
18 on evidence already in the record, including any written  
19 plea agreement, or on evidence adduced at a post trial  
20 hearing. If the property is subject to forfeiture, the court  
21 must enter a preliminary order directing the forfeiture of  
22 whatever interest each defendant may have in the property  
23 without determining what that interest is. Deciding the  
24 extent of each defendant’s interest is deferred until any  
25 third party claiming an interest in the property has peti-  
26 tioned the court to consider the claim. If no such petition

1 is timely filed, and the court finds that a defendant had  
2 a possessory or legal interest, the property is forfeited in  
3 its entirety.

4       “(c) PRELIMINARY ORDER OF FORFEITURE. When  
5 the court enters a preliminary order of forfeiture, the At-  
6 torney General may seize the property subject to forfeit-  
7 ure; conduct any discovery as the court considers proper  
8 in identifying, locating, or disposing of the property; and  
9 commence proceedings consistent with any statutory re-  
10 quirements pertaining to third-party rights. At sentencing,  
11 or at any time before sentencing if the defendant consents,  
12 the order of forfeiture becomes final as to the defendant  
13 and must be made a part of the sentence and included  
14 in the judgment. The court may include in the order of  
15 forfeiture whatever conditions are reasonably necessary to  
16 preserve the property’s value pending any appeal.

17       “(d) ANCILLARY PROCEEDING. If, as prescribed by  
18 statute, a third party files a petition asserting an interest  
19 in the forfeited property, the court must conduct an ancil-  
20 lary proceeding in accordance with the applicable statutory  
21 procedures.

22       “(e) STAY OF FORFEITURE PENDING APPEAL. If the  
23 defendant appeals from the conviction or order of forfeit-  
24 ure, the court may stay the order of forfeiture upon terms  
25 that the court finds appropriate to ensure that the prop-

1 erty remains available in case the conviction or order of  
2 forfeiture is vacated. The stay will not delay the ancillary  
3 proceeding or the determination of a third party's rights  
4 or interests. If the defendant's appeal is still pending when  
5 the court determines that the order of forfeiture must be  
6 amended to recognize a third party's interest in the prop-  
7 erty, the court must amend the order of forfeiture but  
8 must refrain from directing the transfer of any property  
9 or interest to the third party until the defendant's appeal  
10 is final, unless the defendant consents in writing, or on  
11 the record, to the transfer of the property or interest to  
12 the third party.

13       “(f) SUBSTITUTE PROPERTY. If the applicable stat-  
14 ute authorizes the forfeiture of substitute property, the  
15 court may at any time consider a motion by the Govern-  
16 ment to order forfeiture of substitute property. If the Gov-  
17 ernment makes the requisite showing, the court must  
18 enter an order forfeiting the substitute property or must  
19 amend an existing preliminary or final order to include  
20 that property.”.

21       (b) CONFORMING AMENDMENTS.—(1) Rules 7(c)(2),  
22 31(e), and 32(d)(2) of the Federal Rules of Criminal Pro-  
23 cedure are repealed.

1 (2) Rule 38(e), Federal Rules of Criminal Procedure,  
2 is amended by striking "3554," and by striking "Criminal  
3 Forfeiture" in the heading.

4 **SEC. 104. PRETRIAL RESTRAINT OF SUBSTITUTE ASSETS.**

5 Section 413(e)(1) of the Controlled Substances Act  
6 (21 U.S.C. 853(e)(1)) is amended by striking "(a)" and  
7 inserting "(a) or (p)".

8 **SEC. 105. REPATRIATION OF PROPERTY PLACED BEYOND**  
9 **THE JURISDICTION OF THE COURT.**

10 (a) **ORDER OF FORFEITURE.**—Section 413(p) of the  
11 Controlled Substances Act (21 U.S.C. 853(p)) is amended  
12 by inserting at the end the following: "In the case of prop-  
13 erty described in paragraph (3), the court may, in addi-  
14 tion, order the defendant to return the property to the  
15 jurisdiction of the court so that it may be seized and for-  
16 feited."

17 (b) **PRETRIAL RESTRAINING ORDER.**—Section  
18 413(e) of the Controlled Substances Act (21 U.S.C.  
19 853(e)) is amended by adding at the end the following:

20 "(4) Pursuant to its authority to enter a pretrial re-  
21 straining order under this section, including its authority  
22 to restrain any property forfeitable as substitute assets,  
23 the court may also order the defendant to repatriate any  
24 property subject to forfeiture pending trial, and to deposit  
25 that property in the registry of the court, or with the Unit-

1 ed States Marshals Service or the Secretary of the Treas-  
2 ury, in an interest-bearing account. Failure to comply with  
3 an order under this subsection, or an order to repatriate  
4 property under subsection (p), shall be punishable as a  
5 civil or criminal contempt of court.”.

6 **SEC. 106. HEARINGS ON PRETRIAL RESTRAINING ORDERS;**  
7 **ASSETS NEEDED TO PAY ATTORNEYS FEES.**

8 Section 413(e) of the Controlled Substances Act (21  
9 U.S.C. 853(e)) is amended—

10 (1) in paragraph (3), by adding the following at  
11 the end: “The court shall issue any protective order  
12 necessary to prevent the premature disclosure of any  
13 ongoing law enforcement operation or investigation  
14 or the identity of any witness at the hearing. In ad-  
15 dition, in any case involving an ongoing investiga-  
16 tion, the court shall permit the presentation of evi-  
17 dence in camera or under seal. Rule 65, Federal  
18 Rules of Civil Procedure, shall not apply to restrain-  
19 ing orders issued under this subsection.”; and

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

21 “(5)(A) When property is restrained pretrial  
22 subject to paragraph (1)(A), the court may, at the  
23 request of the defendant, hold a pretrial hearing to  
24 determine whether the restraining order should be

1 vacated or modified with respect to some or all of  
2 the restrained property because—

3 “(i) the order restrains property that  
4 would not be subject to forfeiture even if all of  
5 the facts set forth in the indictment were estab-  
6 lished as true;

7 “(ii) the order causes a substantial hard-  
8 ship to the moving party and less intrusive  
9 means exist to preserve the subject property for  
10 forfeiture; or

11 “(iii) the defendant establishes that the de-  
12 fendant has no assets, other than the restrained  
13 property, available to exercise the defendant’s  
14 constitutional right to retain counsel, and there  
15 is no probable cause to believe that the re-  
16 strained property is subject to forfeiture.

17 “(B) If the defendant files a motion under sub-  
18 paragraph (A)(iii), the court shall require the de-  
19 fendant to establish that the defendant has no ac-  
20 cess to other assets adequate for the payment of  
21 criminal defense counsel before conducting any prob-  
22 able cause inquiry. The Government shall have an  
23 opportunity to cross-examine the defendant and any  
24 witnesses the defendant may present on this issue.  
25 If the court determines that the defendant has es-

1        established that the defendant has no access to other  
2        assets, the court shall hold a hearing to determine  
3        whether there is probable cause for the forfeiture of  
4        the defendant's property. If the court determines  
5        that no probable cause exists for the forfeiture of an  
6        asset, it shall modify the restraining order to the ex-  
7        tent necessary to permit the defendant to use that  
8        asset to retain counsel.

9                "(C) In any hearing under this subsection  
10        where probable cause is at issue, the court shall  
11        limit its inquiry to the existence of probable cause  
12        for the forfeiture, and shall neither entertain chal-  
13        lenges to the validity of the indictment, nor require  
14        the Government to produce additional evidence re-  
15        garding the facts of the case to support the grand  
16        jury's findings of probable cause regarding the  
17        criminal offense giving rise to the forfeiture. In all  
18        cases, the party requesting the modification of the  
19        restraining order shall bear the burden of proof.

20                "(D) A person other than the defendant who  
21        has a legal interest in the restrained property may  
22        move to modify or vacate the restraining order for  
23        the reasons stated in subparagraph (A)(ii). In ac-  
24        cordance with subsection (k), however, such person  
25        may not object to a restraining order on grounds

1 that may be asserted only in the ancillary hearing  
2 pursuant to subsection (n).

3 “(E) If the property restrained is subject to for-  
4 feiture as substitute assets, the court shall exempt  
5 from the restraining order assets needed to pay at-  
6 torneys fees, other necessary cost-of-living expenses,  
7 and expenses of maintaining the restrained assets.”.

8 **SEC. 107. CRIMINAL SEIZURE WARRANTS.**

9 Section 413(f) of the Controlled Substances Act (21  
10 U.S.C. 853(f)) is amended to read as follows:

11 “(f) Property subject to forfeiture under this section  
12 may be seized pursuant to section 981(b) of title 18, Unit-  
13 ed States Code. If property subject to criminal forfeiture  
14 under this section is already in the custody of the United  
15 States or any agency thereof, it shall not be necessary to  
16 seize or restrain the property for the purpose of criminal  
17 forfeiture.”.

18 **[SEC. 108. STANDARD OF PROOF FOR CRIMINAL FORFEIT-**  
19 **URE.**

20 **[**Section 413 of the Controlled Substances Act (21  
21 U.S.C. 853) is amended by adding the following new sub-  
22 section after subsection (q):

23 **[“STANDARD OF PROOF**

24 **[“(r) In any forfeiture action under this section, the**  
25 party bearing the burden of proof shall be required to

1 prove the matter at issue by a preponderance of the evi-  
2 dence.”.]

3 **SEC. 109. DISCOVERY PROCEDURE FOR LOCATING FOR-**  
4 **FEITED ASSETS.**

5 (a) **POST CONVICTION DISCOVERY.**—Section 413(m)  
6 of the Controlled Substances Act (21 U.S.C. 853(m)) is  
7 amended by—

8 (1) inserting at the end before the period the  
9 following: “to the extent that the provisions of the  
10 Rule are consistent with the purposes for which dis-  
11 covery is conducted under this subsection”; and

12 (2) adding at the end the following: “The provi-  
13 sions of Rule 15 requiring the consent of the defend-  
14 ant and the presence of the defendant at the deposi-  
15 tion do not apply.”.

16 (b) **BANK RECORDS.**—Section 986 of title 18, United  
17 States Code, is amended—

18 (1) in subsection (a), by striking “in rem”; and

19 (2) in subsection (c), by inserting “or Criminal”  
20 after “Civil”.

21 **SEC. 110. COLLECTION OF CRIMINAL FORFEITURE JUDG-**  
22 **MENT.**

23 Section 413 of the Controlled Substances Act (21  
24 U.S.C. 853) is amended by inserting after subsection (r),  
25 as added by [section 108 of] this Act the following :

1 "COLLECTION OF CRIMINAL FORFEITURE JUDGMENT

2 "(s) In addition to the authority otherwise provided  
3 in this section, an order of forfeiture may be enforced—

4 "(1) in the manner provided for the collection  
5 and payment of fines in subchapter B of chapter  
6 229 of title 18, United States Code; or

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

9 **SEC. 111. APPEALS BY GOVERNMENT IN CRIMINAL FOR-**  
10 **FEITURE CASES.**

11 (a) **PRETRIAL DISMISSAL OF FORFEITURE COUNT.**—

12 Section 3731 of title 18, United States Code, is amended  
13 in the first unnumbered paragraph by inserting ", or dis-  
14 missing a forfeiture count in whole or in part," after  
15 "order of a district court dismissing an indictment or in-  
16 formation".

17 (b) **REVIEW OF A SENTENCE.**—Section 3742 of title  
18 18, United States Code, is amended by inserting the fol-  
19 lowing new subsection:

20 "(i) **FORFEITURE ORDERS.**—The Government may  
21 file a notice of appeal in the district court of any decision,  
22 judgment, or order of a district court denying a forfeiture  
23 in whole or in part, or mitigating a forfeiture for constitu-  
24 tional reasons, except that no appeal shall lie where the

1 double jeopardy clause of the United States Constitution  
2 prohibits further prosecution.”.

3 **SEC. 112. NONABATEMENT OF FORFEITURE WHEN DEFEND-**  
4 **ANT DIES PENDING APPEAL.**

5 Section 413 of the Controlled Substances Act (21  
6 U.S.C. 853) is amended by adding after subsection (s),  
7 as added by this Act, the following:

8 **“NONABATEMENT OF FORFEITURE ORDER**

9 **“(t) An order of forfeiture under this section shall**  
10 **not abate by reason of the death thereafter of any or all**  
11 **of the defendants or petitioners or potential petitioners.”.**

12 **SEC. 113. STANDING OF THIRD PARTIES TO CONTEST**  
13 **CRIMINAL FORFEITURE ORDERS.**

14 Section 413(n)(2) of the Controlled Substances Act  
15 (21 U.S.C. 853(n)(2)) is amended—

16 (1) by striking “(2)” and inserting “(2)(A)”;  
17 and

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

19 **“(B) Notwithstanding any provision of this sec-**  
20 **tion, no person may assert a legal right, title, or in-**  
21 **terest under this section in contraband or other**  
22 **property that it is illegal to possess. In addition, ex-**  
23 **cept as set forth in paragraph (6)(B), no person**  
24 **may assert an ownership interest under this section**  
25 **in the illegal proceeds of a criminal act, irrespective**  
26 **of State property law.**

1 “(C) For purposes of this section—

2 “(i) the term ‘legal interest’ includes a  
3 lien, mortgage, recorded security device, or valid  
4 assignment of an ownership interest; but

5 “(ii) such term does not include—

6 “(I) a general unsecured interest in,  
7 or claim against, the property or estate of  
8 the defendant;

9 “(II) a bailment;

10 “(III) a possessory interest or title  
11 held by a nominee who exercises no domin-  
12 ion or control over the property; or

13 “(IV) a constructive trust.”.

14 **SEC. 114. MOTION AND DISCOVERY PROCEDURES FOR AN-**  
15 **NCILLARY HEARINGS.**

16 Section 413(n)(4) of the Controlled Substances Act  
17 (21 U.S.C. 853(n)(4)) is amended—

18 (1) by striking “(4)” and inserting “(4)(A)”;

19 and

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

21 “(B) Before conducting a hearing, the court may con-  
22 sider a motion to dismiss the petition for lack of standing,  
23 for failure to state a claim upon which relief can be grant-  
24 ed, or for any other ground. For purposes of the motion,  
25 the facts set forth in the petition are assumed to be true.

1       “(C) If a subparagraph (B) motion to dismiss is de-  
2 nied, or not made, the court may permit the parties to  
3 conduct discovery in accordance with the Federal Rules  
4 of Civil Procedure to the extent that the court determines  
5 such discovery to be necessary or desirable to resolve fac-  
6 tual issues before conducting an evidentiary hearing. After  
7 discovery ends, either party may ask the court to dispose  
8 of the petition on a motion for summary judgment in the  
9 manner described in Rule 56 of the Federal Rules of Civil  
10 Procedure.

11       “(D) After the ancillary proceeding, the court must  
12 enter a final order of forfeiture amending the preliminary  
13 order as necessary to account for the disposition of any  
14 third-party petition.

15       “(E) If multiple petitions are filed in the same case,  
16 an order dismissing or granting fewer than all of the peti-  
17 tions is not appealable until all petitions are resolved, un-  
18 less the court determines that there is no just reason for  
19 delay and directs the entry of final judgment on one or  
20 more but fewer than all of the petitions.

21       “(F) The district court has jurisdiction over a peti-  
22 tion filed pursuant to this subsection notwithstanding any  
23 appeal filed by the defendant in the criminal case.”.

1 **SEC. 115. INTERVENTION BY THE DEFENDANT IN THE AN-**  
2 **CILLARY PROCEEDING.**

3 Section 413(n) of the Controlled Substances Act (21  
4 U.S.C. 853(n)) is amended by adding at the end the fol-  
5 lowing new paragraphs:

6 “(8) If the defendant has filed a timely appeal from  
7 a conviction under this section and the appeal is pending,  
8 any person filing a petition under this subsection shall  
9 serve a copy of the petition upon the defendant, and the  
10 defendant shall have a right to intervene in the ancillary  
11 proceeding with respect to the petition in accordance with  
12 Rule 24 of the Federal Rules of Civil Procedure solely for  
13 the purpose of contesting the petitioner’s alleged interest  
14 in the property ordered forfeited. The defendant shall have  
15 20 days from the date of service of the petition to inter-  
16 vene. If the defendant does not intervene within such time  
17 period, the defendant shall have waived the right to chal-  
18 lenge in any forum any adjudication of the petitioner’s in-  
19 terest in the property pursuant to this subsection, regard-  
20 less of the outcome of the appeal.

21 “(9) A hearing provided for in this subsection shall  
22 be limited to an adjudication of the validity of the petition-  
23 er’s legal right, title, or interest in the property ordered  
24 forfeited, and shall not provide a forum to relitigate the  
25 forfeitability of the property.”

1 **SEC. 116. IN PERSONAM JUDGMENTS.**

2 Section 413(n)(1) of the Controlled Substances Act  
3 (21 U.S.C. 853(n)(1)) is amended by adding at the end  
4 the following new sentence: "To the extent that the order  
5 of forfeiture includes only an in personam money judg-  
6 ment against the defendant, or includes only property con-  
7 stituting contraband, no proceeding under this subsection  
8 shall be necessary."

9 **SEC. 117. RIGHT OF THIRD PARTIES TO CONTEST FORFEIT-  
10 URE OF SUBSTITUTE ASSETS.**

11 (a) IN GENERAL.—Section 413(c) of the Controlled  
12 Substances Act (21 U.S.C. 853(c)), as amended by this  
13 Act, is further amended by—

14 (1) inserting after the first sentence the follow-  
15 ing: "All right, title, and interest in property de-  
16 scribed in subsection (p) of this section vests in the  
17 United States at the time an indictment, informa-  
18 tion, or bill of particulars specifically describing the  
19 property as substitute assets is filed."; and

20 (2) by striking "Any such property that is sub-  
21 sequently transferred to a person other than the de-  
22 fendant" and inserting "Any property that is trans-  
23 ferred to a person other than the defendant after the  
24 United States' interest in the property has vested  
25 pursuant to this subsection".

1 (b) CONFORMING AMENDMENT.—Section 413(n)(6)  
2 of the Controlled Substances Act (21 U.S.C. 853(n)(6))  
3 is amended by adding at the end the following new sen-  
4 tence: “In the case of substitute assets, the petitioner  
5 must show that the petitioner’s interest in the property  
6 existed at the time the property vested in the United  
7 States pursuant to subsection (c), or that the petitioner  
8 subsequently acquired the petitioner’s interest in the prop-  
9 erty as a bona fide purchaser for value as provided in this  
10 subsection.”.

11 **SEC. 118. FORFEITABLE PROPERTY TRANSFERRED TO**  
12 **THIRD PARTIES.**

13 Section 413(c) of the Controlled Substances Act (21  
14 U.S.C. 853(c)), as amended by this Act, is further amend-  
15 ed—

16 (1) by striking “(c)” and inserting “(c)(1)”;

17 and

18 (2) by adding at the end the following new  
19 paragraph:

20 “(2) If, as provided in paragraph (1), property trans-  
21 ferred to a transferee is ordered forfeited and the trans-  
22 feree fails to establish that the transferee is a bona fide  
23 purchaser, but the transferee is unable, due to the trans-  
24 feree’s act or omission, to turn the property over to the  
25 United States, the transferee shall owe the United States

1 a sum of money up to the value of the property transferred  
2 by the defendant, plus interest from the time of the trans-  
3 fer. Once the ancillary proceedings regarding the transfer-  
4 ee's claim to be a bona fide purchaser are concluded, the  
5 district court that issued the order of forfeiture shall issue  
6 a judgment in favor of the United States and against the  
7 transferee for the amount of money to which the United  
8 States is entitled."

9 **SEC. 119. FORFEITURE OF THIRD PARTY INTERESTS IN**  
10 **CRIMINAL CASES.**

11 (a) **IN GENERAL.**—Section 413 of the Controlled  
12 Substances Act (21 U.S.C. 853) is amended by adding  
13 after subsection (t), as added by this Act, the following:

14 **"FORFEITURE OF THIRD PARTY INTERESTS**

15 **"(u) In lieu of filing a parallel civil forfeiture action,**  
16 **the Government may seek the forfeiture of a third party's**  
17 **interest in property subject to forfeiture under this section**  
18 **at the conclusion of the ancillary proceeding described in**  
19 **subsection (n). Such proceeding shall be an in rem pro-**  
20 **ceeding in which the third party shall first have the burden**  
21 **of establishing a legal interest in the property pursuant**  
22 **to subsection (n), after which the Government shall have**  
23 **the burden of establishing the forfeitability of the third**  
24 **party's interest in the manner provided for civil forfeitures**  
25 **in chapter 46, title 18, United States Code, and the third**

1 party shall have the burden of establishing an innocent  
2 owner defense pursuant to such chapter.”.

3 (b) CONFORMING AMENDMENT.—Section 413(n)(6)  
4 of the Controlled Substances Act (21 U.S.C. 853(n)(6))  
5 is amended by adding “, unless the Government notifies  
6 the court that it will seek to forfeit the petitioner’s interest  
7 pursuant to subsection (u)” after “in accordance with its  
8 determination”.

9 **SEC. 120. SEVERANCE OF JOINTLY HELD PROPERTY.**

10 Section 413 of the Controlled Substances Act (21  
11 U.S.C. 853) is amended by adding after subsection (u),  
12 as added by this Act, the following:

13 “SEVERANCE OF JOINTLY HELD PROPERTY

14 “(v) If the court determines, pursuant to subsection  
15 (n) or (u), that a third party had a partial interest in prop-  
16 erty otherwise subject to forfeiture, or a joint tenancy or  
17 tenancy by the entirety in such property, the court shall  
18 enter an appropriate order—

19 “(1) severing the property;

20 “(2) transferring the property to the Govern-  
21 ment with a provision that the Government com-  
22 pensate the third party to the extent of the third  
23 party’s ownership interest once a final order of for-  
24 feiture has been entered and the property has been  
25 reduced to liquid assets; or

1           “(3) permitting the third party to retain the  
2           property subject to a lien in favor of the Government  
3           to the extent of the forfeitable interest in the prop-  
4           erty.

5 To effectuate the purposes of this subsection, a joint ten-  
6 ancy or tenancy by the entireties shall be converted to a  
7 tenancy in common by order of the court, irrespective of  
8 State law.”.

9 [SEC. 121. VICTIM RESTITUTION.

10           [Section 413 of the Controlled Substances Act (21  
11 U.S.C. 853) is amended by adding after subsection (v),  
12 as added by this Act, the following:

13                           [“VICTIMS AND RESTITUTION

14           [“(w)(1) The defendant may not use property subject  
15 to forfeiture under this section to satisfy an order of res-  
16 titution. However, if there are identifiable victims entitled  
17 to restitution from the defendant, and the defendant has  
18 no assets other than the property subject to forfeiture with  
19 which to pay restitution to the victims, the Government  
20 may move to dismiss the forfeiture allegations before entry  
21 of a judgment of forfeiture to allow the property to be  
22 used by the defendant to pay restitution in whatever man-  
23 ner the court determines to be appropriate if it grants the  
24 Government’s motion.

25           [“(2) If an order of forfeiture is entered pursuant  
26 to this section and the defendant has no assets other than

1 the forfeited property to pay restitution to identifiable vic-  
2 tims who are entitled to restitution, the Government shall  
3 restore the forfeited property to the victims pursuant to  
4 subsection (i)(1) once the ancillary proceeding under sub-  
5 section (n) has been completed and the costs of the forfeit-  
6 ure action have been deducted. On the motion of the Gov-  
7 ernment, the court may enter any order necessary to facili-  
8 tate the distribution of the property under this subsection.

9       【“(3) For purposes of this subsection, a ‘victim’ is  
10 a person other than a person with a legal right, title, or  
11 interest in the forfeited property sufficient to satisfy the  
12 standing requirements of subsection (n)(2) who may nev-  
13 ertheless be entitled to restitution from the forfeited funds  
14 pursuant to 28 C.F.R. Part 9.8. A person shall be consid-  
15 ered a ‘victim’ if the person is the victim of the offense  
16 giving rise to the forfeiture, or of any offense that was  
17 part of the same scheme, conspiracy, or pattern of crimi-  
18 nal activity, including in the case of a money laundering  
19 offense, any offense constituting the underlying specified  
20 unlawful activity.”.]

21 **SEC. 122. DELIVERY OF PROPERTY TO THE MARSHALS**  
22 **SERVICE.**

23       Section 413(j) of the Controlled Substances Act (21  
24 U.S.C. 853(j)) is amended by inserting “, and Rule C(5)  
25 of the Supplemental Rules for Certain Admiralty and Mar-

1 itime Claims," before "shall apply to a criminal forfeit-  
2 ure".

3 **TITLE II—PROPERTY SUBJECT**  
4 **TO CRIMINAL FORFEITURE**

5 **SEC. 201. CRIMINAL FORFEITURE OF PROCEEDS OF FED-**  
6 **ERAL OFFENSES.**

7 Section 982(a) of title 18, United States Code, is  
8 amended—

9 (1) in paragraph (2), by striking "violate—"  
10 and all that follows through "or 1030 of this title,  
11 shall" and inserting "violate any provision of this  
12 title, or any offense constituting 'specified unlawful  
13 activity', as defined in section 1956(c)(7), shall";  
14 and

15 (2) by striking paragraph (4).

16 **SEC. 202. UNIFORM DEFINITION OF "PROCEEDS".**

17 Section 413 of the Controlled Substances Act (21  
18 U.S.C. 853) is amended by adding after subsection (w),  
19 as added by this Act, the following new subsection:

20 "DEFINITION OF PROCEEDS

21 "(x) For purposes of this section, the term 'proceeds'  
22 means property of any kind obtained at any time, directly  
23 or indirectly, as the result of the commission of the offense  
24 giving rise to criminal forfeiture, and any property trace-  
25 able thereto. Where the offense involves a scheme, a con-  
26 spiracy, or a pattern of criminal activity, 'proceeds' in-

1 cludes any and all property obtained from the entire  
2 course of conduct constituting such scheme, conspiracy,  
3 or pattern. 'Proceeds' is not limited to the net gain or  
4 profit realized from the commission of the offense."

5 **SEC. 203. CRIMINAL FORFEITURE OF FIREARMS USED IN**  
6 **CRIMES OF VIOLENCE AND FELONIES.**

7 (a) **CRIMINAL FORFEITURE.**—Section 982(a) of title  
8 18, United States Code, as amended by this Act, is  
9 amended by inserting after paragraph (3) the following:

10 "(4) The court, in imposing a sentence on a person  
11 convicted of any crime of violence (as defined in section  
12 16 of this title) or any felony under Federal law, shall  
13 order that the person forfeit to the United States any fire-  
14 arm (as defined in section 921(a)(3) of this title) used  
15 or intended to be used to commit the commission of the  
16 offense."

17 (b) **AUTHORITY TO FORFEIT PROPERTY UNDER**  
18 **SECTION 924(d).**—Section 924(d) of title 18, United  
19 States Code, is amended by adding at the end the follow-  
20 ing new paragraph:

21 "(4) Whenever any firearm is subject to criminal for-  
22 feiture under this section because it was involved in or  
23 used in a violation of subsection (c), the Secretary of the  
24 Treasury shall have the authority to seize and forfeit, in  
25 accordance with the procedures of the applicable criminal

1 forfeiture statute, any property otherwise forfeitable under  
2 the laws of the United States that was involved in or de-  
3 rived from the crime of violence or drug trafficking crime  
4 described in subsection (c) in which the forfeited firearm  
5 was used or carried.”.

6 (c) 120-DAY RULE FOR ADMINISTRATIVE FORFEIT-  
7 URE.—Section 924(d)(1) of title 18, United States Code,  
8 is amended by adding at the end the following new sen-  
9 tence: “If the Government institutes an administrative for-  
10 feiture action within the 120-day period, and a claim is  
11 then filed that requires that a judicial forfeiture action be  
12 filed in Federal court, the Government must file the judi-  
13 cial action within 120 days of the filing of the claim. The  
14 time during which any related criminal indictment or in-  
15 formation is pending shall not be counted in calculating  
16 either of the 120-day periods referred to in this sub-  
17 section.”.

18 **SEC. 204. CRIMINAL FORFEITURE FOR ALIEN SMUGGLING.**

19 Section 982(a) of title 18, United States Code, as  
20 amended by section 101, is further amended—

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

23 (2) by amending such paragraph (7)—

24 (A) by inserting “section 274(a),  
25 274A(a)(1), or 274A(a)(2) of the Immigration

1 and Nationality Act of 1952 (8 U.S.C. 1324(a),  
2 1324A(a)(1), and 1324A(a)(2)), or” before  
3 “section 1425” the first time it appears;

4 (B) in subparagraph (A) (as redesignated),  
5 by striking “a violation of, or a conspiracy to  
6 violate, subsection (a)” and inserting “the of-  
7 fense of which the person is convicted”; and

8 (C) in subparagraphs (B)(i) and (ii) (as  
9 redesignated), by striking “a violation of, or a  
10 conspiracy to violate, subsection (a)” and all  
11 that follows through “of this title” and insert-  
12 ing “the offense of which the person is con-  
13 victed”.

14 **SEC. 205. CRIMINAL FORFEITURE FOR MONEY LAUNDER-**  
15 **ING CONSPIRACIES.**

16 Section 982(a)(1) of title 18, United States Code, is  
17 amended by inserting “, or a conspiracy to commit any  
18 such offense” after “of this title”.

19 **SEC. 206. CRIMINAL FORFEITURE OF INSTRUMENTALITIES**  
20 **OF TERRORISM, TELEMARKETING FRAUD,**  
21 **AND OTHER OFFENSES.**

22 Section 982(a) of title 18, United States Code, is  
23 amended by adding at the end the following new para-  
24 graph:

1       “(8)(A) The court, in imposing a sentence on a per-  
2 son convicted of a violation of sections 513, 514, 1028  
3 through 1032, 1341, 1343, and 1344 of this title, or a  
4 conspiracy to commit such offense, shall order the person  
5 to forfeit to the United States any computer, photostatic  
6 reproduction machine, electronic communications device or  
7 other material, article, apparatus, device or thing made,  
8 possessed, fitted, used, or intended to be used to commit  
9 such offense, and any property traceable to such property.

10       “(B) The court, in imposing a sentence on a person  
11 convicted of a violation of section 1028 or 1029 of this  
12 title, or a conspiracy to commit such offense, shall order  
13 the person to forfeit to the United States any conveyance  
14 used on two or more occasions to transport the instrumen-  
15 talities used to commit such offense, and any property  
16 traceable to such conveyance.

17       “(9) The court, in imposing a sentence on a person  
18 convicted of—

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

21               “(B) a violation of the National Firearms Act  
22 (26 U.S.C. chapter 53);

23               “(C) a violation of any of the following sections  
24 of the Federal explosives laws:

25                       “(i) Section 842(a)(1) and (3).

1           “(ii) Section 842(b), (c), and (d).

2           “(iii) Section 842(h)(1).

3           “(iv) Section 844(d) through (m); or

4           “(D) any other offense enumerated in section  
5       2339A(a) of this title;

6 or a conspiracy to commit any such offense, shall order  
7 the person to forfeit to the United States any conveyance,  
8 chemicals, laboratory equipment, or other material, article,  
9 apparatus, device or thing made, possessed, fitted, used  
10 or intended to be used to commit such offense, and any  
11 property traceable to such property.”.

12 **SEC. 207. CRIMINAL FORFEITURE OF VEHICLES USED FOR**  
13 **GUN RUNNING.**

14       Section 982(a) of title 18, United States Code, is  
15 amended by adding at the end the following new para-  
16 graph:

17       “(10) The court, in imposing a sentence on a person  
18 convicted of a gun running offense, as defined in section  
19 **[[981(a)(1)(I)]**, or a conspiracy to commit such offense,  
20 shall order the person to forfeit to the United States any  
21 conveyance used or intended to be used to commit such  
22 offense, and any property traceable to such conveyance.”.

1 **SEC. 206. FORFEITURE OF CRIMINAL PROCEEDS TRANS-**  
2 **PORTED IN INTERSTATE COMMERCE.**

3 Section 1952 of title 18, United States Code, is  
4 amended by adding at the end the following new sub-  
5 section:

6 “(d) The court, in imposing sentence on a person con-  
7 victed of an offense in violation of subsection (a)(1) or  
8 a conspiracy to commit such offense, shall order that the  
9 person forfeit to the United States any proceeds distrib-  
10 uted or intended to be distributed in the commission of  
11 such offense, or any property traceable to such property,  
12 in accordance with the procedures set forth in section 982  
13 of this title.”.

14 **SEC. 209. CRIMINAL FORFEITURE FOR ODOMETER TAM-**  
15 **PERING OFFENSES.**

16 Section 982(a)(5) of title 18, United States Code, is  
17 amended—

18 (1) by striking “or” at the end of subparagraph  
19 (D);

20 (2) by inserting “or” after the semicolon at the  
21 end of subparagraph (E);

22 (3) by inserting after subparagraph (E) the fol-  
23 lowing:

24 “(F) section 32703 of title 49, United States  
25 Code (motor vehicle odometer tampering);” and

## 34

1           (4) by adding at the end the following: "If the  
2 conviction was for a violation described in subpara-  
3 graph (F), the court shall also order the forfeiture  
4 of any vehicles or other property involved in the  
5 commission of the offense."

Mr. MCCOLLUM. Modern forfeiture statutes can be traced back to the 18th century English common law in which we had forfeitures of estates or in personam forfeitures. In 1970, Congress resurrected that concept of in personam asset forfeiture, although in a far more restricted way, when it enacted the Racketeer Influenced and Corrupt Organizations Act, known as RICO. RICO was created to address the problem of the infiltration of organized crime into legitimate businesses.

In 1984, Congress continued the trend by passing the Crime Control Act of 1984, which contained new criminal forfeiture provisions and fortified those already in existence. In the Anti-Drug Abuse Act of 1986 Congress enacted criminal forfeiture for money laundering offenses, following asset forfeiture for child pornography and obscenity in 1998. In 1990, in the wake of the savings and loan scandals, Congress enacted both civil and criminal forfeiture for fraud affecting financial institutions.

Since then, Congress has authorized criminal forfeiture for carjacking, food stamp fraud, and most recently, health care fraud. This patchwork of forfeiture legislation developed slowly. Over the past three decades, it has led to numerous difficulties and inconsistent court decisions. The Federal circuits have split over their interpretations of several significant aspects of the forfeiture laws, and inconsistent application has led to needless litigation and a waste of judicial resources.

The procedural protections given to defendants and third parties vary greatly, and there are still many offenses for which the government cannot forfeit assets at all. For example, the government has no authority to criminally forfeit assets for gambling or smuggling offenses.

Of course, there are some fundamental differences between criminal and civil forfeiture. The differences lie in the nature of the forfeiture itself. We are here today to discuss the criminal asset forfeiture issue. However, I am sure there will be some discussion of how it relates to civil asset forfeiture.

The Department of Justice has proposed legislation which would amend the criminal asset forfeiture laws to provide for uniform standards and procedures. With regard to the expanded authorization of criminal forfeiture—which the Administration is asking for in part, there are several areas of law in which the government does not have the authority to criminally seize the assets of the wrongdoer. Gambling and smuggling offenses only authorize civil asset forfeitures.

There are very significant areas of the law where forfeiture remains unavailable to prosecutors. Today we want to look at some of those areas, for example, crooked telemarketers who use the mail or telephone systems as tools of their activity.

The bottom line is that we want to hear from our witnesses today as to those matters that we ought to be expanding criminal forfeiture into as well as those matters which need to be polished off to make uniformity among the hodgepodge of current statutes.

Mr. MCCOLLUM. With that in mind, I would like to see if Mr. Gekas, my colleague, has any opening remarks.

Mr. GEKAS. I thank the Chair. Only to endorse what the Chairman has enunciated, namely that in this area of the law a patch-

work seems to dominate on the basic issues of forfeiture. If this hearing and the work of this Committee that is yet to follow patches up the patchwork, then we will have gone a long way. I am anxious to hear the witnesses. Thank you.

Mr. MCCOLLUM. Thank you, Mr. Gekas. Mr. Coble, do you have any opening comments?

Mr. COBLE. No—

Mr. MCCOLLUM. Mr. Barr.

Mr. BARR. Just to thank you, Mr. Chairman, for convening these hearings. As everyone knows, we have had hearings going back not only since the beginning of this Congress but the last Congress also looking at the whole issue of asset forfeiture reform, and both the Full Committee as well as the Subcommittee, we have begun at long last to tackle this very thorny issue of the law, and which, perhaps, is more difficult than many others to reach that balance between the legitimate needs of law enforcement and going after the criminals where it indeed hurts them, perhaps, the most, and that is in their pocketbook, and balancing that against the civil liberty needs of our citizens, particularly those innocent who might get trapped up in these.

So I commend the Chairman for holding these hearings and I think we are doing a tremendous service, not only to law enforcement but to the civil liberties heritage of our country in looking at these issues and reforming both the criminal and the civil asset forfeiture statutes.

Mr. MCCOLLUM. Thank you, Mr. Barr. At this time I would like to welcome our first panel this morning. We are pleased to have with us two distinguished government officials with tremendous experience and expertise in the area of asset forfeiture.

From the Department of Justice we have Stefan Cassella, the Assistant Chief of the Asset Forfeiture and Money Laundering Section. Mr. Cassella has been a prosecutor since 1979. He joined the Department of Justice in 1985 and has been involved in forfeiture and money-laundering issues since 1989. He was formerly the Senior Counsel to the United States Senate Judiciary Committee from 1987 through 1989. Mr. Cassella received the Justice Department's John Marshall Award for his handling of the criminal forfeiture proceedings in the prosecution of the Bank of Credit and Commerce International. Welcome, Mr. Cassella.

Mr. CASSELLA. Thank you.

Mr. MCCOLLUM. Our second witness this morning on behalf of the Department of the Treasury is Jan Blanton. Ms. Blanton was selected as the Director of the Executive Office for Asset Forfeiture in March 1994. As Director, she is responsible for the overall management of the Treasury Forfeiture Fund and for developing Treasury policies on asset forfeiture for its law enforcement agencies. Prior to being chosen as Director, Ms. Blanton was a Special Agent with the Internal Revenue Service Criminal Investigation Division for 22 years.

We welcome both of you and will, without objection, enter your complete statements into the record. So ordered.

Mr. Cassella, you may summarize your statement as you feel appropriate.

**STATEMENT OF STEFAN D. CASSELLA, ASSISTANT CHIEF,  
ASSET FORFEITURE AND MONEY LAUNDERING SECTION,  
DEPARTMENT OF JUSTICE**

Mr. CASSELLA. Thank you, Mr. Chairman. I appreciate the opportunity to present the views of the Department of Justice on this important legislation. We have reviewed the rough draft that you circulated this week and are happy to express our full and enthusiastic support.

If enacted, this bill will allow us to realize the full potential of criminal forfeiture as a law enforcement tool. We discussed the proposed bill in detail in our written testimony so let me just highlight a few points.

First of all, criminal forfeiture is a very new law enforcement tool. There have been forfeiture statutes on the books since the first Congress convened in 1789, but for almost 200 years all of those were civil forfeiture statutes. The first criminal statute was not enacted until 1970, and there was not another until 1984. If you read the articles that appear in the press from time to time, you would get the impression that civil forfeiture is somehow new and experimental whereas criminal forfeiture is tried and true. It is actually the reverse. It is criminal forfeiture that is very much the new kid on the block.

Almost all of the criminal forfeiture statutes now in effect were enacted in just the last few years, four of them in the last 12 months alone. Since 1994 we have undertaken a full-scale program to train Federal prosecutors in how to make forfeiture part of their criminal cases, to the point where at least 50 percent of all contested forfeitures are now handled criminally.

What we are talking about today, what this bill is about, are problems that we have encountered in trying to make full use of the criminal forfeiture authority that Congress has given us. We recognize that criminal forfeiture is an inherently limited tool. It will never replace civil forfeiture. We will always need civil remedies to forfeit proceeds and instrumentalities of crime in some cases. To do criminal forfeiture you need a Federal conviction, so if the defendant is dead, or is a fugitive, or is convicted in state court, criminal forfeiture does not do you any good, and criminal forfeiture is limited to property owned by the defendant. You cannot use it to forfeit property that belongs to someone else, even if the defendant used it to commit the crime and even if the third party consented to it.

For example, if we catch someone smuggling drugs in an airplane and convict the pilot, we can forfeit the plane in the criminal case as long as the pilot owns it. But if the owner is not the pilot, but is a drug baron in South America or an offshore corporation, criminal forfeiture gets us nothing.

We understand these limitations. They are inherent in the concept of criminal forfeiture, but some of the obstacles we have encountered in trying to use the new statutes are not conceptually inherent. They are artificial impediments, often purely historical in origin, that can and should be removed to allow us to make full use of criminal forfeiture as Congress surely intended.

Our testimony details a number of problems with the existing statutes. They have led to unnecessary litigation, splits in author-

ity among the Federal circuits, and situations where prosecutors are forced to use civil forfeiture because the criminal laws are inadequate.

Let me mention just three of those.

The first priority is simply to make criminal forfeiture available as an option whenever civil forfeiture is already available. For purely historical reasons, there are many types of property that we can forfeit civilly but not criminally, like gambling proceeds, firearms, vehicles used to smuggle illegal aliens and smuggled goods. That is something that Congress can easily correct, and we support the provision in the draft bill that does so.

Second, to be effective the criminal forfeiture statutes need to contain a set of procedures governing their use. Too many of the recently enacted laws contain only some of the necessary procedures or contain no procedures at all. For example, there are statutes that authorize criminal forfeiture for certain kinds of bank fraud, for carjacking, for food stamp fraud, but contain no procedures—no procedures for seizing or restraining property pre-trial, or forfeiting substitute assets, or recovering property that has been transferred to third parties, or for resolving third-party claims. We fully support the provision in the draft bill that would create uniform procedures and plug these gaps.

Finally, there is a provision dealing with pre-trial restraint of substitute assets. One of the great claims to fame of criminal forfeiture is that it allows the court to order a defendant who has hidden the proceeds of his crime to forfeit something else in substitution. For example, if the defendant steals \$100,000 from the victims in a fraud scheme but spends the money or hides it overseas before he is caught, we can make him forfeit something else of equal value in substitution and use that to reimburse the victims, but the power to forfeit substitute assets is meaningful only if the court has the authority to restrain the property pre-trial. Otherwise, by the time the trial is over, the substitute property will have disappeared just as the criminal proceeds did.

The courts are split over Congress' intended authority when it enacted the substitute asset law back in 1986. The result has been the lawyer's equivalent of trench warfare. My colleagues and I proceed across the country from court to court litigating this issue, winning in some places, losing in others. It keeps all of us fully employed, but we think it would be better for everyone if Congress would put the issue to rest and make the pre-trial restraint of substitute assets absolutely clear.

There are many other provisions of the bill, Mr. Chairman, that we fully support for similar reasons, but let me close with a few comments about Title II of the Draft Bill.

Title II contains provisions that are substantive, not procedural. That is, they expand the categories of property that are subject to criminal forfeiture. By far the most important is the provision that authorizes the forfeiture of the proceeds of most Federal crimes. Many people are surprised to learn that this authority does not already exist, but it is true.

Because of the haphazard ways these laws are developed, a chart showing which crimes carry forfeiture as a penalty and which do not would look very much like a checkerboard. We can forfeit the

proceeds of bank fraud but not the proceeds of consumer fraud. We can take the vessel used to smuggle illegal aliens but not the money paid to the smuggler. We can confiscate proceeds in a drug case but not the money paid to a hit man in a murder-for-hire case, or a terrorist, or to a corrupt public official.

Two things we firmly believe: no person has the right to retain the proceeds of any crime, and law enforcement should have the power to confiscate the proceeds of crime to make sure the defendant does not profit, and to recover it for the victims.

We support the other expansions of forfeiture authority as well, including the power to forfeit firearms used in crimes of violence and the instrumentalities of terrorism; but let me make one last point.

We are happy that the bill authorizes criminal forfeiture for these offenses, but we do not think it is enough to authorize criminal forfeiture without a civil counterpart. Any workable forfeiture program has to have both components. Eighty-five percent of all forfeitures are uncontested. If we have civil authority, we can forfeit that property administratively, but if we must do the forfeiture criminally we will have to clutter the courts with forfeiture pleadings in criminal cases even though no one is contesting the issue.

Also, we would not want to have to say to the victim in a fraud case, "I am sorry, the money the bad guy stole from you is right here in the bank account but he is a fugitive so we cannot help you get it back until he turns himself in and we can convict him in a criminal case."

We need civil authority to recover property in those cases, just as we do in cases where the property belongs to a third party who allowed the defendant to use it to commit a crime. If chemicals, tools, and equipment are used by terrorists to construct a bomb, we should be able to forfeit that property whether the owner is the person who was convicted or the person who let him use the property knowing exactly what it was going to be used for, but who is not prosecuted for committing the crime herself.

Mr. Chairman, let me again thank you, and Mr. Schumer, and Mr. Conyers for the interest all of you have shown in legislation to expand and enhance the criminal forfeiture laws. We look forward to your questions and to working with you in the weeks ahead.

[The prepared statement of Mr. Cassella follows:]

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



## Department of Justice

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STATEMENT

OF

STEFAN D. CASSELLA  
ASSISTANT CHIEF  
ASSET FORFEITURE AND MONEY LAUNDERING SECTION  
CRIMINAL DIVISION

BEFORE THE

SUBCOMMITTEE ON CRIME  
COMMITTEE ON THE JUDICIARY  
U.S. HOUSE OF REPRESENTATIVES

CONCERNING

THE CRIMINAL ASSET FORFEITURE ACT OF 1997

PRESENTED ON

SEPTEMBER 18, 1997

## STATEMENT OF STEFAN D. CASSELLA

September 18, 1997

Mr. Chairman and Members of the Subcommittee, thank you for the opportunity to present the views of the Department of Justice on the draft of the Criminal Asset Forfeiture Act of 1997 (the "Draft Bill"), which you circulated earlier this week. I would like to thank you, Mr. Chairman, and Mr. Schumer for the leadership both of you have shown with respect to legislation that would expand and enhance the criminal forfeiture laws.

**Historical Background**

Asset forfeiture has been part of federal law since the First Congress met in 1789, but for almost 200 years, all forfeiture statutes were civil statutes, and all forfeitures were civil forfeitures. The first criminal forfeiture statute was not enacted until 1970, and there wasn't another one until 1984.

It wasn't until the late 1980's and the 1990's that Congress began to enact a significant number of criminal forfeiture statutes for crimes like money laundering, bank fraud and health care fraud. Even so, most of our forfeiture statutes are still civil statutes, and the law still provides that if Congress enacts a forfeiture statute without specifying the procedures, only civil forfeiture is authorized. See 28 U.S.C. § 2461.

In other words, in contrast to 200 years of experience with, and case law interpreting the civil forfeiture laws, criminal forfeiture is very much the "new kid on the block."

Any new piece of cloth is going to have a few wrinkles that have to be ironed out. The same is true of criminal forfeiture.

It has proven to be an effective and important tool of law enforcement, but the current laws contain loopholes and ambiguities that have prevented us from using this tool as fully as we'd like, and as fully as Congress intended. We look forward to working with this Subcommittee to address the problems that we've encountered in learning to use criminal forfeiture, and hope that by working together, we can make it possible for law enforcement to realize the full potential of the criminal forfeiture program. The Draft Bill is an excellent start in that direction.

#### The Virtues of Criminal Forfeiture

Civil forfeiture will always be an essential component of the forfeiture program. There are times when it is the only option. When the forfeiture is uncontested, or the offender is dead or is a fugitive, or when the offender uses someone else's property -- with that person's knowledge and consent -- to commit the crime, criminal forfeiture just isn't possible or just doesn't make any sense. We will always need to use civil forfeiture in those cases. But criminal forfeiture has unique virtues that make it a powerful tool of law enforcement when it is available, and for those reasons we would like to use criminal forfeiture whenever it is possible to do so.

In particular, criminal forfeiture allows the government to convict the defendant and forfeit the property he derived from, or used to commit, the offense in a single proceeding, thus making more efficient use of judicial resources. And criminal

forfeiture also allows the government to obtain a personal money judgment against the defendant and to forfeit "substitute assets" if the property directly subject to forfeiture is not available.

Since 1994, the Department of Justice has undertaken an aggressive program to train Assistant U.S. Attorneys in the benefits and uses of the criminal forfeiture statutes. Hundreds of federal prosecutors have participated in these programs, and today, we believe that at least half of all contested forfeiture actions are criminal forfeitures. But as we have directed our attention more and more to criminal forfeiture, we have found that there are problems in the way the statutes were drafted, and unanticipated issues that must be addressed.

#### Problems with the Criminal Forfeiture Statutes

Criminal forfeiture is inherently a more limited tool than civil forfeiture. Both proceed from the notion that the government can forfeit property derived from, or used to commit, a criminal offense. In a civil case, we proceed directly against the property, allowing anyone who wants to contest the forfeiture to file a claim. If no one has a valid claim, the property becomes the property of the United States.

In a criminal case, however, we can only forfeit property that belongs to the defendant. If the property actually belongs to his wife, his brother or his girlfriend, criminal forfeiture will not work. For example, if a drug dealer uses an airplane to smuggle drugs into California, the government has an interest in seizing and forfeiting the plane. But suppose the only person

arrested and prosecuted is the pilot. If he owns the plane outright, criminal forfeiture is the way to go. But if the plane is owned by a corporation, or a third-party in South America, or by the pilot jointly with his spouse, criminal forfeiture is pointless.

The same is true if we want to forfeit a crack house. We can prosecute the tenants in the building until the cows come home but will never be able to forfeit the building criminally if the tenants don't own it. If the building belongs to a slumlord who allowed his property to be turned into a crack house, we need civil forfeiture to shut it down.

We will always need parallel civil forfeiture statutes to address those kinds of cases -- and many others. But some of the limitations in the criminal forfeiture statutes are not conceptually inherent; they are artificial impediments -- often purely historical in origin -- that can and should be removed to allow us to make full use of criminal forfeiture as its original sponsors intended. The following are some of the key issues that the Draft Bill attempts to address.

1. Availability. First of all, for purely historical reasons, most statutes authorize civil forfeiture but not criminal forfeiture. Gambling proceeds, for example, may only be forfeited civilly. See 18 U.S.C. § 1955(d). The same is true for smuggling offenses, see 18 U.S.C. § 545, and for almost all of the statutes relating to firearms, see 18 U.S.C. § 924(c). We can think of no reason why criminal forfeiture should not be

available, as an option, whenever civil forfeiture is already authorized. Section 102 of the Draft Bill addresses this problem by making the necessary amendment to 28 U.S.C. § 2461.

2. Uniform procedures. Criminal forfeiture statutes are only effective if they contain procedural provisions prescribing their use. The current criminal forfeiture statutes contain a hodgepodge of procedures that vary considerably from one offense to another, and many criminal forfeiture statutes contain no procedural provisions at all, making them of little use to prosecutors.

The most comprehensive procedural statute is 21 U.S.C. § 853, which deals with restraining orders, seizure warrants, third-party rights, disposal of property, the forfeiture of substitute assets, and all other aspects of a criminal forfeiture in drug cases. Other statutes contain similar, but not identical provisions. See 18 U.S.C. § 1467 (obscenity), 18 U.S.C. § 2253 (child pornography), and 18 U.S.C. § 1963 (RICO). 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 § 853, including some and omitting others. 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 § 853(b) is incorporated for bank fraud, counterfeiting, explosives and other forfeitures under § 982(a)(2) but not for money laundering under § 982(a)(1).

Finally, 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 original forfeiture procedures at all, with the result that these provisions are almost never used.

Section 101 of the Draft Bill addresses most of these problems by enacting a uniform set of procedures to apply to all criminal forfeiture statutes. It fails, however, to include procedures for the forfeiture statute for food stamp fraud in title 7. We appreciate that title 7 offenses may not be within this Subcommittee's jurisdiction, but food stamp fraud remains a serious criminal offense, and the absence of procedures for the forfeiture provisions in § 2024(h) make it almost impossible for us to use forfeiture to combat it, as Congress obviously intended.

3. **Federal Rules of Criminal Procedure.** The judicial proceedings in a criminal forfeiture case are, of course, governed by the Federal Rules of Criminal Procedure. Those Rules, however, fail to address many of the issues that arise in a criminal forfeiture case, leaving the courts guessing as to how to proceed once the government includes a forfeiture count in a criminal indictment. We need a comprehensive set of Rules that govern criminal forfeitures from beginning to end.

Section 103 of the Draft Bill sets forth such a Rule, dealing with, among other things, the indictment, the entry of a preliminary order of forfeiture, the ancillary proceeding at which third-party rights in forfeited property are litigated, the status of forfeiture orders pending appeal, and the forfeiture of substitute assets.

The most important issues resolved by the proposed Rule have to do with the role of the jury in a criminal forfeiture case, and with the proper forum for determining if the forfeited property belongs to the defendant or someone else. Under current law, Rule 31(e) of the Federal Rules of Criminal Procedure, it is the jury, not the court, that determines whether or not the property in question is subject to forfeiture in a criminal case. This means that after the jury returns a verdict of "guilty" in the case-in-chief, it must remain to hear additional evidence and argument relating to the forfeiture, and then must retire to the jury room a second time to fill out a "special verdict form" as to each asset listed in the indictment. Many judges dislike this Rule because of the burden it puts on jurors who, understandably, consider their service complete when they return the verdict on the defendant's guilt or innocence, often after many hours or days of deliberation.

In 1995, the Supreme Court held that criminal forfeiture was an aspect of the sentence imposed on a defendant in a criminal case. See Libretti v. United States, 116 S. Ct. 356 (1995). Thus, like all other sentencing issues, the question whether

certain property should be forfeited by the defendant may properly be determined by the court at sentencing; it need not be submitted to the jury. *Libretti, supra*. Indeed, outside of capital cases, the forfeiture laws are unique in the way they involve the jury in what is clearly a sentencing issue. Accordingly, the proposed Rule in Section 103 would replace Rule 31(e) with a new Rule designating criminal forfeitures as matters to be determined by the court.

The proposed Rule would also resolve the considerable uncertainty regarding the proper forum for determining the ownership of the forfeited property. Some courts construe current law to require the jury or the sentencing judge to find not only that the property was involved in a crime, but also that the property belonged to the defendant. Other courts consider the second step unnecessary because, under provisions added to the forfeiture statutes in 1984, third parties who claim an ownership interest in the forfeited property have an automatic right to have the court determine their claims in an ancillary proceeding following the criminal trial.

It makes no sense to prolong the criminal case with a hearing on the ownership of the forfeited property if the same issue must be litigated all over again in the ancillary proceeding if a third party files a claim. Thus, the new Rule makes it clear that the resolution of ownership issues must be deferred to the ancillary proceeding.

4. Pre-trial restraint of substitute assets. Aside from the savings in judicial resources achieved by allowing the forfeiture to take place in the criminal case, the greatest advantage of criminal forfeiture over civil forfeiture is that it permits the court to order the forfeiture of substitute assets when the directly forfeitable property has been dissipated or concealed. But this power is only effective if the government is able to preserve the substitute property for forfeiture pre-trial. If it cannot, the inclusion of a criminal forfeiture count in an indictment serves mainly as a notice to the defendant to remove all of his property from the jurisdiction of the court before he is convicted.

For example, there are many fraud cases in which the defendant has hidden or dissipated the money taken from the victims yet retains other assets that could be used to pay restitution. By forfeiting the so-called "clean money" as substitute assets, the government can use the forfeiture laws to make the victims whole; but we can do this only if we can restrain the substitute assets pre-trial. If the defendant is able to move the substitute assets while the trial is pending, they will disappear just as the fraud proceeds did, leaving the victims with nothing.

The criminal forfeiture statutes contain a provision authorizing pre-trial restraining orders, and at first, the courts were unanimous in their view that that provision 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, pre-trial restraint of substitute assets is not permitted. United States v. Floyd, 992 F.2d 498 (5th Cir. 1993); In Re Assets of Martin, 1 F.3d 1351 (3rd Cir. 1993); United States v. Field, 62 F.3d 246 (8th Cir. 1995); United States v. Ripinsky, 20 F.3d 359 (9th Cir. 1994).

This ambiguity in the law is one of the greatest impediments to effective use of the criminal forfeiture laws. We strongly support the provision in Section 104 of the Draft Bill that would fix the statute to make it clear that substitute assets may be restrained pre-trial.

5. Other provisions for gaining control of forfeitable property. Several other provisions of the bill also enhance the government's ability to gain control over property subject to forfeiture to make sure it is available at the conclusion of the trial. In particular, I would like to emphasize our support for Section 105, giving the court the power to order the defendant to repatriate property subject to forfeiture that has been moved overseas, and Section 107, giving the government the same power

to seize forfeitable property with a seizure warrant in a criminal case that it currently has in civil cases. The first would be used, for example, to order a drug trafficker to transfer the money he tried to hide in a Caribbean bank account to the United States where it could be forfeited. The second would make it possible for the government to seize highly volatile property like currency in a criminal case without having to open a civil forfeiture case to use the existing civil forfeiture seizure authority to preserve the property.

6. Burden of proof. We also support Section 108 of the Draft Bill which clarifies the burden of proof in criminal forfeiture cases. Almost all courts currently hold that once the defendant is convicted on proof beyond a reasonable doubt, the government is required to establish the forfeitability of his property by a preponderance of the evidence. See e.g. 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. Biari, 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-Escarsaga, 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. Elgerona, 971 F.2d 690 (11th Cir. 1992). One court, however, holds that

the reasonable doubt standards applies to criminal forfeitures in RICO cases, see United States v. Palullo, 14 F.3d 881 (3rd Cir. 1994), and other courts have not addressed the issue.

Given the Supreme Court's holding in Libretti that forfeiture is part of the defendant's sentence, it should now be clear that the proper standard of proof is "preponderance of the evidence," the same standard that applies to all other sentencing issues. By enacting Section 108, however, Congress will save the courts and the taxpayers a great deal of time and expense that otherwise will be wasted in unnecessary litigation on this issue.

7. **Enforcement of the forfeiture judgment.** There are several provisions in the bill that enhance the government's ability to enforce the forfeiture judgment once it is imposed. For example, Section 109 simplifies the procedure for conducting post-trial discovery to locate forfeited assets by making it unnecessary to bring the convicted defendant from the prison where he is incarcerated to the place where the deposition of a witness or records custodian is being conducted. This will put an end to the spectacle of having the convicted defendant transported from prison to the deposition room where he can glower at his former associates as they are asked where the defendant has hidden the fruits of his crime. See United States v. Saccoccia, 913 F. Supp. 129 (D.R.I. 1996).

Section 110 gives the government the same powers to enforce a criminal forfeiture judgment as it has to enforce a restitution order, and Section 112 provides that a forfeiture judgment

remains in effect even if the defendant dies pending appeal. Recognizing that a criminal forfeiture judgment is of little use if it cannot be enforced, we strongly support all of these provisions.

8. **Third party rights.** The most troublesome issues in applying the criminal forfeiture statutes concern the rights of third parties. As I mentioned, in civil forfeiture cases, the government files what is essentially an action against the property itself: the government is seeking full title to the property, and anyone who wants to assert an interest in the property and contest the forfeiture may do so. As a mechanism for affording everyone an equal chance to litigate his claim to the property at the same time, civil forfeiture is perfectly suited.

In contrast, criminal forfeiture is a much more limited tool. Instead of being able to obtain clear title to any property used to commit an offense, the government is limited to divesting the defendant of whatever interest he may have in the property. If the property belongs, in whole or in part, to a third party who was not a defendant in the case -- for example, the defendant's spouse -- the government can only forfeit the defendant's interest, even if the third party knew about, and consented to, the use of the property to commit the offense. That limitation flows from the fact that the defendant is the only person, other than the government, who can take part in criminal proceedings. Because third parties cannot take part in

criminal proceedings, due process bars the forfeiture of their property in such cases, regardless of their complicity in the offense.

For this reason, there has to be a way of determining that the property forfeited in the case actually belongs to the defendant and not to a third party. In 1984, Congress created a process called the "ancillary proceeding" in which third parties are able to file claims to property forfeited in a criminal case.

In recent years, there has been a great deal of litigation over the scope and conduct of the ancillary proceeding, exposing gaping loopholes in the current law. Several sections of the Draft Bill address these problems. For example, Section 114 establishes a process resolving pre-trial motions and conducting discovery in the ancillary proceeding. Section 115 allows the defendant to participate in the ancillary proceeding to defend his interest vis a vis the third party if he is contesting the forfeiture in a pending appeal -- making it possible for the court to resolve a third-party claim before the defendant's appeal is final. And Section 116 makes clear that no ancillary proceeding is necessary -- because no third party rights can be implicated -- if the forfeiture is limited to a personal money judgment against the defendant.

Section 117 establishes a process whereby third parties can contest the forfeiture of substitute assets, and Section 118 creates a process that allows the government to recover the value of forfeitable property that was illegally transferred to a third

party and then dissipated. The latter provision is needed to deal with situations where the defendant transfers drug proceeds or other forfeitable property to an unscrupulous confederate who quickly dissipates or conceals the property so that it cannot be forfeited. See United States v. Moffitt, Everling & Kenler, P.C., 83 F.3d 660 (4th Cir. 1996).

Finally, Section 119 contains a new procedure that merges civil and criminal forfeiture cases together in one proceeding to allow the government to forfeit any property used by the convicted defendant to commit the criminal offense as part of the criminal case, even if the property belongs to a third party. As noted, third party property generally cannot be forfeited in a criminal case because the third party has no opportunity to participate in the case in chief or to contest the forfeitability of the property. The only issue a third party can raise, or needs to raise, in the ancillary proceeding is ownership. If the third party is the true owner of the property, the property is returned to him, even if he was complicit in the criminal offense.

There are many cases in which the government could convict the defendant in a criminal case and forfeit his interest in the property through criminal forfeiture, but would have to return all or part of the property to a third party at the conclusion of the ancillary proceeding. In such cases, the government generally must file a separate civil forfeiture action to forfeit the third party's interest. (This assumes, of course, that the

third party is not an innocent owner. An innocent owner's property cannot be forfeited in any event under most federal forfeiture laws.) Under the new procedure, instead of having to file a separate civil forfeiture action, the government would be able, as soon as it was determined in the ancillary proceeding that the property actually belonged to a third party, to proceed to forfeit the third party's interest by affording the third party an opportunity to contest the forfeitability of the property and to assert any innocent owner or other affirmative defense that would be available in an ordinary civil forfeiture case.

We fully support all of these important and necessary changes to the procedures for dealing with third-party rights in criminal forfeiture cases.

#### **Expansion of the Forfeiture Statutes**

Title II of the Draft Bill addresses a separate topic. Whereas Title I deals with criminal forfeiture procedure, Title II deals with expanding forfeiture authority to cover additional categories of criminal activity. We fully support the enactment of the new authority, but we think the bill needs a civil forfeiture counterpart to accompany the criminal forfeiture provisions.

Again, for historical reasons, a chart of the forfeiture statutes in the federal criminal code would look much like a hopscotch board. There is forfeiture authority for some crimes but not others, with no rhyme or reason to the pattern. For

example, we can forfeit the proceeds of bank fraud, but not the proceeds of consumer fraud; we can forfeit the vessel used to smuggle illegal aliens, but not the money paid to the smuggler; we can forfeit proceeds in a drug case, but not money paid to a "hit man" in a murder-for-hire case, or to a terrorist, or to a corrupt public official.

Section 201 of the Draft Bill goes a long way toward correcting this situation by providing across-the-board forfeiture authority for the proceeds of all crimes in the criminal code and all other crimes defined as "specified unlawful activity" in 18 U.S.C. § 1956(c)(7). With this new authority, for example, the government will be able to forfeit the proceeds of a consumer fraud offense under the mail and wire fraud statutes and then use the recovered property to pay restitution to the victims.

Moreover, Section 202 defines "proceeds" to mean all of the property derived, directly or indirectly, from an offense or scheme, not just the net profit. This point is important. Most forfeiture statutes use terms like "gross proceeds" or "gross receipts" to describe the property subject to forfeiture. But some of the older statutes use the term "proceeds" without any modifier. This has led some courts to construe "proceeds" to mean "net profits" and to allow 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).

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 other provisions in Title II add important new authority to forfeit the property used to commit a number of other serious offenses, such as firearms used to commit a crime of violence (Section 203), the instrumentalities of terrorism (Section 206), and vehicles used for gun running (Section 207).

As mentioned, however, we are greatly concerned that in each case the new authority is limited to criminal forfeiture.

Ever since Congress started enacting criminal forfeiture statutes in the 1980's, it has almost always enacted parallel provisions for civil and criminal forfeiture. In 1996, however, Congress enacted four new criminal forfeiture provisions without civil counterparts.<sup>1</sup> See 7 U.S.C. § 2024 (criminal forfeiture for food stamp fraud); 18 U.S.C. § 982(a)(6) (criminal forfeiture for alien smuggling); 18 U.S.C. § 982(a)(6)<sup>2</sup> (criminal

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<sup>1</sup> The RICO statute, of course, provides only for criminal forfeiture without any civil analog.

<sup>2</sup> There are two statutes codified at 18 U.S.C. § 982(a)(6).

forfeiture for health care fraud), and 18 U.S.C. § 794 (criminal forfeiture for economic espionage). Unfortunately, this has made those statutes very hard to use. As I have said before, there are times when the more limited tool of criminal forfeiture is insufficient or impractical and the case must be brought as a civil matter.

For example, approximately 85 percent of all forfeitures are uncontested. These generally are cases where a person is arrested but chooses not to contest the forfeiture of his property, so that the property is forfeited administratively in what is basically a default proceeding.<sup>3</sup> There is no point in including a criminal forfeiture count in an indictment and presenting the issue to a jury if the defendant is not going to contest the forfeiture. If a defendant facing criminal conviction for drug trafficking, for example, thinks it pointless to contest the forfeiture of the cash seized from him as drug proceeds at the time of his arrest, it is equally pointless to clutter the indictment with a forfeiture count when administrative forfeiture will answer.

But administrative forfeitures are civil forfeitures; if the government has only criminal forfeiture authority, the property can only be forfeited as part of the criminal case, even if the defendant would not have contested the forfeiture. We think this is cumbersome and wasteful of judicial resources.

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<sup>3</sup> Approximately 85 percent of all forfeitures conducted by the Justice Department involve a parallel arrest or prosecution.

Also, criminal forfeiture requires a federal conviction for the crime giving rise to the forfeiture. If the defendant is dead or is a fugitive, there can be no prosecution and therefore no criminal forfeiture. So, if the defendant who defrauds consumers of millions of dollars in an insurance scam flees overseas, for example, we would not be able to use criminal forfeiture to recover the money and return it to the victims. Only through civil forfeiture could we recover the money.

Likewise, if the defendant was prosecuted in a State case, the federal forfeiture would have to be civil because there was no federal prosecution for the criminal offense. Most important, even if the defendant is convicted in a federal criminal case, but only on counts relating to a particular offense, only the property involved in that offense could be forfeited. Property derived from, or used to commit, a related but separate crime, could only be forfeited civilly because the criminal forfeiture is limited to the offense of conviction.

For example, suppose an alien smuggler is arrested in the act of transporting illegal aliens, and thousands of dollars are seized from his bank account. If those proceeds are traceable to the particular aliens who were with the defendant at the time he was arrested, they can be forfeited in the criminal case; but if they are traceable only to earlier offenses involving other illegal aliens, they could only be forfeited civilly, unless the government brings an entirely unnecessary prosecution to convict the same defendant of the earlier offenses as well. And of

course, if the smuggler is merely deported and not prosecuted, there could be no forfeiture at all without a civil forfeiture provision.

Finally, as I have mentioned before, criminal forfeiture is limited to the property of the defendant. If the defendant uses someone else's property to commit the crime, criminal forfeiture accomplishes nothing. Only civil forfeiture will reach the property. Take, for example, the forfeiture provision relating to "any conveyance, chemicals, laboratory equipment, or other material, article, [or] apparatus . . . used to commit" a terrorism offense in Section 206 of the Draft Bill. If federal agents arrest the members of a terrorism ring, they should be able to forfeit the property the members were using to commit the offense. But even if all of the defendants are convicted, the property would have to be released if only criminal forfeiture is available, if it turned out that the property belonged to someone else -- a corporation, for example, or a fugitive who remained beyond the reach of federal law enforcement overseas. Fugitives are not unknown in terrorism cases; and it would greatly frustrate the aims of law enforcement if the instrumentalities of terrorism had to be let go because of the absence of a civil forfeiture counterpart to the provision contained in Section 206.

This last point raises one other matter that we think represents a serious omission from the bill -- the enactment of a provision codifying what is known as the fugitive disentitlement doctrine. Under that provision, which appears as Section 416 of

H.R. 1745, the comprehensive forfeiture bill introduced by Mr. Schumer, a fugitive could not file a claim in either a civil forfeiture proceeding or in the ancillary proceeding in a criminal forfeiture case. Thus, in the terrorism case, for example, if the government did attempt to use criminal forfeiture to confiscate the instrumentalities of the crime, a third-party claiming ownership of the property would be barred from contesting the forfeiture if he was named as a defendant in the case and remained a fugitive.

#### Conclusion

On behalf of the Department of Justice, I again want to thank Chairman McCollum and Congressman Schumer for the efforts you have made concerning this important issue. I would be happy to answer any questions the Subcommittee may have.

Mr. McCOLLUM. Thank you very much, Mr. Cassella. Ms. Blanton, you may proceed.

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

Ms. BLANTON. Mr. Chairman and the members of the Subcommittee, good morning. I am the Director of the Department of the Treasury's Executive Office for Asset Forfeiture. Seated to my left is Bill Bradley, who is counsel to my office. It is my pleasure to appear before you today to offer some of Treasury's comments as you consider the Criminal Asset Forfeiture Act and its effort to improve criminal forfeiture.

Perhaps because of its imposing power, forfeiture is, at times, the subject of adverse media coverage. We in the Federal law enforcement community have heard the critical commentaries, and in cases where Federal forfeiture has been involved, we have taken steps to ensure the fairness that merits the confidence of the public. Singular incidents, however, should not be permitted to obscure the many positive aspects of this formidable law enforcement mechanism.

Last June, we presented our views on Chairman Hyde's bill to reform civil asset forfeiture. In keeping with today's consideration of the draft Criminal Asset Forfeiture Act, I would like to reference a few key asset forfeiture cases and how they have benefitted the victims of crime, including American taxpayers, and even the disadvantaged and vulnerable in our communities.

Almost a decade ago, Ken Mizuno and his corporation intentionally and vigorously oversold memberships to a golf club under development in Japan. He took a good portion of the illegal proceeds from this fraud and used them to purchase real property, vehicles, and aircraft in Nevada, California, and Hawaii. Japanese authorities worked with the United States Customs Service and the Internal Revenue Service during the ensuing money laundering investigation here in the United States. By 1993, the corporation had pled guilty to a criminal information and had agreed to forfeit substantial assets to the United States, including the famous Indian Wells Golf and Country Club, which is a PGA tour stop. Proceeds from the sale of these criminally forfeited assets netted approximately \$50 million, which, by agreement, was returned to the Japanese in 1995 to reimburse the victims of Mizuno's fraudulent scheme. This money was returned by the Treasury Forfeiture Fund.

In another, more recent, civil forfeiture case out of Florida the victims were US taxpayers, and again forfeiture authority helped to make them whole. In this instance, the Criminal Investigation Division of the IRS along with investigators from the Department of Health and Human Services uncovered a Medicare fraud scheme. A Kissimmee man operating Bulldog Medical and MLC-Geriatric Health Services deliberately mischaracterized and marketed as medical devices items he knew did not qualify for Medicare reimbursement. Approximately \$32 million was forfeited to the government, and the majority of these monies will be returned to the Medicare Trust Fund next fiscal year so that the true vic-

tims of this crime, the taxpayers of the United States, receive a degree of restitution.

Finally, Federal forfeiture has served disadvantaged constituencies in America through its ability to transfer real properties under the Weed and Seed Program. A good example of this was a recent criminal forfeiture case involving Radio Pantera in Tucson, Arizona. Radio Pantera was not only the largest Spanish-speaking station in the region but also a business that was used to hide profits from the illegal drug trade. The father and son owners of the station were trafficking marijuana from Mexico to Ohio, taking their cut and laundering it through investments in the station. A Customs and IRS investigation that began in 1992 led to the criminal forfeiture of the property to the government. The Treasury Forfeiture Fund then transferred to the Gateway organization last fall this property.

Gateway is a non-profit drug and alcohol treatment provider that has a quarter-century record of working with indigent substance abusers. Now, thanks to criminal forfeiture authority, it has a new \$200,000 property to offer outpatient services, counseling, and another chance at life to its clients.

These are just three examples of the positive impact of responsible forfeiture. We are doing our best through the development of policies and guidance to ensure a forfeiture program that reflects America's sense of fair play. We have stressed comprehensive training for all Treasury forfeiture personnel, from special agents and supervisors to seized-property managers. We have emphasized the importance of responsible seizures and the need for pre-seizure planning that makes these possible. We have highlighted quality in seized property management so that value, whether forfeited or returned, is never carelessly diminished; and knowing that justice delayed is often justice denied, we have directed Treasury law enforcement to keep on top of all forfeiture caseloads so that all who are affected will benefit from a timely adjudication.

We appreciate the intent of the Criminal Asset Forfeiture Act to improve criminal forfeiture. By creating a uniform procedure for all criminal forfeitures, it reduces complexity and confusion. By allowing for the criminal forfeiture of firearms used in violent crimes, it realizes a longstanding goal of Treasury enforcement. By permitting criminal forfeiture of the instrumentalities of certain crimes Treasury agents pursue each day, it helps us take down the organizations behind them.

Since we have had a limited time to assess the impact of the provisions of this bill and to discuss it fully with our Treasury law enforcement bureaus, we would welcome the opportunity to assist the Subcommittee and its staff with any additional work that needs to be done on this legislation. Specifically, we would like to confer on the language allowing for the criminal forfeiture of firearms associated with violent crimes and on a definition of gun running in connection with the criminal forfeiture of vehicles.

Along with its civil counterpart, criminal forfeiture has become a vital tool in our daily efforts to counteract crime. Improvements on both the civil and criminal sides should progress accordingly. We value the aim of the Criminal Asset Forfeiture Act with respect to criminal forfeiture and we see it as a fitting complement to relat-

ed efforts that we have supported before the Committee to refine and reform civil forfeiture.

This concludes my opening statement, Mr. Chairman. I will be pleased to answer any questions you or the other members of the Subcommittee might have.

[The prepared statement of Ms. Blanton follows:]

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

Mr. Chairman, and to the members of the Subcommittee, good morning. My name is Jan Blanton and I am the Director of the Department of the Treasury's Executive Office for Asset Forfeiture. It is my pleasure to appear before you today to offer some of our comments as you consider H.R. \_\_\_ and its effort to improve criminal forfeiture.

Perhaps because of its imposing power—a power not simply to incarcerate criminals but to actually dismantle their organizations—forfeiture today is, at times, the subject of adverse media coverage. We have heard the critical commentaries, and in cases where federal forfeiture is involved, we have taken steps to ensure the fairness that merits the confidence of the public. Singular incidents, however, should not be permitted to obscure the many positive aspects of this formidable law enforcement mechanism.

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Finally, federal forfeiture has served disadvantaged constituencies in America through its ability to transfer real properties under the Weed and Seed Program. A good example of this was a recent criminal forfeiture case involving Radio Pantera in Tucson, Arizona. At 1450 on the AM dial, Radio Pantera was not only the largest Spanish speaking station in the region but also a business that was used to hide profits from the illegal drug trade. The father and son owners of the station were trafficking marijuana from Mexico to Ohio, taking their cut and laundering it through investments in the station. A Customs and IRS investigation that began in 1992 led to the forfeiture of the property and its transfer to the Gateway organization last fall. Gateway is a non-profit drug and alcohol treatment provider that has a quarter century record of working with indigent substance abusers. Now, thanks to criminal forfeiture authority, it has a new \$200,000 property to offer outpatient services, counseling and another chance at life to its clients.

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Along with its civil counterpart, criminal forfeiture has become a vital tool in our daily efforts to counteract crime. Improvements on both the civil and criminal sides should progress accordingly. We value the aim of H.R. \_\_\_\_ with respect to criminal forfeiture and we see it as a fitting complement to related efforts that we have supported before the Committee to refine and reform civil forfeiture.

Mr. Chairman, this concludes my opening statement. I will be pleased to answer any questions you or the other members of the Subcommittee may have at this time. Thank you.

Mr. MCCOLLUM. Thank you very much, Ms. Blanton. I am going to recognize myself for 5 minutes followed by the other Members present.

As you have discussed, the current criminal forfeiture laws are a hodgepodge,—they are there for certain criminal offenses and not for others.

Mr. CASSELLA. That is right.

Mr. MCCOLLUM. It seems to me, civil asset forfeiture is there, for quite a few things that criminal forfeiture is not. Mr. Cassella and then Ms. Blanton, I would appreciate it if you would touch on the difficulties presented by this apparent inconsistency. I know you told us in your testimony, Mr. Cassella, that you would like to see some uniformity with regard to procedures, but what about the fact that we have criminal forfeiture for some criminal offenses, but not all? And, in some instances, there is even civil forfeiture for those offenses, maybe the ultimate question is should there be criminal forfeiture for absolutely every crime? Or is that going too far?

Mr. CASSELLA. There should be criminal forfeiture, Mr. Chairman, for the proceeds of every crime. I do not think anyone has the right to retain the proceeds of a crime, and if he is convicted in a criminal case he should be made to forfeit whatever ill-gotten gains he realized from having committed that offense.

The problem with the existing statutes is that they are a hodgepodge. They were enacted over time, each year or each session of Congress reacting to whatever the critical issue of the day might have been. The money laundering and drug criminal forfeiture statutes enacted in the late 1980's, the bank fraud statutes selected in the early 1990's, and so forth. Last year, in 1996, criminal forfeiture statutes were enacted for food stamp fraud, health care fraud, economic espionage, and alien smuggling.

But we do not have forfeiture for some of the most critical crimes that we prosecute day in and day out. Consumer fraud is one that comes to mind readily. If someone defrauds citizens, elderly people,

of their life savings through a telemarketing scheme or advanced-fee scheme of some kind, which are unfortunately all too prevalent, we cannot use the forfeiture laws to recover that property directly. If we can make a money laundering case against the defendant, there is forfeiture for money laundering, but in the ordinary course the proceeds of a mail fraud, or a wire fraud, or so many other of the white collar crimes that are in our code have no forfeiture provision.

It is simply an historical accident that there is forfeiture for some things and not for others, so we very much urge you to consider the across-the-board forfeiture proceeds provision that you do have in the bill.

Mr. MCCOLLUM. What about you, Ms. Blanton? Do you concur with that?

Ms. BLANTON. I totally concur. I do not think I could add anything to what Mr. Cassella said except that we, too, believe that proceeds of criminal activity, we should have the availability to civilly or criminally forfeit. I think Mr. Cassella said it very well.

Mr. MCCOLLUM. What percentage of forfeiture cases go uncontested, and what does that mean for the government, Ms. Blanton?

Ms. BLANTON. I do not have any specific figures right now to give you from Treasury as to the percent of forfeitures that go uncontested. I will tell you that it is the majority of the seizures that are made by Treasury law enforcement that go uncontested; that is, there is no one to step forward and contest our proceeding with forfeiture.

Mr. MCCOLLUM. How about you—yes?

Ms. BLANTON. I do not have an exact percentage.

Mr. MCCOLLUM. Mr. Cassella, do you have a feel on that?

Mr. CASSELLA. For the FBI and DEA, Mr. Chairman, it is 85 percent are uncontested.

Mr. MCCOLLUM. What rights do you think, Mr. Cassella, a third party should have in criminal forfeiture proceedings? I am concerned about being fair to them, and I know there is a question of whether they should have to wait until after a case is completed. We have had a lot of questions raised. It does not seem to make much of a difference from an innocent owner's standpoint whether it is criminal or civil. How do we deal with it?

Mr. CASSELLA. The rights of third parties in criminal forfeiture cases is an extremely interesting issue, Mr. Chairman, and Congress has struggled with that, and so have the courts. We have been active in trying to make sure that third-party rights are protected.

Between 1970 and 1984, that is, the first 14 years when the RICO forfeiture statute was on the books, there was no protection for third-party owners. It is understood by everyone that only the criminal defendant's property can be forfeited in a criminal case. If someone uses a truck to smuggle illegal aliens into the country, we can forfeit it in a criminal case if it belongs to him. If it is his sister's truck, we cannot forfeit whether she is innocent or not.

It is not a question of innocent ownership in criminal cases; it is a question of ownership. Only the defendant's property can be forfeited. That is understood.

What we have not succeeded in doing, or what we did not succeed in doing until 1984, is having any statutory mechanism for protecting the third party's right. In that year, the ancillary proceeding provision was enacted, and it allows the third party, the sister in my example, to come in and say, "Wait a minute. You cannot forfeit that truck. It does not belong to him. It belongs to me."

But that statute needs to be refined and improved in many ways. There are no statutory guidelines for motions practice and discovery, or for motions for summary judgment in the ancillary proceeding. We need to have those things.

There are a lot of other things that are detailed in the bill that will improve the government's ability and the courts ability to protect third-party rights.

Ironically, there are many instances where the third party would be better off if the government proceeded civilly as opposed to criminally, because in the civil case we can litigate everyone's interest at the same time. In a criminal case, you necessarily focus on the conviction of the defendant. You do not have the third party sitting at a third table in the courtroom, and jumping up, and addressing the jury periodically saying, "Wait a minute, I object to that because ultimately my property is going to be forfeited."

No, the third party has to wait; he takes a seat. The government proceeds against the defendant and after the defendant is convicted the third-party rights kick in; and so there are times when, to address third-party rights, we would rather proceed civilly.

But even in the criminal context, third-party rights are extremely important and the owners of the property who are not the defendant have to have an opportunity to assert that interest.

Mr. MCCOLLUM. Thank you very much, Mr. Cassella. Because we are going to have a vote in a minute, I want to get to my colleagues.

Mr. Barr, do you have questions?

Mr. BARR. Thank you, Mr. Chairman. Mr. Cassella, I think you mentioned that any—I think you used the word "workable"—criminal forfeiture reform or amendments must be coupled with civil. Did I quote you on that?

Mr. CASSELLA. Well, any expansion, substantive expansion, of forfeiture to a new category of property should have both a civil and a criminal counterpart, is what I meant to say.

Mr. BARR. Does that mean that the Administration would not support H.R. 1965 without additional—

Mr. CASSELLA. Oh, no, we support H.R. 1965 without any conditions. We are not asking that this be made part of that bill. H.R. 1965 was a compromise bill dealing with civil forfeiture, which we fully support whether or not these additional matters are addressed.

Mr. BARR. Okay.

Mr. CASSELLA. We do believe that criminal forfeiture is a separate matter which does need to be addressed, and we are happy this Committee is focusing on it.

Mr. BARR. Okay. When you use the word "compromise," what does that mean? Who did you compromise with?

Mr. CASSELLA. In H.R. 1965, there were originally two bills. Mr. Schumer introduced a bill, 1745, which the Justice Department

drafted. Mr. Hyde introduced a bill, H.R. 1835, which he had drafted, and H.R. 1965 is the result of a blending of the provisions in those two bills.

Mr. BARR. Okay. You also used the term "historical accident" to describe the fact that we have some areas of criminal activity that are covered by asset forfeiture and others that are not. I am not sure what an historical accident is. How long has this historical accident, to use your term, been in existence? Quite a long time?

Mr. CASSELLA. Well, in the case of criminal forfeiture, since 1984. What has happened since 1984 is that in each session of Congress, as a particular issue has come to the fore whether it be drugs and money laundering in the 1980's, or the bank fraud issues during the savings and loan crisis of 1989 and 1990, or carjacking in 1992, or food stamp fraud last year, Congress has addressed that issue, passed the legislation, and included a criminal forfeiture provision.

If the issue has not come to the fore in the last 13 years since criminal forfeiture statutes began to be enacted, then there is no criminal forfeiture authority. So there is not for mail and wire fraud, there is not for telemarketing fraud, there is not for public corruption, and so forth.

Mr. BARR. Where is the—I mean, has there been any restraint on the Department of Justice seeking the authorities that we are discussing today?

Mr. CASSELLA. Oh, no, we have been asking—

Mr. BARR. To rectify that so-called historical accident.

Mr. CASSELLA. We have been asking for this increased authority.

Mr. BARR. Okay, and why has it not been forthcoming?

Mr. CASSELLA. Well, here we are. We have reached the point where Congress—

Mr. BARR. Turning over—oh, if the Department has been concerned about this for at least 13 years—I suspect it is somewhat longer than that but let us say for at least the last 13 years—what I am trying to get at is I am not sure that to say it is an historical accident. There have been a myriad for the Department to come forward under various administrations to seek to rectify what you have described as a problem area here, a patchwork, to use the Gentleman from Pennsylvania's word, and I think would you not concede that it might be more than just an accident that all of that power has not been granted to the government, and maybe there are some serious concerns that the people of this country have and that their representatives have in this area?

Mr. CASSELLA. I am not aware, Congressman, of any instance where concerns were expressed with the idea of forfeiting the proceeds of a crime in a case where the defendant was convicted, and that is what we are here to talk about today, the—

Mr. BARR. Okay, you are not aware, for example, of the position of the National Association of Criminal Defense Attorneys?

Mr. CASSELLA. Opposing the forfeiture of proceeds? I am not. Maybe I am not aware—

Mr. BARR. Well, no, they are not opposing necessarily the general concept. If you pose the question in those terms, of course, it is very difficult for anybody to mount an effective argument against it. What we are talking about here, though, are a lot of nuances, a lot of specific procedures, and so forth, and the National Associa-

tion of Criminal Defense Attorneys, just as one example, I think has come forward, not just on this one occasion but on other occasions as well, and I would suspect that the Department is aware of those, you know, positions.

I just think that it is more than historical accident, and there are some very serious concerns that a number of folks have, and I do not think those concerns are new, and if they are brand new to the Department, then I wonder what is going on, because I do not think they are new. They are very well thought-out and there are some legitimate issues of discussion here.

So I would not slough this off as an historical accident. It is something that does need to be addressed.

I have other questions, Mr. Chairman. Maybe we will have additional time.

Mr. McCOLLUM. Yes, we will probably have a second round, but I would like to give Mr. Gekas time before we go to vote.

Mr. Gekas—

Mr. GEKAS. Yes.

Mr. McCOLLUM [continuing]. You are recognized for 5 minutes.

Mr. GEKAS. Yes, I only have one question. Out of curiosity I want to ask Ms. Blanton, the reference that she made to that one forfeiture case in Florida in the Medicare fraud indicates \$32 million was forfeited. Was that conversion of real estate and other assets into that cash or was this a cash cache?

Ms. BLANTON. I am pretty sure it was a little bit of both. Predominantly it was currency bank accounts that were forfeited. There were some properties, I believe, that were forfeited and have been since converted into cash.

Mr. GEKAS. Do you mean to tell me that this individual had that large amount of cash—

Ms. BLANTON. Yes.

Mr. GEKAS [continuing]. In deposits?

Ms. BLANTON. Yes. He, I believe—

Mr. GEKAS. I am not surprised you caught him.

Ms. BLANTON. You are or you are not?

Mr. GEKAS. Am not.

Ms. BLANTON. Oh.

Mr. GEKAS. I mean, he was a little dumb.

Ms. BLANTON. Well.

Mr. GEKAS. But that is why I wanted to know. That would be unusual, would it not, to be able to seize cash—

Ms. BLANTON. It is—

Mr. GEKAS [continuing]. As a forfeiture?

Ms. BLANTON. It is not at all unusual. We seized—the overwhelming majority of the seizures of Treasury law enforcement are currency seizures.

Mr. GEKAS. In bank accounts, et cetera.

Ms. BLANTON. Bank accounts, et cetera. In the particular case, the Bulldog Medical case in Florida, I believe the total fraud he committed against Medicare was in the neighborhood of \$44 million, and we were only able to identify the approximately \$32 million that was seized and forfeited.

Mr. GEKAS. In the conduct of his business, did he need large amounts of cash on hand like—

Ms. BLANTON. I do not believe he did. I believe what he was doing was defrauding the Medicare, and then he was taking all the money and using it for a very lavish personal lifestyle and to build up an array of assets.

Mr. GEKAS. Well, if he was, he was leaving large amounts behind.

Ms. BLANTON. Well—

Mr. GEKAS. Millions of dollars is what you are saying you were able to seize in cash.

Ms. BLANTON. Yes, sir. Criminals are not always—

Mr. GEKAS. They are sort of dumb.

Ms. BLANTON [continuing]. Smart about how they hide their proceeds.

Mr. GEKAS. All right, I have no further questions.

Mr. MCCOLLUM. Thank you very much, Mr. Gekas. Before we go, Mr. Chabot, do you have any questions?

Mr. CHABOT. No, I do not, Mr. Chairman.

Mr. MCCOLLUM. All right, we will be in recess until after this vote and then we will come back and have a second round.

[Recess.]

Mr. MCCOLLUM. The Subcommittee on Crime will come to order. When we recessed we had completed one round of questions. I am going to take the liberty of beginning the second round. A vote is still going on, so Members may wander back in. I will try to keep the questioning open for a little while simply to protect their interests. I am interested in asking a few questions that I have not yet asked Mr. Cassella and Ms. Blanton.

The first one is about restitution. In his submitted statement, Mr. Edwards—a witness on the second panel—expresses a concern that I would share if it is indeed accurate. His concern is that under the proposed legislation the seized property of the defendant would go to the government's coffers instead of towards restitution for the victims. That often occurs now, he says.

Do you foresee that occurring under this proposed legislation?

Mr. CASSELLA. No, not at all, Mr. Chairman. We think that forfeiture is an excellent tool to achieve the purpose of getting the money back to the victim in restitution, in any case that involves victims. Now, not all forfeitures involve victims. Drug cases do not involve victims—but in any case that involves victims, providing restitution to the victim is the first priority. We do not keep a nickel in the forfeiture fund if there are victims out there.

You mentioned in your opening statement, Mr. Chairman, that I have worked on the BCCI case. In that case we have recovered over \$900 million in criminal forfeiture. All of it, except for the costs of the government's investigation which was less than 1 percent, has gone to the victims, to a liquidator to distribute pro rata to the victims, and that is the rule we apply.

We think that forfeiture is an excellent tool to recover the property to get it back to the victims. In a restitution case, if there were no forfeiture, in a restitution case you would come to the end of the trial, and the victim would appear at the sentencing, make his plea for restitution, and the court would basically say, "Mr. Defendant, if you have been kind enough to have kept your proceeds in escrow for the benefit of the victims in case you were convicted, you must

now pay restitution to the victims." There is no way to restrain the property to make sure it is still available, there is no way to get the marshals involved to liquidate the property, all the tools we have under the forfeiture laws.

In a forfeiture case, we can restrain or seize the property pre-trial to preserve it, and then after the defendant is convicted and the rights of third parties are resolved, the forfeiture order is signed, and we can distribute the property to the victims if, indeed, there are any.

Also, in the legislation there is an option the government has to simply withdraw the order of forfeiture at the point of conviction, so that the court can then let the restitution process go forward, if that seems to be in the best interest of the victims at that point. At least we will have preserved the property under the forfeiture laws up to that time.

Mr. MCCOLLUM. What about the cost of the forfeiture that is deducted in here? Some are going to argue that restitution only comes after those costs are deducted. As a result, the restitution that otherwise would be there would diminish significantly under this legislation.

Can you give us any idea what the cost may be and to what extent it is likely to diminish the restitution?

Mr. CASSELLA. Sure. In a typical case, if we are dealing with cash there are not a lot of costs. If we are dealing, on the other hand, with the personal property that has to be stored and then liquidated at auction, we may have storage costs, the auctioneer's costs. If it is real property, we are going to have a broker's fee, the cost of fixing up the property to ready it for sale, all of that.

Basically, the government has exercised its power to preserve this property for the victims, and then it is just recovering for the taxpayers the cost of doing that before distributing the property to the victims.

In BCCI, I think the government's costs were 6 million out of the \$900-and-some million.

Mr. MCCOLLUM. You do not charge, then, or count as costs the time that an attorney would charge if you were in—

Mr. CASSELLA. We are not—

Mr. MCCOLLUM [continuing]. Civil practice.

Mr. CASSELLA. Yeah, I wish I could. Many have suggested that if I had worked on commission in the BCCI case, I would be indeed a wealthy man today. No, we do not get a chance to—we do not charge an hourly rate or deduct the costs of our time. We work for the government. We are going to be there anyway. It is the out-of-pocket expenses that we have to spend for special masters, for auctioneers, for storage costs for boats and airplanes.

Mr. MCCOLLUM. Okay. Ms. Blanton, why is pre-trial restraint of property so important and useful for prosecutors?

Ms. BLANTON. Well, I believe, as Mr. Cassella said earlier, we need the ability to preserve those properties. If we do not have that ability, the bad guys are just going to liquidate them, remove them from the court's jurisdiction, and we will not ever be able to get those properties.

Just following along on the issue of costs, I might add the Mizuno case, which I mentioned, we did at the Treasury Forfeiture

Fund, we did deduct our expenses. As I mentioned, Indian Wells Golf Course, several other significant multimillion dollar properties were seized by the government in that particular case, and we did deduct our expenses, which were basically the costs of maintaining that property. With these kinds of properties there are high maintenance costs, and I believe our expenses over about 2½-year period were around \$13 million, but a lot of that went right back into those properties to preserve their value.

Mr. MCCOLLUM. That is fair enough. I appreciate the fact that you took the chance to elaborate. I would like to finish just one train of thought on pre-trial restraint, then I will let Mr. Barr ask any questions he wants.

You have given us a reason for the pre-trial restraint of property being important, but—I am curious—should not the government have to make a showing, pre-trial, that the substitute assets it seeks are even subject to forfeiture in the first place, or at least that there is a risk that they will be concealed or transferred without the pre-trial restriction?

Mr. CASSELLA. We have to make—we have to show in order to get any pre-trial restraining order that, first of all, the property is subject to forfeiture. If it has been named in an indictment, a grand jury has established probable cause in returning the indictment, and the indictment serves as the instrument that establishes probable cause to believe that certain property is subject to forfeiture.

If we were simply talking about the directly forfeitable property, the proceeds, or the boat, or whatever it might be, we could then get the restraining order from the court, and if the court issued a restraining order, it would be subject to a post-restraint pre-trial hearing at which the defendant could come in and say, "Wait a minute, there are the reasons why that property should not have been restrained. I need it to pay my attorneys' fees. That property could have been restrained in less burdensome way. Do you need to shut down my business? There are other ways to preserve the property." That hearing is provided for in this legislation as well.

The same things would apply to the restraint of substitute assets.

Mr. MCCOLLUM. What is the justification for giving the government the right to cross-examination of the defendant, and all of the witnesses, at a pre-trial restraining order hearing? What is the rationale for that?

Mr. CASSELLA. Well, if a defendant comes forward after his property has been restrained and says, "I need that property to hire a lawyer," several things kick in.

First the Supreme Court has held in *Caplan and Drysdale* that a defendant does not have the right to use criminally-derived property to hire a lawyer, and so if, in fact, the property is criminal proceeds that is not a reason to vacate the restraining order.

Also, the defendant only has a right to raise the issue if, in fact, he needs money to hire a lawyer. If he is a wealthy defendant, then there is no reason why the government's effort to restrain the property should be thwarted.

So there are two issues. If he files a motion to modify or vacate the restraining order on Sixth Amendment grounds—i.e., that he

needs the money to hire counsel, the first question is does he indeed need money to hire counsel. If he would put on evidence, we have a hearing; but a hearing is not a hearing unless both sides get to ask questions, and so the government would get a chance to ask questions in cross examination.

Second, if it was found that he did need the money, then we would move on to whether or not the property was subject to forfeiture. The indictment establishes that the crime occurred, or there is probable cause to believe the crime occurred, and then the remaining issue would be whether or not the property has the requisite nexus to that crime.

Mr. MCCOLLUM. And you need to ask questions of him and other witnesses to establish that fact, because I was curious as to why you would ask any questions other than is he indigent or not.

Mr. CASSELLA. Because, in our view, the court cannot make the necessary determination without a hearing, and a hearing is not a hearing unless both sides are asking questions.

Mr. MCCOLLUM. Okay. Mr. Barr, you are recognized for 5 minutes.

Mr. BARR. Thank you, Mr. Chairman. Just in leafing through this there are just so many questions that are raised in my mind, and it is not, just to make clear for the record, it is not that I am at all opposed to going after just as hard as possible the actual proceeds gained through illegal activity of any person convicted of that crime. That is not—I do not even think it is an issue here among any of the current witnesses, or anybody up here, or any of the additional witnesses, but I do have a lot of concerns about the specific definitions and scope of these which go, I think, far beyond simply going after the proceeds.

For example, we have at on page 7 of the proposed bill amendments to Rule 32.2. It says, after guilt, "the court must determine what property is subject to forfeiture because it is related to the offense." That is kind of odd wording, but.

Then it goes on to say, "The determination may be based on evidence already in the record, including any written plea agreement, or on evidence adduced at a post trial hearing."

Mr. Cassella, are there any limitations whatsoever with regard to what evidence the government can use? There does not seem to be here. It just has a couple of illustrative areas that the government—from which the government may derive evidence. Are there any limits at all?

Mr. CASSELLA. Well, maybe it would be helpful if I gave an example of how this would work. Let us assume the government—

Mr. BARR. I just—I mean, are there—does this provision provide unlimited reach for the government to consider any evidence whatsoever in that post conviction of criminal forfeiture proceedings?

Mr. CASSELLA. Yes, but it is not the language of this rule that does it. It is the rule that at a sentencing hearing the government is entitled to put on certain categories of evidence. The post-trial hearing that this rule speaks of is a sentencing hearing.

Mr. BARR. You are also allowed to go outside of that.

Mr. CASSELLA. At a sentencing hearing, the government can put on hearsay and other kinds of evidence that would not be admissible in the case in chief, and whatever rules apply to a sentencing

hearing would apply to this post-trial determination. It is a sentencing proceeding, as the Supreme Court has held.

Mr. BARR. You would at least concede that its reach would be extremely broad.

Mr. CASSELLA. As broad as any other sentencing issue. When the sentencing guidelines are being applied, and the court has to determine what relevant conduct the defendant may have committed that is outside the scope of the indictment, it is as broad as those determinations.

Mr. BARR. What, if you could enlighten me, is the theory behind having these proceedings conducted by the court and not by a jury? Is it the government's position that there is no basis on which a person ought to have the right to a jury determination on these? Is that the government's position, or is it simply that this makes it easier?

Mr. CASSELLA. I am not sure that it makes it easier. I think it just makes more sense and it is consistent with the law. The Supreme Court has held that a criminal forfeiture order is part of the defendant's sentencing, and a determination of what to include in the criminal forfeiture order is part of the sentencing process.

Outside of capital cases, juries are not involved in sentencing the defendant. That is something the court does. The court determines what guideline level should apply, and in our view the court should determine what the forfeiture, what the scope and extent of the forfeiture, ought to be.

The only reason the jury is involved is because there is a rule, Criminal Procedure Rule 31(e), which says the jury is involved. That was promulgated back in 1970 and has not been amended since, and since that time—

Mr. BARR. It would be your position that there is no theory or basis on which the right to a jury trial before somebody's property is taken extends early in our history before that point?

Mr. CASSELLA. The Supreme Court held in *Libretti v. United States* in 1995 that the forfeiture is part of the sentencing, and that all the rules that apply to—the jury-right rule, which applies to the elements of the offense—do not apply to the criminal forfeiture, that is right.

Mr. BARR. So the government's position is there is no pre-existing body of law or political theory that holds, for example, in the writings of our founding fathers that that right to one's property not being taken away without a jury trial, that—

Mr. CASSELLA. No, the defendant—

Mr. BARR [continuing]. Does not exist.

Mr. CASSELLA [continuing]. Congressman, has had a jury trial. He has been convicted beyond a reasonable doubt of committing a crime at a jury trial, and the loss of the property only occurs following that proceeding, and it is only following that proceeding that we get to the sentencing. You cannot have a sentencing of someone who has not been convicted, and you cannot forfeit the property of anyone who was not a defendant in the criminal case. We are talking about criminal forfeiture here, so the due process rights and the jury rights, I think, are fully protected.

Mr. BARR. Let me ask just if I could, Mr. Chairman, one specific question on this. There, I am sure, will be a lot of others as I read

through this but there is a provision, Mr. Cassella, on page 14 of the draft bill, which is a portion of, it looks like, Section 106.

At the top of 14 there is a paragraph (E).

Mr. CASSELLA. Yes.

Mr. BARR. "If the property restrained is subject to forfeiture as" et cetera.

Whose expenses are we talking about there, the defendant's or the third party? Who does this paragraph apply to?

Mr. CASSELLA. This applies to the defendant. This codifies current Justice Department policy, which is that in those circuits where we are allowed to obtain an order restraining substitute assets pre-trial, we will accede to any request by the defendant to exempt money he needs for attorneys' fees, cost of living expenses, and the cost of maintaining his assets.

For example, I recently worked on a case in Baltimore where we restrained the assets of a defendant on trial for odometer fraud, odometer tampering, and we restrained substitute assets pre-trial, and the court held a hearing to determine how much of the property that was restrained as substitute assets had to be exempted so that he would be able to pay his counsel and maintain his automobiles.

Mr. BARR. Okay, but those provisions apply to the defendant, not to a third party, the provisions that we are talking about.

Mr. CASSELLA. That is right because you are only restraining substitute assets that belong to the defendant. In a criminal case, only the defendant's property can be forfeited, and so only substitute assets that belong to the defendant can be restrained.

Mr. BARR. Well, but portions of it, the government is seeking power to go after portions of it; for example, a minority interest in a business, the gross receipt. There may be commingled in that monies that had nothing to do—that came in and had no connection whatsoever to any illegal activity, yet they would be subject to these provisions, too, correct?

Mr. CASSELLA. It is certainly the case that you could restrain property in a criminal trial that belonged to the defendant, and yet there were some third-party interests in that property. The defendant may live in a community property state and his wife may have a community interest in the property, and that interest would be restrained as well. You are absolutely correct, and that is what the ancillary proceeding is all about, post trial.

Mr. BARR. Would it also include, for example, if you had an owner of a firearms store.

Mr. CASSELLA. Right.

Mr. BARR. A legitimate business selling firearms, complying with everything. You have investors that own a portion of that business, and the person does not comply with, the defendant does not comply with, certain of the ATF forms or whatnot, and is prosecuted. What would happen to—and it only, say, has to do with one or two sales out of many thousands.

Mr. CASSELLA. Right.

Mr. BARR. And would therefore represent at most a very, very small portion of the receipts coming into that business, and therefore a very small portion of the assets of all of the owners of that business, yet it would all be reachable under those—

Mr. CASSELLA. We could restrain the proceeds pre-trial; we could restrain substitute assets in equal value to the proceeds pre-trial under this legislation. Whether that extended to the entire business or not, I do not know. It depends on how much money we are talking about but the bill provides—and you are correct, to the extent of the restraint of the proceeds or the substitute assets, it would apply equally to the defendant's joint interest with third parties, but under the provisions of the bill the third parties, like the defendant, would have an opportunity to seek modification of the restraining order on the ground that it causes substantial hardship to the moving party and less intrusive means exist to preserve the party for forfeiture.

So there is a due process procedure here where whoever's ox is being gored can come in and say, "Wait a minute, you have restrained this entire business. You have shut my business down. You only needed to restrain \$50,000 in alleged proceeds. Is there not another way we could have done this without putting us out of business, without having the marshal or the Treasury contractor running through"——

Mr. BARR. Are there provisions to allow that third party to seek to free up sufficient assets for them to defend or for them to assert their position?

Mr. CASSELLA. I would have to answer yes because the provision says it is causing a substantial hardship to the moving party, meaning the defendant or the third party, to have this party restrained, and so they come in and assert whatever that substantial hardship is in that hearing.

Mr. BARR. And even if the court then determines against them, they could still receive enough of those assets back to pay for the costs of defending, or not defending but asserting their right.

Mr. CASSELLA. Well, if the court rules against them and holds that there is not a reason to modify the restraining order, the property would be restrained throughout the trial, and then in the ancillary proceeding the third party would have the right to come forward and say, "Wait a minute, to the extent of my interests, the government cannot forfeit that property."

Mr. MCCOLLUM. Mr. Barr, if I can piggyback on that, I am curious, Mr. Cassella and Ms. Blanton, why in Section 202 you think the definition of proceeds needs to be as broad as it is. It seems to be very, very broad.

Mr. CASSELLA. It is, Mr. Chairman, and we think that is necessary. We think that the law has to be made clear that when we say "proceeds" we mean gross proceeds and not net profits.

The last six or seven criminal forfeiture statutes that have been enacted—I am thinking in particular in terms of the statutes in 18 U.S.C. 982(a), having to do with carjacking, and food stamp fraud, and alien smuggling—speak in terms of gross proceeds or gross receipts, they use those terms.

That makes it absolutely clear we are talking about the gross amount of money the defendant realized without any deduction for his cost of doing business, but the older statutes used the word "proceeds" without any modification, and that has led some courts to assume that Congress must have meant something more limited when it used the term "proceeds" in lieu of "gross proceeds," and

there are cases out there where, for example, a heroin dealer was given credit for the cost of manufacturing the heroin, where someone who engaged in bank fraud and invested so many thousand dollars in a fraud scheme was allowed to deduct the cost of investing in the scheme and to forfeit only the net that he realized above that.

We think that is wrong. We think that the gross amount that someone realizes should be forfeited. Let me give you a quick example: someone defrauds elderly persons of \$100,000 in a telemarketing scam, but he is not a very good fraud artist. He manages to lose the money in investing it, so that at the end of the day he does not make any profit. Well, the victims still lost \$100,000.

Whether the defendant makes a profit or not does not matter. He took the \$100,000 he took from these elderly people, and he invested it in the stock market, and while everybody else was making 30 percent a year on the stock market, lost it. He should not get credit for having invested the money and lost it. He took \$100,000 from people and that is how much he should forfeit, and that is how much should be paid in restitution to the victim.

So that is why we have asked that a definition be made consistent.

Mr. MCCOLLUM. Are there not cases like Mr. Barr is talking about where an innocent third party who has a legitimate business interest could be damaged by the broad definition of gross proceeds or do you think that is not a problem?

Mr. CASSELLA. I do not think so because we cannot forfeit the third party's interest. To the extent that property belongs both to the defendant and to the third party, the defendant forfeits his interest, the third party does not.

Now, query, whether a third party could ever have a legitimate interest in what we define as criminal proceeds. We have had cases where the defendant sells methamphetamine in California, makes \$1 million, and then his wife comes in and says, "I live in a community property state. I have an interest in one-half of the money my husband made selling methamphetamine."

Happily the courts have rejected that claim on the ground that no one acquires a property interest under California law in criminal proceeds.

Mr. MCCOLLUM. Do you think that the definitions of proceeds that are in this bill would cover both instrumentalities used to commit a fraud as well as the ill-gotten gains?

Mr. CASSELLA. No, only the ill-gotten gains are covered by this legislation. You would need a separate provision authorizing the forfeiture of "property used to facilitate, property involved in" or language to that effect, or as in the RICO statute "property acquired, or maintained, or affording a source of influence." Those are the phrases which are understood to mean facilitating property.

Mr. MCCOLLUM. Do you think that we should do that with respect to fraud cases?

Mr. CASSELLA. I would like to see someday an opportunity to have broader forfeiture in fraud cases than just the proceeds. I appreciate the issues that are raised in that context. There is certainly an Eighth Amendment issue, an excessive fines issue, when

you talk about facilitating property that would have to be addressed.

I certainly would like to see it. I am happy to go one step at a time and make sure we can at least forfeit the proceeds and then move on, if we get that far, to what property we may forfeit in the category of facilitating property.

Mr. MCCOLLUM. Ms. Blanton, I am going to conclude the panel, but you ought to have a chance at least to answer. Mr. Barr raised the question of ATF, really, in firearms transactions. Do you have any comments that you want to make about the proceeds question or about the issues that were raised here by the last few questions we peppered Mr. Cassella with?

Ms. BLANTON. I think Mr. Cassella answered remarkably well, and I would just ask my counsel on the firearms issue if he has anything—to add.

Mr. MCCOLLUM. Could you introduce your counsel?

Ms. BLANTON. Yes.

Mr. MCCOLLUM. He has been sitting there so quietly today and we did not introduce him.

Ms. BLANTON. He is kind of a quiet guy. This is Bill Bradley. He is part of the General Counsel Office at the Department of the Treasury, and he is assigned to my office as counsel for forfeiture issues.

Mr. MCCOLLUM. We are happy to have Mr. Bradley here. If you would like to comment on the firearms question Mr. Barr raised, please do.

Mr. BRADLEY. Thank you. Just briefly, the firearms question is kind of an anathema. Because Congress has—with respect to firearms, provided limited forfeiture authority. The only firearms we would probably be able to forfeit in that instance would be the ones that were actually involved, that were illegally sold, that violated Title II or Title I. The proceeds would be different than the firearms, but we would not be able, probably except administratively for ATF. If the Federal firearms licensee had somehow violated the law—we would be able to restrain perhaps or take some administrative action vis-a-vis their license to continue to transact in firearms, but we would not be able to forfeit the entire store or restrain the business as long as it was operating legitimately. We would only be able to forfeit the firearms that were actually involved in the crime.

Mr. MCCOLLUM. Just for clarification, administrative forfeiture is civil?

Mr. BRADLEY. Administrative forfeiture is civil but, excuse me, Mr. Chairman, I did not mean to indicate that we would administratively forfeit that business. We would take some administrative action, perhaps, if the Federal firearms licensee had done something to violate their license requirements. We would take some administrative action to revoke their license or impose some penalty.

Mr. MCCOLLUM. Right.

Mr. BRADLEY. But not administratively forfeit the business based on the violation of one owner.

Mr. MCCOLLUM. I think you have clarified it. Mr. Barr, do you want to follow up?

Mr. BARR. If I could, Mr. Chairman. I am still a little concerned, Mr. Bradley, with looking at, just for example, the definition on pages 27 and 28, the definition of "proceeds."

Are you saying that in the hypothetical where you have a legitimate firearms business, a person sells firearms and ammunition, generally speaking above board. There are investors that have invested in that business. You have one of those persons who engages in a, let us say, a pattern of, not all the time but over a period of time, every 10th sale or whatnot they fudge on the ATF records or whatnot, and they do this over an extended period of time, for example.

Are you saying that notwithstanding the language here defining the proceeds very, very broadly, which would seem to encompass all the proceeds of that business, that the government would not proceed against any of the assets other than those that are directly traceable to the offending transactions themselves?

Mr. BRADLEY. Yes, as I read the statute it would apply to the proceeds derived from the sale, those 10, every 10th sale that was, in fact, an illegal sale. That would not necessarily be all the assets of that business. If we could quantify that, that is what we would seek or that amount is what the US Attorney would seek to restrain and make available for forfeiture.

It clearly would not reach the entire business if every 10th sale of one individual involved in the business were, in fact, forfeitable. So I do not think that we would seek to restrain the entire business even with this definition, as broad as it is, under those circumstances.

Mr. BARR. And would the government entertain an amendment to clarify this in that event?

Mr. BRADLEY. With respect to corporate interest and business interest?

Mr. BARR. Well, whatever interest. That was just one hypothetical.

Mr. BRADLEY. To the extent that it could be clarified, I think that it would. I would have to confer with my colleague, Mr. Cassella, and the other law enforcement bureaus to get a full understanding of it, but I think if it can be clarified I do not see why we would not seek to do that.

Mr. BARR. Okay, thank you.

Mr. MCCOLLUM. Thank you, Mr. Barr. I want to thank the panel for coming. It was very enlightening. Hopefully we can proceed to pass a bill that will help to remedy some of the problems you have discussed with us today. Thank you again for coming.

Mr. CASSELLA. Thank you, Mr. Chairman.

Mr. MCCOLLUM. Our second panel today consists of only one witness, but he has got a burden to carry here because we have used his comments rather liberally in questioning the first panel.

Mr. E.E. (Bo) Edwards is here on behalf of the National Association of Criminal Defense Lawyers. Mr. Edwards currently serves as a parliamentarian in NACDL and has long served as Co-Chair of its Forfeiture Abuse Task Force. He is currently Senior Partner to the litigation firm of E.E. Edwards and Associates, and is also a member of the Tennessee Supreme Court's Commission on Rules of Criminal Procedure. We thank you for coming this distance to be

with us today. Your testimony, Mr. Edwards, will be admitted into the record.

Without objection? Hearing none it will be entered en toto, including the accompanying documents that you sent to us. You may proceed to summarize your testimony as you see fit.

**STATEMENT OF E.E. (BO) EDWARDS, SENIOR PARTNER, E.E. EDWARDS AND ASSOCIATES, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS**

Mr. EDWARDS. Mr. Chairman, thank you very much. I appreciate the opportunity to be here today. It may be just a few moments too late, but with the Chair's leave, I would like to do this anyway.

Stef Cassella and I have known each other for several years, and I respect him and like him very much. We appeared at a seminar on forfeiture at Notre Dame Law School a year or two ago, and I introduced his son who was in the audience, and I wish to introduce his daughter, Megan Cassella, this morning, but I am afraid that she left with her dad, but maybe not. If she is here—

Mr. MCCOLLUM. Mr. Cassella is here. I do not know whether she is or not.

Mr. EDWARDS. Well, good.

Unidentified Speaker. He is still here.

Mr. MCCOLLUM. She is still here. I see her back there.

Mr. EDWARDS. It was my great pleasure to meet Megan.

Mr. MCCOLLUM. I see her hiding back there; we appreciate your being here, young lady. That is pretty neat that you can have your child come with you Stef. We appreciate that.

Mr. EDWARDS. Mr. Cassella and I have some rather fundamental differences on the subject of forfeiture, but that does not keep me from having very high regard for him. Today, however, I have some serious problems because I was almost stunned to hear the spin, apparently, the Justice Department seems to be giving this draft legislation, that it will clear up a patchwork or a hodgepodge of forfeiture provisions scattered throughout the United States Code. I do not think that. While it may undertake in some part to do that, I believe that, in fact, this bill is something far more onerous.

I would suggest that this bill is nothing less than a direct frontal assault on two of the most basic and cherished institutions in our country, the private right of ownership and the right to a jury trial. Perhaps the most alarming aspect of all of this is that it is the Justice Department that is trying to tear down as basic and fundamental American a concept of American justice as the right to a jury trial.

Earlier this year, in June, I witnessed and was honored to testify before the Full Committee at the hearing of the bipartisan bill, H.R. 1835 sponsored originally by Chairman Hyde and Mr. Conyers, and now co-sponsored by several dozen other members of the House, which would provide much needed, long overdue reform of civil forfeiture provisions and procedures, which is still very badly needed. But now I hear that, at least from my perspective, the Justice Department just does not *get it*.

It seems to me that throughout Congress there is a broad recognition that there needs to be reform enacted in the area of civil

forfeiture because of abuses that have been recognized and are still ongoing from coast to coast.

Forfeiture is almost like a narcotic to law enforcement agencies. Once they get a little money through forfeiture, they want more money, and once they have some authority to forfeit property, they want more authority to forfeit property. And I do not suggest that some forfeiture is not completely justified. The problem is the playing field of civil forfeiture and criminal forfeiture is anything but level. It is skewed in favor of the government so it is easy for the government to forfeit property, and it is very difficult for any but the most affluent citizens to fight the government when it seizes property.

But apparently even though there is broad bipartisan support within the Congress and outside the Congress for forfeiture reform, the Justice Department just does not get it; and they bring today a very poorly conceived bill that is an extraordinarily broad attack on these two basic institutions of our country. Somehow the DOJ seems to be blind to the abuses that are going on and that this Committee has recognized in numerous hearings, but I am confident that members of this Committee can see these abuses and recognize the need for change.

This bill is really asking this Committee to change over two centuries of American tradition, to change rights of jury trial that were, in fact, a fundamental cause of the American Revolution. And I would like to share a brief historical anecdote because it is so important that we not be ignorant of how we got where we are today as the freest and greatest country in the world.

There was a New England merchant and smuggler in the 18th century who had several run-ins with the officers of King George. He had had his sloop, which was named the Liberty, seized and forfeited because he did not pay some of the charges in the Navigation Acts. In 1764, I believe it was, the English Parliament made a basic amendment change in the Navigation Acts, the British law through which all commerce in and out of Britain and British colonies was controlled. This change provided that British citizens in Great Britain who had property that was allegedly used in violation of the Navigation Act and subject to forfeiture would have a jury trial as they had traditionally had for centuries in Great Britain.

The trial occurred before a jury in the court of exchequer if it occurred in Great Britain, but under this amendment to the Navigation Act, *in the colonies* property owners would no longer receive jury trials in forfeiture cases. Apparently the crown felt that it had had some trouble with colonial juries in trying to forfeit the property of American colonials, so it provided that in the future, after this amendment, trials in the colonies of alleged violations of the Navigation Act would occur before vice admiralty courts without a jury.

Well, this particular New England merchant again ran afoul of King George and he hired a lawyer in Boston named Adams, who began to rail publicly and in court against the deprivation of jury trial of American colonials, and his writings were published all over the colonies and made a very deep impression on colonial Americans.

Well, it just turns out that a few years later in 1776 this same merchant-smuggler, whose name was John Hancock, turned out to be the President of the Constitutional Convention, and his signature adorns the Declaration of Independence. And Mr. Jefferson, when he drafted that declaration, in its middle portion where it recited grievances against the crown, it mentions deprivation of our citizens of the right to jury trial in many cases. He was talking about what happened because of the amendments Parliament imposed on colonists in the Navigation Act, and it so happened that his lawyer, Mr. Adams, turned out to be the second President of the United States.

So I tell that story to emphasize just how deep in American history the reverence that we have paid to the right of citizens to a jury trial before the government can take their privately-owned property away from them. And this bill is an enormous expansion of forfeiture procedure, would just simply do away with that. No longer in civil, or in criminal, or as I read it in civil forfeiture, would a citizen have a right to a jury trial.

How do I derive that? Because there is a provision in this bill that says in any law of the United States where there is an alleged violation of the laws—and there is a provision for forfeiture—the government can add a forfeiture count to an indictment, and by doing so the procedures for criminal forfeiture trump any other applicable procedures.

So if you have an area of the law that proves for civil forfeiture, where citizens still under the Seventh Amendment have a right to a jury trial, under this provision that is trumped if a US Attorney decides to add a forfeiture count in the indictment; and once they do, under these proposals, that citizen would not have the right to have a jury decide whether the government could take his or her property away from them. And it would be part of a sentencing procedure, under which, as Mr. Cassella acknowledged, the rules of evidence would go out the window, the amount of protection that is afforded the accused, relative to the protections before a real jury trial, are extraordinarily reduced.

So I think it is very clear what the Justice Department is trying to do here. They are trying to make it very, very easy for them to forfeit vast amounts of property.

The bill attacks basic notions of the right of ownership of private property. There is an enormous expansion of the right of the government to seize property and hold it for “safekeeping,” if you will, before anyone is convicted of any crime. And I refer to the provisions that allow pre-trial restraint of, not only assets that the government claims are tainted because they are the instrumentality of crime or because it is “involved in crime”—one of the terms that is used in some forfeiture statutes. The government could go in—and let me give you a typical example of how this could work and how it would work, from my experience how US Attorneys offices would use these provisions.

And I say parenthetically it is an enormous, an enormous power on the part of the government to seize the property of an individual before that individual has a trial in which he is accused of committing a crime. If the government weakens the accused economically,

and then charges him, and then places him on trial, his ability to defend himself against those charges is enormously reduced.

So here is what could and would happen under this bill:

Let us say a person is a small-time drug dealer who is arrested. The government, DEA agent, for example, goes to talk to him, and says, "Man, you are in deep trouble. You are going away for a long time. You had better help us. If you help us, we will help you," knowing that he had just been caught with, let us say, half a kilo of cocaine, and he knows that they have got a locked case and he is in bad trouble. He says, "Okay, I will help you."

They say, "Do you know anything about John Jones," the person, a businessman, let us say, in this hypothetical who has assets and who has savings. Let us say that the drug dealer knows nothing about John Jones, and the government simply suspects that John Jones may be doing some financing of drug dealing on the side. But this new arrestee is not stupid, and he knows the only way he can get out or get help with the charge of which he is guilty is to say, "Yeah, I know him." Whether he does or not, he is going to say "yeah, I know him."

The government says, "Well, we hear he is moving 10 kilos a month. Is there any truth to that?" The guy says, "Probably is."

Well, under this bill, based on as sketchy information as the scenario I have just given, the government could go into a judge, into the judge's chambers, *ex parte*, in a secret opportunity or a secret interview, and present information to the judge that the government has an "informer," and on the basis of information received from this informer, it believes that John Jones is not only a drug dealer but is moving hundreds of thousands, or even millions, of dollars of drugs, and they need—on the basis of the substitute assets, the brand new provisions of this statute—they want to seize pre-trial \$1 million worth of this accused's assets.

So they go out and seize his business, and seize his life savings, and then they indict him. It is true that if they have seized everything he owns, and only if they have seized everything he owns under this bill, he would be entitled to an adversary hearing to see if he could get some of the assets relieved or released so he could hire a lawyer, but it is also true under this bill the government could cross examine the accused in that hearing on the threshold issue of whether he could prove that he does not have any other assets the government has not taken yet.

I mean, I do not want to belabor this, but I hope you can understand the enormous advantage the government has when, by using *ex parte* secret proceedings, the government can get orders, restraining orders, from a Federal judge to seize enormous amounts of private assets, even assets that the government has no contention whatsoever were used in criminal activity. The consequences are just incredible.

It would appear that this bill would also expand the ATF's ability to use forfeiture to seize not just firearms, but conceivably vehicles, businesses, homes, farms, etcetera, on an allegation that they were "involved in" some illegal activity. And what the representatives from Treasury just said—"Well, we would not just do that"—defies what *has* happened.

In the *Shirk* case in the middle district of Pennsylvania, the government tried to forfeit a \$10 million wholesale firearm business—which I believe was one of, if not the, largest wholesale firearms business in the country—on the theory that there had been currency law violations. Under using the currency civil forfeiture statute, 981, they tried to forfeit the entire business.

I testified before the Full Committee in June, on H.R. 1835, about a country doctor in Alabama whose entire life savings of almost \$3 million had been seized by the government because the doctor put \$300,000 in cash that he had hoarded over 20 years of medical practice into a bank, and his local bank president, who knew this doctor well and knew he was obsessive about privacy, did not file a currency transaction report. And they seized not just the \$300,000, but his entire 2.5 million account.

So the thrust of this bill gives the government the power to seize enormous amounts of property—which, understand, the government cannot now seize—by using a new substitute assets theory to seize property pre-trial in civil forfeiture cases, as well as in criminal cases. There are circuit court opinions including *US v. Riley* from the Eighth Circuit that have held even though the statute does not provide for it, the courts have held that due process requires an adversary hearing, and at which the accused has the right to confront witnesses and cross examine them before a criminal court can issue restraining orders to seize property prior to trial.

In the 48 hours I've had to review this draft bill, I cannot even spot all the enormous expansions of government power to take property from private citizens before they have convicted those citizens of a crime. I have just mentioned a couple today.

So, in summary, by changing over two centuries of American history and not allowing citizens to have a jury to determine that property should be forfeited to the government, by writing a bill that sort of goes in the back door so the government can turn any civil forfeiture where there is now a right to a jury trial under the Seventh Amendment into a "criminal" forfeiture case where there is not one under the provisions of this bill—I mean, it just boggles the mind.

What I would propose, Mr. Chairman, is that this Committee and the Full Committee return to Chairman Hyde and Mr. Conyers' very carefully thought-out and well-drafted 1835; pass it out; level the playing field in civil forfeiture. And then I pledge to the Chairman that NACDL, and the ABA, and the bar at large, will be very happy to work with this Committee, and the Full Committee, and with Mr. Cassella in Justice, to try to work out reforms in the area of criminal forfeiture that are also needed. But this is not a reform bill. This is a draconian measure that destroys American principles.

[The prepared statement of Mr. Edwards follows:]

PREPARED STATEMENT OF E.E. (BO) EDWARDS, SENIOR PARTNER, E.E. EDWARDS AND ASSOCIATES, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS



**Formal Written Statement on Criminal Forfeiture**

**By E.E. Edwards**

**Parliamentarian and Co-Chair, Forfeiture Abuse Task Force  
National Association of Criminal Defense Lawyers (NACDL)**

**Hearing Before the Judiciary Committee,  
U.S. House of Representatives, Subcommittee on Crime; September 18, 1997**

**I. Introduction:  
Current Criminal Forfeiture Laws are Too Abusive and in Need of Reform;  
DOJ's Draft "Criminal Asset Forfeiture Act of 1997" is the Most Radical, Lop-  
Sided *Expansion* of Government Power to Seize and Forfeit Private Property  
Yet Seen**

Although the federal criminal forfeiture statutes have not been significantly expanded in substance since 1986, the scope of application for these statutes has been greatly expanded, in a piece-meal fashion, since then. But the defense bar and other forfeiture reformers have never been heard with regard to the deficiencies in the criminal forfeiture statutes. Each year, or every other year, the Justice Department has relentlessly sought expansions in the scope of the criminal forfeiture laws with little scrutiny from other interested organizations or Congress.

The Justice Department's draft Criminal Asset Forfeiture Act of 1997 is the most radical and lop-sided request for expansion of the government's power to seize and forfeit property yet seen. The government's civil and criminal forfeiture powers are already too abusive. Congress should reform both the civil and criminal forfeiture statutes in a uniform manner. It should rein in, not expand, governmental abuses under these laws. The last thing Congress should be doing is broadening the government's forfeiture powers in either the civil or the criminal context, especially not in the dangerous ways urged by DOJ.

We respectfully urge the Subcommittee to convene additional hearings to examine the many ways in which the government abuses its current powers before it considers any new legislation that would lead to an expansion of those abuses, like the Department's

proposals would do. Indeed, the Subcommittee should reject the Department's draft outright.

## **II. Criminal Forfeiture -- Even More Dangerous to Innocent Property Owners Than Civil Forfeiture**

For many months, DOJ has been waging a campaign for drastic new forfeiture powers through the relatively obscure U.S. Judicial Conference Rules Committee process. DOJ has lobbied the Rules Committee hard to eliminate the historical right to a jury trial on forfeiture issues in criminal cases. Until recently, the Department was satisfied with this "behind the scenes" lobbying campaign. Now, however, DOJ comes to this Subcommittee with a proposal for an end-run around the Judiciary's rule-making process. The Department urges the Subcommittee to hastily gut Federal Rule of Criminal Procedure 31 (e) and the important historical right to a jury trial for which the Founding Fathers fought a revolution. See Oral Testimony Before the Subcommittee of NACDL Parliamentarian and Forfeiture Abuse Task Force Co-Chair E.E. Edwards. The Subcommittee should reject this proposal.

It is especially important to remember that the criminal forfeiture laws are in many respects even more troubling than are the "civil" forfeiture laws. These criminal forfeiture laws, like the civil laws, need to be *reformed -- not expanded*.

For example, criminal forfeiture statutes currently provide that a third-party claimant has no right to a jury trial -- a circumstance of very questionable constitutionality. This is wrong and should be changed. Likewise, criminal forfeiture statutes place the burden of proof on the innocent third-party claimants. Third-party claimants are barred from asserting any interest at all in seized

property until the criminal proceeding against the defendant is completed. This can and often does take years, especially in complex "white collar" cases. There is a large body of case law chronicling the claims of innocent third-parties whose property has been wrongfully restrained or seized under criminal forfeiture laws.

DOJ's draft "Criminal Asset Forfeiture Act of 1997", like the predominantly criminal forfeiture H.R. 1965 (which DOJ also drafted), does nothing to make the currently unfair procedures in criminal forfeiture more just. Rather, the Department's proposed legislation simply grants the government greatly expanded criminal forfeiture powers, including the draconian new power to restrain "substitute assets" *prior to trial*.

### III. Current Criminal Forfeiture Laws Must Be Reformed

We propose that Congress reform the criminal forfeiture laws in the following ways:

- > *Reform the current substantive over-breadth in the scope of the criminal forfeiture statutes.*
- > *Strengthen the protections for innocent third party property owners and other third-party stakeholders.*
- > *Reform procedures that protect the person or business accused, as well as innocent third-party property owners and other stakeholders.*

Specific discussion of these necessary reforms follows.

#### IV. Specific Reforms Needed in Current Criminal Forfeiture Law

##### A. *Congress Must Reform the Current Substantive Over-Breadth in the Scope of the Criminal Forfeiture Statutes*

##### ➤ *Congress Needs to Fairly and Uniformly Define "Proceeds" Forfeiture*

Congress needs to define the term "proceeds." It should be defined as "gross receipts" where illegitimate good or services such as drugs or arson for hire are involved. But otherwise, the term proceeds should be defined as net proceeds after the cost of the goods or services provided are deducted.

The proposal by the Department is wholly unacceptable, as it *exacerbates* the problem in this area. For example, in H.R. 1965 (Page 23, lines 6-20), it has drafted a radical expansion of the current definitions of "proceeds" in forfeiture law, so as to encompass all "gross receipts" of legitimate businesses, allegedly obtained from almost every felony in Title 18 of the federal code. This simply encourages unfair seizures by federal agencies that in many instances will destroy or force into bankruptcy legitimate businesses. For this reason alone, H.R. 1965 is highly objectionable and should not be supported. This provision should be deleted in its entirety, and replaced with a more reasonable, and more truly uniform definition of proceeds.

The government desires a new, broad "gross receipts" definition of "proceeds." In non-money laundering cases, DOJ would provide only the most meager exemption, allowing legitimate business persons to deduct the cost of the goods or services provided from the gross receipts subject to forfeiture *only if it involves an "over-billing scheme."* See H.R.

1965, discussed in NACDL's Letter to Chairman Hyde, July 28, 1997 (attached).

By defining "proceeds" in the broadest terms, the Department would turn "proceeds forfeiture" into an instrument of draconian punishment, rather than the remedial provision it is *supposed* to be. If given such a provision as that it has already exacted in H.R. 1965, the government will argue to the courts that, unless an "over-billing scheme" is involved, the narrow allowance for the costs of the goods and services provided does not apply. *Very few fraud or other white collar cases involve "over-billing." Instead, they involve all manner of different circumstances, which should be treated the same.*

Congress should amend the definition of "proceeds" in the money laundering statute, so it is the same as the definition in all other forfeiture statutes. Otherwise, the government will continue to overuse and abuse the over-broad money laundering statute. The government automatically appends it to all charges in just about every case it brings. It does so simply to "reap the bounty" allowed under the current over-broad definition of "proceeds" in that statute, and to obtain unfairly enhanced sentencing guidelines.

We agree with the government that the deduction for reasonable costs should only be available for *legitimate* goods and services. So, drugs and other inherently illegal enterprises, like gambling, for example, would not even be considered for the deduction. We do not object to this requirement that such a deduction only be available for legitimate businesses.

However, the effect of the government's over-broad "gross receipts" definition is simply to ensure over-reaching by the government, and the sure-fire wipe out, at the whim of the prosecutor, of all sorts of *legitimate businesses* -- family businesses, small partnerships, and complex corporations alike -- upon which so many in the community depend.

The courts are *already* greatly troubled by the government's *current courtroom advocacy efforts* to construe some proceeds forfeiture statutes as allowing forfeiture of the "gross receipts" of an offense, without any allowance for the cost of legitimate goods and services provided by the offender otherwise engaged in a legitimate enterprise. Courts have routinely rebuffed these arguments because they rightly consider the results sought by the government to be "absurd." See e.g., *United States v. Riley*, 78 F.3d 367, 371 (8<sup>th</sup> Cir. 1996) (court of appeals dismisses as "absurd" government contention that \$28 million -- the gross receipts of insurance companies comprising a RICO enterprise -- was subject to forfeiture; court observed that such an extreme forfeiture would prevent the insurance companies from paying the claims of their policy holders); *United States v. 122,942 Shares of Stock*, 847 F. Supp. 105 (N.D. Ill. 1994) (rejecting government's attempt to define money laundering proceeds as gross receipts under 18 USC 981 (a)(1)(C)).

In short, the results that would occur in innumerable cases if proceeds are so broadly defined as DOJ desires, and as now in their bill, H.R. 1965, would be horrific. It is well-recognized by the courts that the government is already abusing even the *limited authority*

it *now* possesses to forfeit the proceeds of "white collar" type offenses.

For example, in embezzlement cases, where a defendant has returned the property embezzled prior to the time the embezzlement is discovered, the government has nonetheless sought forfeiture of the entire amount of the property or monies embezzled. This results in wiping out the legitimate businessperson defendant, who, of course, no longer has the wherewithal to pay back the amount embezzled since he has already returned the money to the entity from which it was taken. Indeed, this so troubled the conservative U.S. Court of Appeals for the Fourth Circuit that the panel reversed defendant William Aramony's money laundering conviction in order to knock out the unfair "proceeds" forfeiture. At oral argument, the panel made it clear that this is what it was doing. *U.S. v. Aramony*, 88 F.3rd 1369 (4<sup>th</sup> Cir. 1996).

In other circumstances, this provision could destroy entire legitimate businesses. A defendant property-owner should not be wiped out by the forfeiture simply because he has in some technical way committed a fraud or has supplied widgets that are not precisely up to Department of Defense "mil spec" standards.

*What Congress should do is reform the currently abused definition of proceeds under the money laundering statutes, and rein in the government. The last thing it should be doing is expanding the government's powers to abuse legitimate businesses and innocent Americans through unrealistic and unfairly broad definitions of proceeds.*

*More specific, the following fair and uniform definition of "proceeds" should be enacted:*

"(2) For purposes of paragraph (1), the term 'proceeds' is defined as follows.

"(A) In cases involving illegal products such as controlled substances, illegal services, such as odometer tampering or unlawful activities such as espionage or arson, or healthcare fraud involving the provision of unnecessary services, the term 'proceeds' means property of any kind obtained directly or indirectly, as the result of the commission of the offense giving rise to forfeiture, and any property traceable thereto, and is not limited to the net gain or profit realized from the offense.

"(B) In cases involving essentially lawful products or lawful services that are sold or provided in an illegal manner, the term 'proceeds' means the amount of money acquired through the illegal transactions resulting in the forfeiture less the direct costs incurred in providing the products or services. The defendant shall have the burden of going forward with the evidence concerning direct costs. Once the defendant does so, the government shall bear the ultimate burden of proving the amount of the proceeds subject to forfeiture."<sup>1</sup>

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<sup>1</sup> This definition of proceeds avoids confusing conflict in the law threatened by the government's unreasonable proffered definition. See e.g., DOJ's desired definition, which it already insisted upon as part of a supposed global settlement with the full committee on the entire subject of forfeiture, in H.R. 1965, page 23-24, lines 6-20, and lines 7-8, respectively.

➤ ***Congress Must Clearly Forbid the Pre-Trial Restraint by the Government of "Substitute Assets" and Clearly Narrow the Scope "Substitute Assets" Forfeiture***

The concept of forfeiting "substitute assets" *at all* (post-trial) has always been a dubious one. It first entered the law as a limited concept in 1986. But even under the original, narrowly-intended conception, it has been abused by the government ever since. Reasonable restrictions must always be placed on any forfeiture of "substitute assets." Without such restrictions, any substitute assets provision grants the government an outrageous power to arbitrarily restrain all of the property on an accused, on the theory that

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Our suggested amendment *tracks*, rather than *conflicts* with the established case law under the money laundering and RICO statutes. *E.g.*, United States v. Riley, 78 F.3d 367, 371 (8th Cir. 1996) (characterizing as "absurd" government's contention that \$28 million, representing the gross receipts of the insurance companies constituting the RICO enterprise during the course of the alleged conspiracy, was subject to forfeiture; court observes that an insurer's gross receipts would include amounts needed to pay policy holder claims); United States v. Lizza Industries, 775 F.2d 492, 498-99 (2d Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986) (in bid-rigging conspiracy, "proceeds" subject to forfeiture should be amount of money acquired through illegal contracts less the direct costs from the contracts, such as the cost of cement used on a particular project; however, the prorated cost of a cement mixer, which might be used on other projects, could not be deducted); United States v. Masters, 924 F.2d 1362, 1369-70 (7th Cir.), *cert. denied*, 111 S.Ct. 2019 (1991) ("the proceeds to which the statute refers are net, not gross, revenues-profits, not sales, for only the former are gains."); United States v. Elliott, 727 F. Supp. 1126 (N.D.Ill. 1989) (in case involving lawyer convicted of misusing confidential client information for his personal benefit in nine sets of securities transactions, government conceded that the purchase price of the stock defendant bought had to be deducted from the sale price to calculate defendant's proceeds from the scheme); United States v. 122,942 Shares of Common Stock, 847 F. Supp. 105 (N.D.Ill. 1994) (the term proceeds in 18 U.S.C. §981(a)(1)(C) encompasses only the profit from a fraudulent stock transaction, not all of the property acquired as a result of the transaction; claimants were entitled to the return of their direct costs in purchasing the stock).

all of the property *might constitute substitute assets which may be subject to forfeiture.*

"Substitute assets" forfeiture should actually be available only where the defendant or his privies take some deliberate action to make the tainted assets unavailable -- such as transferring them abroad or hiding them. Congress needs to clarify by amendment that merely *spending* tainted money, without the intent to avoid forfeiture, is not enough to empower federal prosecutors to invoke the drastic, "seize it all," substitute assets remedy in 18 U.S.C. §1963(m) and 21 U.S.C. §853(p).

While the present scope of the current substitute assets provisions is unclear, the government and courts have assumed that the substitute asset provisions apply whenever and for whatever reason the original tainted assets are no longer available for forfeiture. At a minimum, the substitute assets remedy should not be available with respect to *facilitating* property unless the defendant or his privies take deliberate action to make the tainted property unavailable for forfeiture. It is arbitrary enough that a car used to drive to the scene of a conspiratorial meeting is subject to forfeiture. If the defendant thereafter sells or wrecks the car without the intent to avoid forfeiture, the government should not be able to forfeit his home as substitute property.

Even worse, the government has been trying to secure for itself a horrific new power to seize substitute assets *pre-trial*. Such power would allow the government to destroy the ability of the citizen accused to use his own assets to obtain counsel and pay for the expense of his defense and to support his family, before there is even any adjudication of guilt. The

government says it needs this new authority in all criminal forfeiture cases. *Don't buy it.* Widespread government abuse under current, post-trial "substitute assets" provisions shows that such a radical expansion of power to economically cripple the defendant at the very outset of his battle with the government will be greatly abused.

***> Congress Must Limit the Scope of the "Facilitation" Doctrines Under Current Forfeiture Statutes***

Objective observers agree that the biggest problem with the scope of both civil and criminal forfeiture is the failure of Congress or the courts to limit the scope of facilitation forfeitures. This is, for example, the view embraced by House Judiciary Committee Chairman Henry J. Hyde in his book, Forfeiting Our Property Rights, at 61 (CATO 1995).

*The scope of all facilitation forfeitures should be limited by requiring a "substantial and significant connection between the crime and the property to be forfeited." Moreover, the judge should have discretion to deny forfeiture of facilitating property if, taking into consideration the nature of the property and its use in the crime, forfeiture would be disproportionate.*

Congress limited the availability of facilitation forfeitures in exactly this manner in the Economic Espionage Act of 1996, 18 U.S.C. §§1831-1839, effective October 11, 1996. Congress should also clarify that an entire legitimate business cannot be forfeited as "facilitating property" unless it is pervaded by criminal activity.

For example, the money laundering forfeiture statutes, 18 U.S.C. §§981 and 982, use "property involved in" language as a substitute for the facilitation concept. And the courts

have given the "property involved in" language an even broader construction than the congressional language calls for. This has created severe problems. It has, for instance, resulted in the forfeitures and threatened forfeitures of entire legitimate businesses, where *any* dirty money can be shown to have been deposited in a bank account owned by the business.

An example of how the government abuses the current "property involved in" language of the money laundering statutes is found in United States v. Shirk, Crim. No. 1-CR-90-294 (M.D. Pa.). In Shirk, the government sought forfeiture of businessman Ron Shirk's Shooter Supplies, Inc., a legitimate gun business valued at \$10 million. Its theory was that, under the money laundering statutes, all "property involved in" an offense is subject to forfeiture, and all of Mr. Shirk's business was "involved in" the alleged offense of defrauding the IRS.

While the defendant was allegedly defrauding the IRS, the government invoked the over-broad money laundering statutes against him. Why? Under the government's theory, the "property involved in" language would allow the government to forfeit the entire business. The government could not have forfeited anything under the more relevant provisions of the Internal Revenue Code. The government shut down Mr. Shirk's business. He only got it back by a settlement effectively extorted by the government.

Congress should rein in the government by eliminating the "property involved in" language from the money laundering statutes, which have wreaked such injustice, and

substitute instead a fair and uniform definition of facilitation, applicable to all forfeiture cases. Again, that definition should read as follows: *The scope of all facilitation forfeitures should be limited by requiring a "substantial and significant connection between the crime and the property to be forfeited."* Moreover, the judge should have discretion to deny forfeiture of facilitating property if, taking into consideration the nature of the property and its use in the crime, forfeiture would be disproportionate.

➤ ***Congress Must Eliminate "Liberal Construction" Clauses From the Forfeiture Statutes***

Liberal construction clauses are improper in criminal statutes. They violate the "rule of lenity." The ancient common-law rule of lenity directs the court to construe ambiguous criminal statutes narrowly, in favor of the citizen accused. It is grounded in fundamental due process principles. As the Supreme Court has said, the rule of lenity "reflects not merely a convenient maxim of statutory construction. Rather, it is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited." Dunn v. United States, 442 U.S. 100, 112 (1979).

The anomalous and unfair presence of these liberal construction clauses in criminal forfeiture statutes has given the courts an excuse to decide every issue of statutory interpretation in favor of the government, instead of following the historical and traditional rule of lenity, which is grounded in basic notions of due process.

The cases are all over the map on the proper view of the Liberal Construction Clauses. Compare Sedima, S.P.L.R. v. Imrex Co., 473 U.S. 479, 491 n.10 (1985) (stating that Liberal Construction Clause of RICO statute should apply only to §1964, the civil, remedial, part of the statute) with United States v. McHan, 101 F.3d 1027, 1042 (4th Cir. 1996) (relying on §853(o) to impose vicarious forfeiture liability on co-conspirators, which Congress never intended); United States v. Rivera, 884 F.2d 544, 546 (11th Cir.), *cert. denied*, 494 U.S. 1018 (1989) (relying on §853(o) for broad construction of facilitation provision of §853(a), court holds that rule of lenity is trumped by Liberal Construction Clause).

➤ ***Congress Needs to Clarify and Limit the Scope of Forfeiture Under the RICO Statute***

The scope of the confusingly worded RICO forfeiture provisions has never been clear. 18 U.S.C. §1963(a)(1) and (2) should be clarified and narrowed in scope. This is a complex subject, too technically extensive to cover here. For the detailed discussion the subject warrants, See 2 David B. Smith, Prosecution and Defense of Forfeiture Cases, ¶13.02[1][c] (1997).

➤ ***Congress Should Bar Vicarious Liability for Proceeds Received by Co-Conspirators***

The courts have held that conspirators are jointly and severally liable for the proceeds received by any other member of the conspiracy. While this is a very harsh doctrine, given the ambiguity of the conspiracy statutes, it may be appropriate where the court is unable to

determine the amount of proceeds received by each member of the conspiracy. *E.g.*, United States v. Caporale, 806 F.2d 1487 (11th Cir. 1986). However, the Fourth Circuit recently held that the same principle applies even when the exact division of the proceeds among the culprits *is* known. United States v. McHan, 101 F.3d 1027, 1043 (4th Cir. 1996). The effect of this decision is to allow the government to wipe out individuals for the sins of others. This wrong interpretation by at least some courts should be corrected by Congress.

**B. *Congress Needs to Strengthen Protections for Innocent Third-Party Property Rights***

➤ ***Congress Must Provide for a Right to Trial by Jury***

The current criminal forfeiture statutes deny an innocent third-party the right to have factual forfeiture issues decided by a jury. See 21 USC 853(n)(2); 18 USC 1963 (1)(2). This needs to be changed.

It should be clear that the Seventh Amendment provides for a right to trial by jury in the ancillary forfeiture hearing. The courts have consistently characterized this proceeding as civil in nature. *See e.g.*, United States v. Douglas, 55 F.3d 384 (11th Cir. 1995) (Congress viewed §853(n) proceeding as a substitute for separate civil litigation between government and third parties).

It is well established that the Seventh Amendment provides for a right to trial by jury in a federal civil forfeiture proceeding. Although this ancillary, third party hearing provision was enacted in 1984, there is, remarkably, no reported case addressing the question of whether the denial of trial by jury is constitutional.

The Seventh Amendment clearly requires trial by jury even in actions unheard of at common law, where they involve rights and remedies in the nature of those traditionally involved in an action at law rather than in an action at equity or admiralty. United States v. Dudley, 739 F.2d 175, 178 (4th Cir. 1984). The third-party, ancillary provision of the criminal forfeiture statutes “serves the same essential function” as a common law *in rem* civil forfeiture action against property. Pernell v. Southall Realty, 416 U.S. 363, 375 (1974). It is a proceeding “in which *legal rights* [are] to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered . . .” *Id.* (emphasis in original). Indeed, in Pernell, the Supreme Court held that an action for the recovery and possession of specific real or personal property is one at law triable to a jury. *Id.* at 370.

Pernell involved a mere landlord-tenant dispute. The interests that are typically at stake in a criminal forfeiture case are much weightier. It is thus particularly imperative to afford a right to trial by jury when the United States government is the plaintiff seeking to take property away from citizens who have never even been accused of wrongdoing, as in these forfeiture cases.

➤ *Congress Needs to Clarify the Scope of Defense for “Bona Fide Purchasers for Value”*

*The law needs to be made explicit, that the term “bona fide purchaser for value” (“BFP”) includes bona fide service providers (“BFSPs”) and bona fide sellers of goods and services (“BFSs”).*

In order to qualify as a *bona fide purchaser* ("BFP") for value under the "innocent owner" defense to forfeiture, you should not have to literally purchase a tangible piece of property from the bad actor. The limited statutory defense for a "bona fide purchaser for value" needs to be clarified to carry out Congress's clear intent: to protect all those who engage in an arms-length transaction, between an innocent third party and a defendant.

The government argues that the defense is extremely narrow and applies only to *purchasers of tangible property, per se*. The Department is threatening to render, and in at least one important case, succeeded in rendering, the current "uniform innocent owner" provision ineffective.

The government argues that Congress has failed to protect *bona fide sellers* of goods, as well as *both bona fide sellers and purchasers of services* -- like merchants, banking institutions, and attorneys. But these business persons and entities, like bona fide purchasers of tangible property *per se*, also unknowingly engage in an arms-length commercial transaction with someone who happens to be using money later found subject to forfeiture. They should receive the same protection. This is an especially important matter for Congress to clarify given that, as the Department and the Administration should well know, it is the *selling* of goods, and especially the buying and selling of *intangible services*, which drives a healthy economy and balance of trade in this day and age.

For example, a merchant or automobile dealer, or a service provider such as a hospital, bank, doctor or attorney, who unknowingly accepts tainted money from some bad actor in exchange for legitimate goods or services *should be protected* under the "BFP" innocent owner provision.

Until recently, all of the courts considering the government's contrary position had given the "BFP for value" provisions in the criminal forfeiture statutes the reasonable interpretation that "BFP" includes *bona fide sellers and service providers* ("BFSs" and "BFSPs"). But there has now emerged an especially troubling judicial development, thanks to the Department's chief bill drafter and negotiator, Stefan Cassella. Mr. Cassella's courtroom advocacy is far different from his assurances to Congress about what the statutory "BFP" term encompasses.

Unlike all other courts, the D.C. Circuit -- in the *BCCI* cases litigated by Mr. Cassella -- has now given the "BFP for value" provision a very narrow, literalistic reading, at Cassella's urging, thus defeating the *bona fide* interests of the innocent service provider. See United States v. BCCI Holdings (Luxembourg), S.A., 961 F. Supp. 287, 295 (D.D.C. 1997) (American Express Bank cannot qualify as "BFP for value" under §1963(l)(6)(B) because that provision protects only "those transactions involving the purchase of tangible property."); United States v. BCCI Holdings (Luxembourg), S.A. (In re Petitions of Trade Creditors), 833 F. Supp. 22, 28 (D.D.C. 1993), *aff'd*, 48 F.3d 551 (D.C. Cir.), *cert. denied*, 116 S.Ct. 563 (1995) (same).

It is now especially important that Congress clarify the "BFP" provision, with language that more specifically and accurately reflects Congress' intent -- to protect a much broader category of innocent parties who unknowingly engages in arms-length transactions with a bad actor, that is, BFSs, and BFSPs for value as well.

- ***Congress Should Ensure That a Third Party Can Defend on the Ground That Property Was Not the Proceeds of a Crime or Facilitating of Crime***

It is unclear from the present language of the criminal forfeiture statutes whether a third party may defend against a forfeiture on the ground that the government has not

demonstrated that the property facilitated or constitutes the “proceeds” of the offense for which the criminal defendant was convicted. Several cases, however, have held that a third party does have the right to defend on this ground since the preliminary order of forfeiture obtained in the criminal trial is not binding on the third party. See e.g., United States v. Douglas, 55 F.3d 584, 586 (11th Cir. 1995); United States v. Reckmeyer, 836 F.2d 200, 206 (4th Cir. 1987).

Douglas illustrates the need to allow third parties to litigate the merits of the criminal forfeiture. The defendant had entered into a plea agreement forfeiting his interest in the properties. Under Eleventh Circuit precedent, the district court was not required to determine whether there was a factual basis for the forfeiture. A secured judgment creditor of Douglas filed a §853(n) petition demonstrating that the properties owned by Douglas were simply not subject to forfeiture. Indeed, the government did not even challenge the creditor’s factual contentions. The government’s position was held to be frivolous, and attorney fees were awarded to the creditor under the EAJA.

The government takes the contrary position – that third-parties do not have a right to litigate the merits of the forfeiture they suffer. This position should be clearly rejected by Congress. The defendant, by whom the government would bind the innocent third-party, does not even necessarily have an interest, let alone the same interest, in the property of concern to the third-party. And yet, as in the Douglas case, the government wants these property stakeholders to be bound by the litigation choices, or plea agreements the

defendants made solely in his own *self-interest*. It is quite obvious defendants will often find that "pleading out" the property interests of another is an attractive way to diminish their own criminal penalty exposure. This corrupts the criminal justice system.

**C. *Congress Should Reform Criminal Forfeiture Procedures to Adequately Protect the Person or Business Accused, as Well as Third-Party Property Owners and Other Third Party Stakeholders***

**➤ *Congress Should Clarify that the Burden of Proof in Criminal Forfeiture Is Beyond a Reasonable Doubt***

Congress needs to clarify that the government must prove property is subject to criminal forfeiture, beyond a reasonable doubt. The legislative history of the Crime Control Act of 1984 makes it clear that this was the congressional intent. But the government and many courts have ignored the legislative history, reasoning that because criminal forfeiture is part of a sentence, the burden of proof should be by preponderance of the evidence. But even if criminal forfeiture is properly conceived of as part of the sentencing process, Congress remains free to establish a higher burden of proof than that which normally governs simple sentencing matters. See United States v. Pehullo, 14 F.3d 881, 902-06 (3rd Cir. 1994) (comprehensive opinion demonstrating that in RICO cases government must prove forfeiture allegations beyond a reasonable doubt); United States v. Elgersma, 929 F.2d 1538 (11th Cir. 1991), *reversed*, 971 F.2d 690 (11th Cir. 1992) (*en banc*); United States v. Dunn, 802 F.2d 646, 647 (2d Cir. 1986), *cert. denied*, 480 U.S. 931 (1987) (government asserts that criminal forfeiture under 21 U.S.C. §853 requires proof beyond a reasonable doubt and court agrees with government); 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 requires proof beyond a reasonable doubt). *But see* United States v. Rogers, 102 F.3d 641, 647-48 (1st Cir. 1996) (although Congress could provide for a more stringent burden of proof it did not do so in §853); United States v. Tanner, 61 F.3d 231 (4th Cir. 1995), *cert. denied*, 116 S.Ct. 925 (1996) (reasoning that if forfeiture is merely part of the sentence, then standard of proof should be by a preponderance).

Congress *should* establish a higher burden of proof in this area than that which normally governs *simple* sentencing matters.

Even if criminal forfeiture is part of the sentencing process, it is unique in many respects that warrant the higher standard. For one thing, a jury must return a verdict of forfeiture before property can be taken by the government. The fact that Congress provides for a jury trial right on the issue of forfeiture demonstrates the sound congressional intent that the burden of proof should be beyond a reasonable doubt. *See* Sullivan v. Louisiana, 113 S.Ct. 2078 (1993). The legislative history of the 1984 Act is clear on this point.

➤ ***Congress Should Ensure Prompt Post-Restraining Order Hearings for Persons and Businesses Accused as Well as Interested Third-Party Owners and Other At-Risk Stakeholders***

The restraining order provisions of the 1984 Act have been declared unconstitutional by most of the circuits. *See e.g.*, U.S. v. Riley, 78 F.3d 367 (8<sup>th</sup> Cir. 1996); U.S. v. Monsanto, 924 F.2d 1186 (2d Cir (en banc)), *cert. denied*, 502 U.S. 943 (1991); U.S. v. Roth, 912 F.2d 1131 (9<sup>th</sup> Cir. 1990). *Cf.* Aronson v. City of Akron, 116 F.3d 804 (6<sup>th</sup> Cir.

1997) (similar Ohio State "RICO" statute).

Congress should provide for a prompt, post-restraining order adversary hearing upon the request of a defendant or third party who asserts an interest in the assets restrained by the government.

At such a hearing, the government must be required to at least show probable cause for its belief that the restrained assets are subject to forfeiture. The defendant or third party should also be able to request that the order restraining assets be lifted on hardship grounds -- such as undue interference with an ongoing business.

Moreover, if *facilitating* property is restrained, there should be an automatic exemption for funds needed to pay counsel in the criminal case and for necessary living expenses. The restraining order hearing provision in H.R. 1965, which was drafted at the last minute by the Justice Department, is blatantly unconstitutional in its denial of due process. See July 28, 1997 Letter to Chairman Hyde, at 11-12 (attached).

➤ *Congress Should Ensure the Right to a Bifurcated Forfeiture Trial*

Most courts have recognized that a defendant's request for a bifurcated criminal forfeiture trial should be granted. See e.g. United States v. Sandini, 816 F.2d 869 (3rd Cir. 1987); United States v. Feldman, 853 F.2d 648 (9th Cir.), *cert. denied*, 489 U.S. 1030 (1988). However, some courts have declined to adopt a rule requiring even partial bifurcation of the proceedings. See e.g., United States v. Perholtz, 842 F.2d 343 (D.C. Cir.), *cert. denied*, 488 U.S. 831 (1988). Because the conduct of a unitary trial is likely to result

in unfair prejudice to an accused, and unduly limit a defendant's opportunity to present evidence showing that particular items of property are not subject to forfeiture, bifurcation should be available whenever the defendant requests it. See Markus, Procedural Implications of Forfeiture Under RICO, the CCE, and the Comprehensive Forfeiture Act of 1984: Reforming the Trial Structure, 59 Temp. L.Q. 1097, 1107-1127 (1986).

➤ ***Congress Should Amend 21 U.S.C. 853(h) and 18 U.S.C. 1963 to Allow for Stays of Execution Pending an Appeal of a Forfeiture Order***

21 U.S.C. §853(h) and 18 U.S.C. §1963 should be amended to allow a defendant to seek a stay of execution pending appeal of the criminal forfeiture order. Inexplicably, the present provisions only allow a *third party* to seek such a stay of execution. Even DOJ agrees that these provisions should be amended to allow the defendant to apply for a stay of forfeiture execution.

➤ ***Congress Should Reinvigorate Rule 7(c)(2) of the Federal Rules of Criminal Procedure***

Congress needs to reinvigorate Rule 7(c)(2), by emphasizing that it indeed means what it says: "No judgment of forfeiture may be entered in a criminal proceeding unless the indictment . . . allege[s] the extent of the interest or property subject to forfeiture." The lower courts have ignored the command of this Rule, holding that if the government gives notice of the specific property or categories of property allegedly subject to forfeiture, in a bill of particulars or even by less formal means, such as pretrial discovery, the Rule is somehow "satisfied." See e.g., 2 David B. Smith, Prosecution and Defense of Forfeiture

Cases, ¶14.01 (1997) (collecting cases).

Now that the Supreme Court has incorrectly stated in Libretti v. United States, 116 S.Ct. 356 (1995), that criminal forfeiture can be regarded as merely “part of the sentence,” and not in the nature of a separate charge in the indictment, there is little or no hope of getting the lower courts or the Supreme Court to correctly interpret Rule 7(c)(2). Congress must act to set this important matter right.

➤ ***Congress Should Amend Federal Rule of Criminal Procedure 11(f)***

Federal Rule of Criminal Procedure 11(f) should be amended, to ensure it is always made applicable by courts to the forfeiture aspect of a plea agreement. Rule 11(f) forbids a court to enter judgment upon a plea of guilty without assuring that there is a “factual basis” for the plea. But in Libretti v. United States, 116 S.Ct. 356 (1995), the Court held that, *by its terms*, Rule 11(f) does not *require* a district court to inquire into the factual basis for a stipulated forfeiture of assets embodied in a plea agreement.

The Court did not dispute Libretti’s concern about the potential for prosecutorial overreaching. It merely held that Rule 11(f) as presently phrased does not address that concern: “We do not mean to suggest that a district court must simply accept a defendant’s agreement to forfeit property, particularly when that agreement is not accompanied by a stipulation of facts supporting forfeiture, or when the trial judge for other reason finds the agreement problematic.” 116 S.Ct. at 365. In this regard, the Court observed that the Department of Justice had recently issued a Revised Policy Regarding Forfeiture By

Settlement and Plea Bargaining in Civil and Criminal Actions, Directive 94-1 (Nov. 1994). This Directive instructs prosecutors that, to ensure a valid forfeiture agreement, the agreement to forfeit property must be in writing "and the defendant must concede facts supporting the forfeiture."

Although that was not done in Libretti, the Court, through a somewhat strained scouring of the record, was able to conclude that the trial judge was satisfied, by the time sentence was imposed, that the facts supported the forfeiture agreed to by Libretti. Therefore, the Court concluded that it did not have to decide "the precise scope of a district court's independent obligation, if any, to inquire into the propriety of a stipulated asset forfeiture embodied in a plea agreement" -- apart from Rule 11(f).

In a cogent dissent, Justice Stevens emphasized:

"[T]he law -- rather than any agreement between the parties -- defines the limits on the district court's authority to forfeit a defendant's property. [Thus,] entirely apart from Rule 11(f), the district court has a legal obligation to determine that there is a factual basis for the judgment entered upon a guilty plea. Such plea agreements must be scrutinized by the courts to guard against the possibility that a wealthy defendant might bargain for a light sentence by voluntarily 'forfeiting' property to which the government had no statutory entitlement. This, of course, is not the law. No matter

what a defendant may be willing to pay for a favorable sentence, the law defines the outer boundaries of a permissible forfeiture.”

116 S.Ct. at 370.

At oral argument, even the Solicitor General explicitly conceded this important point. *Transcript of Oral Argument*, at 32-33. And yet still the majority did not acknowledge what the government itself was willing to concede.

The Arizona Republic said it well in its editorial on the Libretti decision:

The Supreme Court “essentially said that if Congress wants forfeiture agreements reviewed [by the courts], Congress had better rewrite the rule. Congress had better do so.”

*Legal Extortion, The Ariz. Republic*, Nov. 27, 1995, at B6. We agree. We respectfully urge Congress to so rewrite the rule to make this important matter of fundamental fairness explicit.

**V. Specific Provisions of the DOJ Draft Criminal Forfeiture Bill to Which NACDL Does and Does Not Object**

In hopes of assisting the Subcommittee, and the full Committee which already has before it the Department’s predominantly criminal forfeiture bill, H.R. 1965, the following are provisions being requested by DOJ to which we do, and do not object:

**A. *Specific Provisions Requested by DOJ to Which NACDL Does Not Object***

We do not object to consideration of the following provisions in the Department's latest forfeiture expansion bill, as part of a true criminal forfeiture *reforming* bill, which includes the much-needed reforms discussed above.

- **Sec. 102 (Use of Criminal Forfeiture as an Alternative to Civil Forfeiture).**
- **Sec. 105 (Repatriation of Property).**
- **Sec. 107 (Criminal Seizure Warrants).**
- **Sec. 109 (Discovery Procedure of Criminal Forfeiture Judgments).**
- **Sec. 111 (Appeals by Government in Criminal Forfeiture Cases) (however, this should be modified to bar appeals from adverse jury verdict or verdicts of no forfeiture by the judge sitting as the trier of fact).**
- **Sec. 114 (Motion and Discovery Procedures for Ancillary Hearings) (however, this provision should be modified to make discovery a right and to allow summary judgment motions to be made at any time).**
- **Sec. 115 (Intervention by the Defendant in the Ancillary Proceedings).**
- **Sec. 116 (In Personam Judgments).**
- **Sec. 117 (Right of Third Parties to Contest Forfeiture of Substitute Assets).**
- **Sec. 119 (Forfeiture of Third Party Interests in Criminal Cases).**
- **Sec. 120 (Severance of Jointly Held Property).**
- **Sec. 121 (Victim Restitution).**

> Sec. 122 (Delivery of Property to the Marshals Service).

**B. *Specific Provisions Requested by DOJ in its Draft Criminal Forfeiture Expansion Bill to Which NACDL Most Strenuously Does Object***

We most strenuously *do* object to the following provisions in DOJ's latest forfeiture expansion bill. (Page References are to the Draft Bill we received three days before the hearing of September 18.)

> Draft Page 7.

*This DOJ proposal, to abolish the ancient right to trial by jury in criminal forfeiture determinations, is the single worst provision in this draft full of outrageous and dangerous provisions. It should be rejected outright.*

DOJ would have Congress abolish the jury trial right for which the Founding Fathers fought a revolution, and treat forfeiture as a simple "sentencing matter," like a sentencing guideline determination, under a new Rule 32.2. This is an especially outrageous proposal, as I have discussed at length in my oral remarks.

Moreover, the Department's proposed Rule 32.2 makes no sense, insofar as it provides that where no third party files a petition, the defendant's property "is forfeited in its entirety." See Draft Page 8, at line 2. So, what if the defendant only obtained 10% of the property with alleged dirty money? Obviously, the government should only be able to forfeit 10% of the property, regardless of whether a third party files a claim.

Rather than abolishing a defendant's right to trial by jury, that right should in fact be extended by Congress to innocent third parties, as explained above. Indeed, as discussed

above, although the courts have not considered it in any reported jurisprudence, the Seventh Amendment requires jury trial of a third party's claims. In any event, it is certainly what fair policy requires.

> **Draft Pages 9, 11, 12, 13.**

For the reasons discussed above, we object to the government's proposal for new powers of pre-trial seizure or restraint of alleged "substitute assets." Indeed, the government's currently abused, post-trial substitute asset forfeiture powers should be reined in, as discussed above.

In addition, the Department's proposed restraining order hearing provision, at draft page 12, is blatantly unconstitutional. See Monsanto, Riley, Roth, Aronson v. City of Akron, cited above, among other decisions on point. Assets needed to pay attorney fees or necessary living expenses should be exempted in facilitation cases, whether or not substitute assets are involved.

> **Draft Page 14.**

The burden of proof should remain as it is: "evidence beyond a reasonable doubt." Congress should not make the government's forfeiture of the citizenry's private property *easy*. Rather, it should be ensuring its protection against wrongful government takings. Why should someone lose everything he has worked for, based on a mere 51% likelihood that it is forfeitable -- and this, according to the government's wishes, with no jury determination? Do we really want to put Americans' life savings, family farms and

businesses at such an unfair risk? *At the very worst*, the burden of proof should be “clear and convincing evidence.”

➤ **Draft Page 17, lines 22-26.**

This new provision would bar a third party from asserting any interest in “illegal proceeds” except as the most narrowly-construed “bona fide purchaser,” under section 853(n)(6)(B). There is much wrong with this. But for one thing, it is plainly unconstitutional.

Under the government’s proposal, if the third party is the true owner of the alleged “proceeds,” she is to be divested of them without any opportunity to be heard! What if they are not in fact “proceeds”? The government is not infallible.

➤ **Draft Page 19.**

Discovery should not be discretionary. How can parties be divested of their property with no opportunity for discovery? A motion for summary judgment should be permitted prior to discovery, as well as after discovery. A private citizen subjected to the perils of forfeiture should be able to obtain quick, appropriate summary judgment relief against the government, just as litigants can in all sorts of other civil disputes with “lesser” accusers. This is not only fair. This is the only efficient use of scarce federal court resources.

➤ **Draft Page 27.**

The uniform definition of proceeds here is grossly unfair. Indeed, it is even worse than (and inconsistent with) the highly objectionable one already insisted upon by the

Department in H.R. 1965. See NACDL Letter to Chairman Hyde, July 28, 1887 (attached).

Here, DOJ constructs a provision for itself that does not allow a deduction for the cost of legitimate goods sold or services provided under any circumstances, no matter how technical, or regulatory the forfeiture-triggering infraction.

> Draft Page 29.

18 U.S.C. §924(d) would be expanded under the DOJ draft -- to broadly sweep into the scope of forfeiture not only firearms, but *all* property "involved in" a crime of violence or drug trafficking crime in which the firearm was "used" or "carried." This is completely unnecessary, and dangerous. It gives the BATF even more forfeiture authority than other agencies, because the "involved in" language is so broad.

> Draft Page 31.

The government's reach must be curbed in this area. Vehicles used on two or more occasions to transport computers, et cetera, simply should not be forfeitable.

> Draft Page 31.

The draft would expand forfeiture under the National Firearms Act. Why? The expansion seems wholly unnecessary. The language is also too vague and over-broad. What assets are DOJ and BATF trying to reach here? Homes in which guns are kept?

## VI. Conclusion

Mr. Chairman, thank you very much for affording us the opportunity to be heard about this important subject of criminal forfeiture -- specifically, the many ways it needs to

*be reformed to rein in the current arbitrary, abusive government powers so victimizing of innocent property owners.*

The last thing that is needed is for the government to be given still more sweeping criminal forfeiture powers.

Not only should this latest DOJ Draft Bill be rejected. The Committee and Congress should likewise reject H.R. 1965. H.R. 1965, also drafted by the Department, is primarily a criminal forfeiture (expansion) bill. And it is far too badly infected with the same dangerous provisions in this latest DOJ draft bill to be supported.

We hope you will convene additional hearings as soon as possible, on the many ways in which current criminal forfeiture law is in dire need of meaningful reform, to protect the sanctity of the basic American principle of private property ownership.

Meanwhile, H.R. 1835 is a very good, broadly-supported, true civil forfeiture reform bill – *uncontaminated by DOJ's criminal forfeiture expansion wishlist*. It was the subject of very positive hearings at the Full Committee in June. We hope it will be moved to the floor immediately, and independently of the Crime Subcommittee's serious consideration about criminal forfeiture reform.

We look forward to assisting you and the Committee in any way we can to achieve the necessary reforms of both the civil and the criminal forfeiture laws. My fellow co-chairs on the NACDL Forfeiture Abuse Task Force and I stand ready to help; as does our very knowledgeable legislative director in the Washington National office, Ms. Leslie Hagin,

who may be reached at (202) 872-8600 (ext. 226). My fellow Task Force Chairs and I can also be reached through Ms. Hagin at the national office.

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**ATTACHMENT**



We write to explain in detail our objections to H.R. 1965, in terms of both its civil and criminal provisions. We have raised these objections with your counsel, counsel for Mr. Conyers, and counsel for the Department of Justice. We have asked to speak with you personally about them. And we memorialized them all, preliminarily, in our June 17 letter analysis objecting to the "Discussion Draft Document," which was introduced in Committee without change, as H.R. 1965, two days later, June 19, 1997.

We have been advised by General Counsel Tom Mooney that our comments are welcome, and that they will be given careful consideration. In that spirit, we respectfully offer the following refined comments about H.R. 1965, as currently written.

In short, we believe your worthy effort to reform asset forfeiture law was frustrated at the mark-up of H.R. 1835, when a switch was made in favor of a substitute bill tracking the DOJ's demands for new, ever-more expansive forfeiture powers. At that time, several hastily drafted provisions were inserted into the bill at DOJ's behest with no input from NACDL or the many other concerned citizens and organizations long supportive of your reform efforts. While we know your bill is intended to curb forfeiture abuses, if enacted as now written it will in fact *greatly expand the government's unfair forfeiture powers, both in terms of scope and procedures. Instead of curbing them.* H.R. 1965 as written would make forfeiture law more unfair, not less.

As you have been in the vanguard in attempting to bring about meaningful reform, we urge you to make some critically important changes to H.R. 1965, through a Manager's Amendment.

The following are the most seriously flawed provisions of H.R. 1965, and are the ones most in need of correction through a Manager's Amendment:

1. H.R. 1965 contains an ineffective "uniform innocent owner" provision which fails to protect *bona fide* sellers of good and services, like merchants, automobile dealers, banking institutions, doctors and attorneys, who unknowingly engage in an arms-length commercial transaction with someone who happens to be using money later found subject to forfeiture.
2. H.R. 1965 contains an extraordinary provision effectively repealing an individual's existing right to summary judgment against the government for wrongful seizures. It carves out a special rule on summary judgment in favor of the government in forfeiture cases, which is not only unfair to the affected citizen, but anomalous in American law.
3. H.R. 1965 expands current forfeiture law to encompass all "gross receipts" allegedly obtained from almost every felony in Title 18 of the federal code, thereby encouraging unfair seizures by federal agencies that in many instances will destroy or force into bankruptcy legitimate businesses.

4. H.R. 1965 provides for extreme and unprecedented pre-trial, injunctive restraints on entirely untainted property (so-called "substitute assets"), which are not the primary property allegedly subject to forfeiture, without the government ever having to demonstrate that the substitute assets are actually forfeitable and that they are at risk of being concealed, transferred or dissipated. The defendant is afforded no right to a meaningful hearing on the propriety of the restraint, *at any time*.

5. H.R. 1965 contains a provision that would deprive indigent citizens of their new right to appointed counsel without unreasonable interference by the attorneys for the government. This provision requires that an indigent citizen who seeks appointment of counsel must first subject himself to wide-open, uncounseled interrogation by the prosecutor on *not just his financial status*, but even on the merits of the case.

More specifically, by page and line cite, here are the reasons why these provisions in H.R. 1965 must be deleted or changed:

I. Page 7-8, lines 9-25; lines 1-17.

Re: "(d) Appointment of Counsel". (Sec. 2 Creation of General Rules Relating to Civil Forfeiture Procedures)

This provision is anathema to American law. It is inconsistent with fundamental American principles of due process and fair access to justice. It would condition a citizen's right to appointed counsel on his or her "willingness" to be subjected to wide-open, uncounseled cross-examination by the prosecutor before the case has even begun.

*This provision should be deleted in its entirety. It should be replaced with a fair appointment of counsel provision, consistent with the model Criminal Justice Act (CJA) appointment of counsel provisions – as provided below.*

As currently re-written by DOJ, this core provision is now meaningless. It creates a costly, unwieldy procedure, unique to American law, whereby one's claim of indigence and request for court-appointed counsel is subject to cross-examination by the government. It not only allows a prosecutor to cross-examine an uncounseled citizen about his assets, under the guise of probing the *bona fides* of his claimed indigence. *It also allows a wide-open interrogation as to anything, including the substance of the charges underlying the seizure and potential defenses to forfeiture, such as the innocent owner defense.*

This was no oversight by the DOJ. They have insisted upon this provision, as written, even *after* it was pointed out that it would allow prosecutors to cross-examine

the uncounseled citizen claimant, not just on the issue of indigence, but on the merits of the case.

Thus, the nation's poorer citizens, or those *rendered indigent* by the government's seizure of assets, would have to run the substantial, unprecedented risks of uncounseled, under-oath questioning by prosecutors in order to obtain court-appointed counsel. Those wealthy enough to afford private counsel would not.

Of course, under all other appointment of counsel statutes, the courts are quite capable of discerning whether one is actually financially eligible for the benefit. Especially ill-considered and wasteful, this provision in H.R. 1965 may even compel the courts, under the Fifth and Sixth Amendments, to appoint counsel to the person being subjected to such an unlimited examination by prosecutors — a procedure supposedly intended to decide whether or not the person *should* have counsel appointed.

In addition, as now written, Subsections (2) and (3) in the bill are in conflict. Subsection (2) envisions using the well-established, fair procedures established under the Criminal Justice Act (CJA) for appointments of counsel. (These are the model provisions always envisioned by previous Hyde and Conyers bills over the years. And the CJA fund is now even the *source* to be tapped under the bill, rather than the Asset Forfeiture Fund as you originally intended, for the money to pay for appointed counsel.) Subsection (3), however, contradicts subsection (2) and is unprecedented in American jurisprudence.

*The following amendment is needed to correct the confusion between (d)(2) and (d)(3), and to restore this core, appointment of counsel provision to a meaningful one.*

*Delete Section (d)(3), at page 8, lines 6-17, in its entirety. Substitute the following, as a new (d)(3):*

"(d) \* \* \*

(3) The procedures for implementing the right set out in subdivision (d) (1) of this section shall be those provided by law, and as provided by 18 U.S.C. 3006A and Fed. R. Crim.P. 44(b), and by local rule of the district court in which the property is seized or the forfeiture is commenced. The request for appointment of counsel shall be made to the Clerk of the Court of the district in which the property is seized, who shall provide the applicant with a Financial Affidavit. The Clerk shall forward the request for counsel and completed Financial Affidavit to a United States Magistrate Judge, who shall act upon the request within five (5) court days. All time periods set forth in this statute shall be tolled between the time the person submits the completed Financial Affidavit and the time the court acts upon the request.

II. Page 10, line 20.

Re: "Uniform Innocent Owner" Provision.

*This is an ineffective "uniform innocent owner" provision failing to protect bona fide sellers of good and services — like merchants, banking institutions, and attorneys — who, like bona fide purchasers of tangible property, also unknowingly engage in an arms-length commercial transaction with someone who happens to be using money later found subject to forfeiture.*

*"Innocent owner" is too narrowly defined in this provision. The provision must be clarified to insure that equally-deserving bona fide service providers and bona fide sellers are also covered.*

In order to qualify as a *bona fide purchaser* ("BFP") for value under the innocent owner provision, you should not have to literally purchase a tangible piece of property from the bad actor. Thus, the bill needs to be explicitly clarified to state that the term "BFP" includes *bona fide service providers* ("BFSPs"), and *bona fide sellers* ("BFSs").

For example, a merchant or automobile dealer, or a service provider such as a hospital, bank, doctor or attorney, who unknowingly accepts tainted money from some bad actor in exchange for legitimate goods or services also ought to be protected under the "BFP" innocent owner provision, so long as he or she was reasonably without cause to believe that the money was subject to forfeiture.<sup>1</sup>

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<sup>1</sup> Note that this "due diligence" requirement now in H.R. 1965 is not even part of the innocent owner provisions in current law at sections 881 and 981. Thus, in this way alone, the provision already represents a significant narrowing of the current innocent owner

In our June 17, 1997 preliminary letter analysis of the "discussion draft" DOJ substitute bill that would become H.R. 1965, we said all of the courts have given the identical BFP for value provisions in the *criminal* forfeiture statutes the reasonable interpretation that "BFP" includes *bona fide* sellers and service providers ("BFSs" and "BFSPs"). But there has now emerged an especially troubling judicial development, thanks to DOJ's chief bill negotiator, Stefan Cassella, making it even more imperative that this bill be corrected to specify that BFSs and BFSPs are fully within its contemplation of protected innocent owners.

Unlike all other courts, the D.C. Circuit -- in the *BCCI* cases litigated by Mr. Cassella -- has now given the "BFP for value" provision a very narrow, literalistic reading -- at Cassella's urging -- thus defeating the *bona fide* interests of the innocent service provider. See *United States v. BCCI Holdings (Luxembourg), S.A.*, 961 F. Supp. 287, 295 (D.D.C. 1997) (American Express Bank cannot qualify as "BFP for value" under §1963(1)(6)(B) because that provision protects only "those transactions involving the purchase of tangible property.") *United States v. BCCI Holdings (Luxembourg), S.A. (In re Petitions of Trade Creditors)*, 833 F. Supp. 22, 28 (D.D.C. 1993), *aff'd*, 48 F.3d 551 (D.C. Cir.), *cert. denied*, 116 S.Ct. 563 (1995) (same).

The fact that the government (indeed, Mr. Cassella himself) is arguing *in courts* for a literalistic interpretation of BFP for value, and succeeding (at least in some cases), while simultaneously telling the Committee staff that "of course, BFP is broad enough to cover BFSPs and BFSs", makes it *all the more important* that the words "BFP for value" be replaced by language that specifically and accurately reflects Congress' intent -- to protect a much broader category of innocent parties who unknowingly engages in arms-length transactions with a bad actor, that is, BFSs, and BFSPs for value as well.

### III. Page 16, lines 6-12.

Re: Section Sec. 2 (f) (the So-Called "Pre-Discovery Standard")

*Subsection (f), at page 16, lines 6-12, should be deleted in its entirety.*

*This is an extraordinary provision, creating a special, and abusive, summary judgment rule for the government in forfeiture cases, enjoyed by no other party in any other type of civil litigation. The provision would defeat the citizen's current rights to summary judgment against the government in a case commenced without the requisite probable cause, by carving out a special rule on summary judgment for the government in forfeiture cases. It would allow the government to "seize now, and fish later" -- through the very costly, time-consuming civil discovery process -- to try to find after-the-fact "justification" for its forfeiture action.*

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defense.

*The objectionable provision does not deal with the governing Fourth Amendment/probable cause seizure standard, as some have suggested. This provision does not deal with the seizure. Rather, it would grant the government the new "right" to delay responding to a timely and meritorious motion for summary judgment, as any other litigant would be required to do in any other case under the summary judgment rules.*

*At best, the current wording of this Rule 56 discovery provision is both confusing and misleading as now written. But worse, while DOJ is assuring Congress that this provision merely "tracks Rule 56," the general summary judgment rule, it is clear the Department intends to argue something much different in the courts.*

*At best, then, the provision is nonsense as written, and can only produce confusion and unjust decisions, because some courts are bound to conclude that it "must" mean something different from the current law of summary judgment, as specific congressional dictates are not to be interpreted by the courts to be meaningless. For that reason alone, it is best to simply eliminate the entire provision.*

*Worse still, this provision says that even if a citizen has a good claim for summary judgment, the court would now be specifically forbidden from handling the case as it would any other, according to standard Rule 56 summary judgment procedures. Rather, the court would be forced to allow the DOJ to operate under special rules, whereby the "World's Largest Law Firm" could harass an innocent citizen and waste the federal court's resources through a costly and time-consuming "fishing expedition" for new evidence to "support" its forfeiture allegation.*

*Given the fact that property is not supposed to be seized without probable cause, it would be far better to require a rule opposite to that in the bill — that a court should never allow the government a continuance for discovery under the now-discretionary Rule 56(f), before the government answers, and survives, the citizen's summary judgment motion. As recently observed by a federal court of appeals: "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 probable cause exists." U.S. v. \$191,910.00 U.S. Currency, 16 F.3d 1051, 1067 (9<sup>th</sup> Cir. 1994); Accord U.S. \$31,990.00 U.S. Currency, 982 F.2d 851, 856 (2d Cir. 1993). At minimum, this mischievous provision should be stricken from the bill. The government should not be granted any such special rule. It should be bound by the same rules of procedure, including summary judgment rules, as bind all other litigants in America's federal courts.*

IV. Page 23, lines 6-20.  
Re: "Uniform Definition of Proceeds"

*H.R. 1965 in fact now has two different definitions of "proceeds" and is not uniform. There should be only one such definition of proceeds. As now written, this provision would greatly expand current forfeiture law to reach all "gross receipts" allegedly obtained from almost every felony in Title 18 of the federal code, thereby encouraging unfair seizures by federal agencies that in many instances will destroy or force into bankruptcy legitimate businesses.*

*This is probably the single most egregious provision in H.R. 1965. It should be deleted in its entirety, and replaced with a more reasonable, more truly uniform definition of proceeds.*

The bill provides a broad "gross receipts" definition of "proceeds." In non-money laundering cases, the bill now provides a narrow exemption allowing legitimate business persons to deduct the cost of the goods or services provided from the gross receipts subject to forfeiture, *but only if it involves an overbilling scheme*. Thus, the government will surely argue to the courts that, unless an "overbilling scheme" is involved, the narrow allowance for the costs of the goods and services provided does not apply.

Very few fraud or other white collar cases involve overbilling. Instead, they involve all manner of different circumstances, which should be treated the same.

Moreover, the money laundering statute's definition of "proceeds" should be the same as the definition in all other forfeiture statutes. Otherwise, the government will continue to overuse and abuse the over-broad money laundering statute (automatically appending it to all charges in just about every case it brings, simply to "reap the bounty" allowed under the current overbroad definition of "proceeds" in that statute).

By defining "proceeds" in the broadest terms, the Department would turn "proceeds forfeiture" into an instrument of draconian punishment rather than the remedial provision it is *supposed* to be.

*We are all agreed that the deduction for reasonable costs are only to be available, as under the bill, for legitimate goods and services. So drugs and other inherently illegal enterprises would not even be considered for the deduction. We do not object to the requirement, imposed by the bill, that the deduction only be available for legitimate businesses.*

But the effect of this overbroad "gross receipts" definition is to ensure over-reaching by the government, and the sure-fire wipe out, at the whim of the prosecutor, of all sorts of *legitimate businesses* – family businesses, small partnerships, and complex corporations alike – upon which so many in the community depend.

The courts are *already* greatly troubled by the government's *current courtroom advocacy efforts* to construe some proceeds forfeiture statutes as allowing forfeiture of the "gross receipts" of an offense, without any allowance for the cost of legitimate goods and services provided by the offender otherwise engaged in a legitimate enterprise. Courts have rebuffed these arguments because they rightly consider the results sought by the government to be "absurd." See e.g.; *United States v. Riley*, 78 F.3d 367, 371 (8<sup>th</sup> Cir. 1996) (court of appeals dismisses as "absurd" government contention that \$28 million – the gross receipts of insurance companies comprising a RICO enterprise -- was subject to forfeiture; court observed that such an extreme forfeiture would prevent the insurance companies from paying the claims of their policy holders); *United States v. 122,942 Shares of Stock*, 847 F. Supp. 105 (N.D. Ill. 1994) (rejecting government's attempt to define money laundering proceeds as gross receipts under 18 USC 981 (a)(1)(C)).

The results that would occur in innumerable cases if proceeds are so broadly defined as now in H.R. 1965, would be horrific. It is well recognized by the courts that the government has been abusing even the *limited authority* it *now* possesses to forfeit the proceeds of "white collar" type offenses.

For example, in embezzlement cases, where a defendant has returned the property embezzled prior to the time the embezzlement is discovered, the government has nonetheless sought forfeiture of the entire amount of the property or monies embezzled. This results in wiping out the legitimate businessperson defendant, who, of course, no longer has the wherewithal to pay back the amount embezzled since he has already returned the money to the entity from which it was taken. Indeed, this so troubled the conservative U.S. Court of Appeals for the Fourth Circuit that the panel reversed defendant William Aramony's money laundering conviction in order to knock out the unfair "proceeds" forfeiture. At oral argument, the panel made it clear that this is what it was doing. *U.S. v. Aramony*, 88 F.3rd 1369 (4<sup>th</sup> Cir. 1996).

In other circumstances, this provision could wipe out entire businesses. A defendant property-owner should not be wiped out by the forfeiture simply because he has in some technical way committed a fraud or has supplied widgets that are not precisely up to Department of Defense "mil spec" standards.

H.R. 1965 purports to provide some relief, but only in a narrow class of "overbilling" cases. Yet, even there, the relief promised by the provision is illusory, since it does *not* apply to all-encompassing money laundering cases. For example, in every case in which fraud is involved, the government typically charges money laundering as well (due to the tremendous overbreadth of the money laundering statute). By doing that, the government avoids any limitation on proceeds forfeiture in cases based simply on mail or wire fraud.

*The current provision defining proceeds as all "gross receipts" should be stricken and the following definition substituted, as "(2)" at lines 6-20:*

"(2) For purposes of paragraph (1), the term 'proceeds' is defined as follows.

"(A) In cases involving illegal products such as controlled substances, illegal services, such as odometer tampering or unlawful activities such as espionage or arson, or healthcare fraud involving the provision of unnecessary services, the term 'proceeds' means property of any kind obtained directly or indirectly, as the result of the commission of the offense giving rise to forfeiture, and any property traceable thereto, and is not limited to the net gain or profit realized from the offense.

"(B) In cases involving essentially lawful products or lawful services that are sold or provided in an illegal manner, the term 'proceeds' means the amount of money acquired through the illegal transactions resulting in the forfeiture less the direct costs incurred in providing the products or services. The defendant shall have the burden of going forward with the evidence concerning direct costs. Once the defendant does so, the government shall bear the ultimate burden of proving the amount of the proceeds subject to forfeiture."<sup>1</sup>

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<sup>1</sup> This definition of proceeds avoids confusing conflict in the law threatened by the current wording in H.R. 1965. Unlike the current wording of the bill, this suggested amendment *tracks*, rather than *conflicts*, with the established case law under the current money laundering and RICO statutes. E.g., *United States v. Riley*, 78 F.3d 367, 371 (8th Cir. 1996) (characterizing as "absurd" government's contention that \$28 million, representing the gross receipts of the insurance companies constituting the RICO enterprise during the course of the alleged conspiracy, was subject to forfeiture; court observes that an insurer's gross receipts would include amounts needed to pay policy holder claims); *United States v. Lizza Industries*, 775 F.2d 492, 498-99 (2d Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986) (in bid-rigging conspiracy, "proceeds"

## V. Page 24, lines 7-8.

Re: Subsection (3), under (h), "Uniform Definition of Proceeds"

The Eighth Amendment has been uniformly held to provide no protection to the citizen challenging a proceeds forfeiture. If Congress fails to protect that citizen or business entity from abuses in this area, the person will in fact have no protection.

Lines 7-8 on page 24 must be deleted, and instead, the following should be substituted: "shall be left in the discretion of the court."

This change is necessary because the Eighth Amendment as it has been misinterpreted by the courts, would *never prohibit* a forfeiture of *proceeds* that have been invested and then greatly appreciated in value. Relying on the Eighth Amendment in this area is reliance on a straw man.

## VI. Pages 68-69

Re: Section 47 -- "Hearings on Pre-Trial Restraining Orders."

*As we have stated to your counsel, Mr. Conyers' counsel and DOJ counsel on numerous occasions, this criminal forfeiture provision is extreme and unwise. It provides for pre-trial, injunctive restraints on entirely untainted property -- so-called "substitute assets" -- which are not the primary property allegedly subject to forfeiture, without the government ever having to demonstrate that the substitute assets are actually forfeitable or that they are at risk*

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subject to forfeiture should be amount of money acquired through illegal contracts less the direct costs from the contracts, such as the cost of cement used on a particular project; however, the prorated cost of a cement mixer, which might be used on other projects, could not be deducted); *United States v. Masters*, 924 F.2d 1362, 1369-70 (7th Cir.), cert. denied, 111 S.Ct. 2019 (1991) ("the proceeds to which the statute refers are net, not gross, revenues-profits, not sales, for only the former are gains."); *United States v. Elliott*, 727 F. Supp. 1126 (N.D.Ill. 1989) (in case involving lawyer convicted of misusing confidential client information for his personal benefit in nine sets of securities transactions, government conceded that the purchase price of the stock defendant bought had to be deducted from the sale price to calculate defendant's proceeds from the scheme); *United States v. 122,942 Shares of Common Stock*, 847 F. Supp. 105 (N.D.Ill. 1994) (the term proceeds in 18 U.S.C. §981(a)(1)(C) encompasses only the profit from a fraudulent stock transaction, not all of the property acquired as a result of the transaction; claimants were entitled to the return of their direct costs in purchasing the stock).

*of being concealed, transferred or dissipated. The defendant is afforded no right to a meaningful hearing on the propriety, or impropriety of the restraint.*

*The whole section 47 on pre-trial restraint of substitute assets should be deleted in its entirety. There is no "fix" for this provision.*

*Congress has never given the government power to restrain or seize substitute assets prior to trial. And for good reason!*

This new power envisioned in the bill would allow the government to destroy the ability of the citizen accused to use his own assets to obtain counsel and pay for the expense of his defense and to support his family, before there is any adjudication of guilt.

The government says it needs this new authority in all criminal forfeiture cases. *Don't buy it.* This drastic power to economically cripple the defendant at the very outset of his battle with the government will be greatly abused.

The concept of forfeiting "substitute assets" *at all (post-trial)* has always been a dubious one. It first entered the law as a limited concept in 1986 and has been abused ever since. Many examples are easily found. (We can provide them to you or your staff.)

Reasonable restrictions must always be placed on any forfeiture of "substitute assets." Without such restrictions, any "substitute asset" provision is utterly contrary to the spirit and purpose of all your laudable efforts toward reform. It would simply give an outrageous new power to arbitrarily restrain all of a defendant's property, on the theory that all of the property constitutes substitute assets which *might* be subject to forfeiture. The government gets to do this without having to make any showing to the court that the "substitute assets" are in fact subject to forfeiture or that such drastic restraint is necessary to conserve the assets.

*This provision must be stricken from the bill.*

###

Mr. Chairman, some might claim, as the Department's chief negotiator Stefan Cassella does, that H.R. 1965 is better than no bill at all because as long as it makes forfeiture "procedure" more fair, there is nothing wrong with so vastly expanding the government's civil and criminal forfeiture "powers." Aside from the fact that the bill *creates less fair procedures* (e.g., the "seize now, fish later," special government summary judgment rule addressed above), the argument is

simply far too sweeping. As you have observed in your excellent book, *Forfeiting Our Property Rights: Is Your Property Safe From Seizure?* (Cato Institute 1995), the scope of forfeiture statutes is just as important as the procedures used in enforcing them. Statutes that allow drastic, arbitrary forfeitures — such as those endorsed and expanded by H.R. 1965 as written — cannot be made fair through procedural tinkering, however well-intended.

As your own book demonstrates, one of the central problems with forfeiture is the extreme overreach, or scope of government powers under the forfeiture statutes — an overreach greatly aggravated, through unprecedented expansion, by H.R. 1965. This overbreadth, expanded by the bill, will allow the government to impose drastic penalties on wrongdoers and on innocent persons alike.

Finally, you should be aware that this bill is but a piece of the Department's strategy to use criminal forfeiture much more, and to render it much more unfair in terms of both scope and procedure. Right now, they are busy lobbying the U.S. Judicial Conference to do away with the right to a jury trial in criminal forfeiture cases. Their scheme is to substitute a "streamlined" sentencing proceeding before a judge, at which rank hearsay would be admissible.

Make no mistake, the Department is intending to use criminal forfeiture much more and much less fairly than in the past — in large part because of the extremely expansionist criminal forfeiture provisions in H.R. 1965.

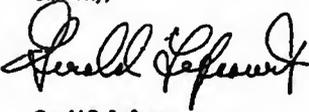
*Criminal forfeiture is in many respects at least as troubling as civil forfeiture. If anything, innocent third party property owners and other innocent property stakeholders are harmed even more by criminal forfeiture actions.* For example, these statutes provide that a third party claimant has no right to a jury, a circumstance of very questionable constitutionality. This is wrong and should be changed. Likewise, the statutes place the burden of proof on the innocent third party claimant. Moreover, third party claimants can assert no interest at all until the criminal proceedings against the one accused wrongdoer is completed, which of course can and routinely does take years, especially in complex white collar business cases. There is a very large body of well-established caselaw dealing with the claims of innocent third parties whose property has been wrongfully restrained or seized under the criminal forfeiture laws.

Although H.R. 1965 now largely a criminal forfeiture bill, it does nothing to make these unfair procedures in criminal forfeiture more just. Rather, it gives the government greatly expanded criminal forfeiture powers, including the draconian power to restrain substitute assets prior to trial.

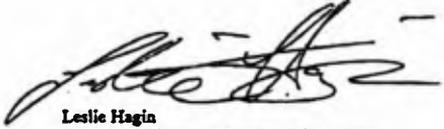
Again, Mr. Chairman, we commend you for your tireless leadership in attempting to meaningfully reform the asset forfeiture laws. But the current bill, H.R. 1965, is so seriously flawed that we cannot support it. It is no wonder that the Department and some other law enforcement agencies who have always opposed your reform efforts are now the only supporters of the current bill.

As always, we support you in your valiant efforts, and look forward to assisting you in any way possible to remove or amend the most egregious forfeiture-expanding provisions the DOJ has managed to slip into your bill.

Sincerely,



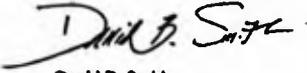
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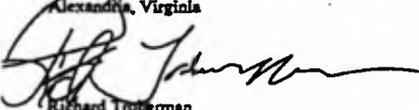
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Some of the worst provisions of the current version of H.R. 1965, the product of compromise negotiations between the DOJ, Full Committee Chairman Hyde and Ranking Member Conyers, are also in this draft measure. They are addressed in detail in our letter of July 28, 1997 to Chairman Hyde, attached for your convenience and so as not to reinvent the wheel. I hope you and your colleagues will read this brief letter very carefully, and that you will accept it, along with this letter, as my preliminary written statement for purposes of the hearing tomorrow morning.

In the draft bill before you, like in H.R. 1965's worst provisions, the government is seeking to radically expand its powers of criminal forfeiture law, through an ill-considered overhaul of Title 18 of the U.S. Code and the fundamental federal rules of criminal and civil procedure. And this, despite the fact that criminal forfeiture laws already provide less protection for innocent third party property owners and other stakeholders than the abusive civil forfeiture laws. For example, these laws provide that innocent third party property owners and other, non-accused-but-interested, innocent stakeholders (e.g., holders of interests in business entities) have no right to a jury, a circumstance of highly dubious constitutionality. This is wrong and it should be changed. Likewise, statutes now place the burden of proof on the innocent third party claimant. Moreover, third party claimants can assert no interest whatsoever until the criminal proceedings against the one accused wrongdoer are completed, which of course can and often does take years, especially in complex, regulatory or "white collar" business cases. There is a large body of well-established caselaw dealing with the claims of innocent third parties whose property has been wrongfully restrained or seized under the current criminal forfeiture laws.

The draft bill, like H.R. 1965's numerous criminal forfeiture provisions insisted upon by DOJ, does nothing to make these unfair procedures in criminal forfeiture more just. Rather, it simply gives the government still more, unprecedented unfair procedures and scope of powers with effectively no bounds or restraint, or accountability.

Following are just some of the issues that jump out about the draft in the short time we have had to review it:

> First, the proposal in the DOJ's draft wishlist bill, to apply forfeiture to all criminal proceedings sweeps far too broadly. There may well be better, more appropriate sanctions. What is needed is a more careful review of the various statutes, to see when and if forfeiture is an appropriate sanction under the circumstances and given the interests, including the victims, involved. For example, under the draft, it appears that all defendant property would go the government's coffers from forfeiture, instead of toward the victim restitution that often occurs now. Victims would only get their restitution as a sort of "second lien holder," at the discretion of the government's forfeiture program, unlike current law.

> Provisions like those in section 102 of the draft would turn forfeiture fundamentals on their head, so that all property at all associated with any accused person is presumed, *prestrial*, to be guilty property, no matter its relationship to alleged wrongdoing. Thus, for instance, if one

holds a minority interest in a corporation, it will be presumed, under the government's wishlist provision in this draft, that the government has a "right" to the interests of the entire corporation, of all interests -- well beyond that alleged to be involved in the defendant's own alleged wrongdoing. The supposed nexus between the property subject to forfeiture and the wrongdoing giving rise to forfeiture is severed, and the law becomes an unharnessed engine for selective abusive takings by the government. Our letter on H.R. 1965, of July 28, 1997, discusses this unprecedented provision for undue powers to seize innocent property, at VI, page 11.

> The highly abusive "gross proceeds" definition of profits contained in H.R. 1965, is also in this draft. It will cripple innocent business interests, because it is only *legitimate* business (not drugs or gambling, etc) which are even targeted by the section. The Eighth Amendment's rudimentary protections of proportionality provide no protection whatsoever, because the courts have misinterpreted the Amendment to *per se*, never prohibit a forfeiture of "proceeds, no matter how unreasonably defined. In short, if Congress fails to protect the interests of innocent business owners and stakeholders, the courts will be powerless to do so. See July 28, 1997 letter, at V, page 11. We have addressed this whole crucial issue of the DOJ's proposed "uniform definition of "proceeds" in our July 28, 1997 letter, at IV, at page 8.

> Section 106 of this draft bill literally creates a Star Chamber interrogation procedure for the government against the citizen accused, in a manner all too similar to the unjust interrogation procedure contemplated in H.R. 1965, addressed at I, page, 3, of our July 28, 1997 letter.

> Finally, many provisions in the draft, as in H.R. 1965, make an ill-considered end run around the established rule-making process of the federal judiciary's Judicial Conference Rules Committees. We think it is sound, and well-established practice to seek the judiciary's input, at least, about these sweeping, controversial changes to basic rules of procedure. For example, like H.R. 1965, this draft, at sec. 114, and 115, would create special summary judgment and other basic rules of civil procedure in favor of the government litigant, enjoyed by no other, citizen citizen, to the grave detriment of individual Americans subjected to the government's all-powerful forfeiture arsenal. See July 28, 1997 letter, at III, page 6.

We have also highlighted some of the worst abuses under current criminal forfeiture law in other previous submissions to this committee. We have specifically identified some of the most severe exacerbations of these abuses that would result from enactment of the DOJ's wishlist for radical new powers of summary criminal forfeiture, and loosened or eliminated safeguards against government abuse. See e.g., Hearing before the U.S. House Committee on the Judiciary, July 22, 1996 (Serial No. 94), on H.R. 1916 (104<sup>th</sup> Congress), Attachments A & B to Comments of NACDL Regarding DOJ Proposed Forfeiture Acts of 1994 and 1996, at page 313 et seq.; Supplemental Material, Letter to Stefan Cassella, Deputy Chief, DOJ Asset Forfeiture and Money Laundering Section from NACDL Forfeiture Abuse Task Force Co-Chair David B. Smith (former Assoc. Director of the DOJ Asset Forfeiture Office, and author of the treatise, *Prosecution and Defense of Forfeiture Cases* (Matthew Bender 1996),

and Civil EDCO (Matthew Bender 1996), on behalf of NACDL, at page 26, et seq.

But even these many materials and the voluminous and complicated proposals by the DOJ for new criminal forfeiture powers only begin to delve into the appropriate interests and safeguards against government abuse the current criminal forfeiture laws require.

Mr. Chairman, we appreciate your taking an interest in criminal forfeiture. We hope you will convene future hearings, which will take the committee even further toward the careful, comprehensive review of the laws that is needed. We hope and trust you will resist efforts by the DOJ to rush the process of consideration of such an important subject, and to push through ill-considered, lopsided proposals for expanded, unwise government taking powers, to the detriment of basic American liberty. We hope and trust you will resist this draft bill, and certainly refuse to introduce it, or anything like it. We also, accordingly hope you will resist H.R. 1965 as now written. It is indeed unfortunate that no hearings were ever held with regard to the many criminal forfeiture provisions DOJ insisted upon having slip-dashed onto H.R. 1965.

We hope future hearings will involve the federal judiciary, the American Bar Association, and others, who I understand also have grave concerns about this draft, and H.R. 1965, but were unable to appear before you at this hearing, given the short time available.

We look forward to providing you with our careful, more detailed review of this DOJ draft bill as soon as possible, and to assisting you in your review of the criminal forfeiture laws in any way we can.

Thank you again for affording us this opportunity to be heard about this subject generally, so important to the American people -- and the discussion draft of DOJ proposals so obviously and profoundly threatening to their most cherished rights and liberties.

Sincerely,



E.E. Edwards, III

NACDL Parliamentarian and Co-Chair, Forfeiture Abuse Task Force

**E.E. Edwards, III, of Nashville, Tennessee, is a graduate of the University of North Carolina and Vanderbilt University Law School. He is the senior partner in the firm of E.E. Edwards and Associates, a litigation-oriented firm with a heavy concentration on criminal defense in both state and federal courts.**

**Mr. Edwards began his career as an Assistant District Attorney General in Nashville. He has also served as President of the Tennessee Association of Criminal Defense Lawyers, and as a member of the Tennessee State Bar Association's House of Delegates.**

**He currently serves as Parliamentarian of the National Association of Criminal Defense Lawyers, the prominent organization in the United States advancing the mission of the nation's criminal defense bar to ensure justice and due process for all persons accused of crime, and promoting the fair and proper administration of criminal justice. He has long served as Co-Chair of NACDL's Forfeiture Abuse Task Force.**

**He is a member of the Tennessee Supreme Court's Commission on Rules of Criminal Procedure, and a guest lecturer at Vanderbilt Law School and numerous legal seminars across the country.**

Mr. MCCOLLUM. Thank you, Mr. Edwards. Let me ask you a question about this issue on jury trials. Do you think that the Supreme Court decision on criminal forfeiture with respect to the sentencing decision, the Libretti case, should be, in essence, reversed legislatively? Should we provide for jury trials in criminal forfeiture cases?

Mr. EDWARDS. Well, Mr. Chairman, the Libretti case did not involve a trial. It involved a plea agreement and a dispute regarding procedures that were used in the plea agreement.

I deeply regret some of the language that the Supreme Court used in the Libretti decision because it was so broadly written that it would appear to apply to criminal forfeiture across the board, not just to a case under the facts before the court.

The fact is, not on the basis of Constitutional right but on the basis of statute, criminal forfeiture is only invoked by a jury after the jury, based on proof beyond a reasonable doubt, has found an accused guilty. And then in the same trial the same jury determines whether to forfeit property and to what extent property should be forfeited to the extent of the defendant's interest in that property.

That is the way it is now under present law and that is the way it should continue to be; but this bill would, of course, do away with that.

Mr. MCCOLLUM. Let me ask you something. I am not a student of history on this subject to the degree you obviously are. In the John Hancock-Liberty case, was the violation of the Navigation Tax Act that you were referring to criminal or civil at that time?

Mr. EDWARDS. Most—no, it was civil. Most of the statutory forfeiture proceedings—well, let me back up a step. There were three types of forfeiture, historically, in Great Britain, going back to the reign of Edward the First.

There was the forfeiture of estates, and for many centuries in Great Britain any person convicted of almost any felony forfeited their entire estate. As you know, our Constitution prohibits that.

Mr. MCCOLLUM. Right.

Mr. EDWARDS. There was the concept of the law de addende, the concept that if an instrumentality caused the death of a person, that instrument, whether it was a horse, or an ox team, a mill run, whatever, would be, it or its value, would be forfeited to the crown.

Again, the United States did not adopt the law de addende, and it was eventually repealed; after a century of industrial revolution in Great Britain, it was repealed. What was maintained was the concept of statutory forfeiture.

The Navigation Acts in Great Britain were used as a vehicle under the theory of mercantile economics that evolved after the Renaissance and in the beginning of the Industrial Revolution. Nations in that time believed that the way to grow the economy, to use a current word, was to control the ingress and exit of goods and services. So under the Navigation Acts as originally passed by the British Parliament, in order for any ship to bring any goods into Great Britain or into any British colony, they either had to be British goods or they had to originate in a port licensed by the king. And much of the crown's revenues derived from the customs duties imposed on these goods.

So literally, if a product was made on the Continent, was made in France, or Spain, or Denmark, those products could not be brought into England unless they went through a port that was licensed by the king and allowed in. Otherwise, the goods and the ship they came on were both seized. If the seizure occurred in Great Britain as opposed to on the high seas, the trial was a civil proceeding before the court of exchequer, which is one of the three great common law courts, and the English jury discerned whether the goods should be forfeited or not. And that tradition was carried over into this country because, as you know, for the first century or more of our country's existence, 80 percent or more of the Federal Government's income came from customs duties——

Mr. MCCOLLUM. Right.

Mr. EDWARDS [continuing]. And without the ability to make seizures in rem of ships and their cargo, a fledgling new nation could not have protected its revenue.

Mr. MCCOLLUM. I appreciate your laying that out because it does put everything in historical perspective and saves me from doing a lot of reading. One of the arguments that could be made with regard to the forfeiture that we are dealing with here today, is that it is criminal forfeiture. You have been convicted, so you have lost some rights you otherwise would have. In the sentencing, a judge is going to decide the very liberty of an individual. So the argument would be that since you are already a convicted criminal, there is nothing wrong with the judge only deciding a criminal forfeiture case at that stage. I would suspect that would be the argument. How do you respond to that?

Mr. EDWARDS. I think the other side of that argument is the fundamental concept is it was not the judge that made that decision. It was a jury of the accused's peers that made the decision that the defendant had been guilty of criminal conduct.

Mr. MCCOLLUM. And they would also decide, then, so, if they decided he is guilty, then they should also decide what happens to his property?

Mr. EDWARDS. That is exactly right, and I can assure you in many, many cases, even cases where the proof of guilt is overwhelming and even in cases where the accused has blatantly defied and violated the law, it is very often a very different matter what property, if any, had been involved in the criminal conduct so as to make it subject to forfeiture, and when for 4 or 5 years now the American public has seen stories over and over again—on TV programs, on "60 Minutes," "20/20," on the "Investigative Reports" on A&E, in the newspaper series—about law enforcement agencies taking property from innocent people, well, it seems to me that the inevitable result of that is to diminish the confidence, and respect, and trust that citizens have in their government. When they see that happening to their neighbors, deep down inside they realize it could happen to others.

Mr. MCCOLLUM. If we were to impose on all criminal forfeiture proceedings the jury trial concept, would that remedy a lot of the other problems in this bill? In other words, you would not object as seriously to bringing as much under this legislation as you would otherwise, is that not true?

Mr. EDWARDS. That would remedy one very large aspect of my many problems with this bill. But another very large aspect is pre-trial seizure and restraint of assets, because of the extraordinary impact that it has on the ability of an accused to defend himself or herself.

This bill proposes enormous expansions of pre-trial restraint.

Mr. MCCOLLUM. I will let Mr. Barr ask you questions about that.

Mr. EDWARDS. Okay.

Mr. MCCOLLUM. I have consumed more time than I should here. Mr. Barr?

Mr. BARR. Thank you, Mr. Chairman. I had some discussions, as you know, with the previous witnesses focusing both on the proposed rule, 32.2, as well as then on the definition of "proceeds" found later in the bill, and I think we need to look at both of them in sort of looking for answers to questions that we have posed to the other panel.

Focusing, Mr. Edwards, for a moment on page 7 and 8 of the proposed bill, which relates to Proposed Rule 32.2, criminal forfeiture—

Mr. EDWARDS. Yes, sir.

Mr. BARR [continuing]. Subsection B, I find the language that is used very, almost, unartful in some respects but there would be a great deal of confusion out of that. Give me your thoughts, please. I am looking at the sentence that begins on line 20, "If the property is subject to forfeiture, the court must enter a preliminary order directing the forfeiture of whatever interest each defendant may have in the property." That raises the question in my mind what if we are only talking about one defendant. Does that obviate even the need for this, each interest, each defendant "may have in the property" without determining what that interest is?

Then it goes on to say that, "deciding the extent of each defendant's interest"—if we only have one defendant, then I guess that would mean that defendant's interest—"is deferred until any third party claiming an interest in the property has petitioned the court to consider the claim. If no such petition is timely filed and the court finds that a defendant had a possessory"—I guess that would mean any possessory—or any "legal interest, the property is forfeited in its entirety."

I would conclude from that that the only way that a defendant can avoid having his entire business or whatever the asset is, whatever the proceeds are of whatever, so long as the government can prove that there was one criminal act that may have used that business, such as somebody coming in and filling out a form improperly or whatnot, that the only way that the defendant, a defendant, can avoid having the entire property forfeited, regardless of the extent to which his criminal activity may have relied on the property, is if a third party comes in. If no third party comes in, then the court is not even empowered to take these steps to determine what, if anything, less than the entire property would be forfeited. Do you read it the same way?

Mr. EDWARDS. I read it the same way, yes, and that is a significant change from the current law. I mean, the jury has to determine to what extent property is involved and how much, if any,

should be forfeited now, and that is something that should be held onto with tenacity.

Mr. BARR. But it even goes beyond that. I mean, is that what the government is trying to get at here? Like I say, it strikes me as sort of odd the way this is worded. This whole last portion of that sub-paragraph seems to imply that these provisions only apply if there is more than one defendant, but if there, indeed, is only one defendant, which would be, I presume, in a lot of different cases, then this additional finding that the court would be required to make—in other words, what, if anything, less than the entire property ought to be forfeited—the court would not even get to that issue, would they?

Mr. EDWARDS. As I understand it, that is correct. I think it would all go no matter. The only defense that could be raised under that circumstance that occurs to me at the moment is that, let us say, forfeiting a \$1 million business for a relatively minor infraction of the law, would constitute an excessive fine under the Eighth Amendment, and other than that I think it would be gone.

Mr. BARR. Would you be comfortable of your client's chances for success in basing your whole argument on that?

Mr. EDWARDS. No, I would not. No, I would not, because obviously courts are very cautious and reluctant to use Constitutional defenses when not prescribed by statute. Sometimes they do but they are very cautious in doing so.

There is another provision in this bill that would make it appear that hardship grounds are the only grounds that a third party could raise against the seizure and restraint of property. But they simpl could not raise the fact that the property was not subject to forfeiture. Some of the language in here is so extraordinarily draconian as just to defy belief. I mean, in reading this I have repeatedly thought to myself, "This could not possibly mean what it seems to mean. It could not possibly be that the Justice Department is really seeking this broad an authority," but apparently they are.

Mr. BARR. Well, they could just be drafting errors. [Laughter.]

Mr. EDWARDS. I do not think so. I do not think so.

Mr. BARR. I appreciate, Mr. Edwards, your being here and also some of the written material that you have provided, not only on this short notice that you have had about this matter but with regard to Chairman Hyde's bill as well. And I would hope, and I presume—I do not want to speak for the Chairman—but I think that probably all of us would appreciate on more careful reflection any additional comments and background, since you obviously have a great deal in this area, that you could provide to us. I know I would appreciate receiving that.

Mr. EDWARDS. It would be my pleasure to do so. David Smith, my co-chair of the Forfeiture Task Force of NACDL, is here today with me, and both of us will be working on just such a more detailed response. For example, we have not even talked about third party claimants' problems in either this bill or existing criminal forfeiture law, and it is a very serious problem.

Mr. MCCOLLUM. Mr. Edwards, we would appreciate it. You mentioned earlier you had hoped that we would go forward with the Chairman's bill, Chairman Hyde's bill, on civil forfeiture first and then get to this legislation; however, we are going to dual track

this. I do not know what his schedule is going to be. I think there are perhaps problems with that bill, and although he has chosen, with all due respect, to take the civil asset forfeiture aspect, we still have jurisdiction over the criminal aspect.

Mr. EDWARDS. Yes, sir.

Mr. MCCOLLUM. And while I do not anticipate moving a bill before the end of this session, we will certainly want to early next year in February or March or so. If over the next 2 or 3 months you could come up with a good analysis of this proposed legislation, it would be very helpful to us.

Mr. EDWARDS. I am sure—

Mr. MCCOLLUM. Yes, you think you can complete such an analysis over that time?

Mr. EDWARDS. I believe we can, and we will strive to do so. There are certainly areas of criminal forfeiture that Justice has not mentioned needing some reform—

Mr. EDWARDS [continuing]. Nevertheless do.

Mr. MCCOLLUM. We would also like you to look at what crimes you would or would not be opposed to. Maybe the earlier suggestion that we ought to apply some uniformity to this and say if something is a crime and there are ill-gotten gains from it, then we ought to be able to forfeit those ill-gotten gains. If you could give us your thoughts on that subject, that would be helpful.

Also, I would like to address the issue of the trial jury deciding the forfeiture involved in criminal cases. You implied, maybe you did not intend to, that it was acceptable to you for there to be a judge only deciding the forfeiture of a case where there had been a plea bargain, and there was an agreement. There was no trial, no jury deciding as to one's guilt or innocence of the crime. Is that acceptable or would you still insist that with regard to criminal forfeiture there should be a jury deciding the forfeiture?

Mr. EDWARDS. Well, the right to jury trial is one that can be waived. If a defendant does not feel it is in his or her interest to go before a jury, then I have no problem with the district judge handling it.

Mr. MCCOLLUM. But it would require separate waiver for that as opposed to—

Mr. EDWARDS. Absolutely.

Mr. MCCOLLUM [continuing]. Simply saying, "I am guilty of the crime." One could not automatically go in and say, "The judge can decide it." That is your point?

Mr. EDWARDS. That is exactly right. That is right.

Mr. MCCOLLUM. Mr. Conyers, do you have some questions? I know I have caught you with your soup, but you are welcome to ask anything you wish.

Mr. CONYERS. I cannot ask anything I wish, Mr. Edwards, because we are in a public setting. So I wanted to greet you and—

Mr. EDWARDS. Thank you very much.

Mr. CONYERS [continuing]. I wanted to be here for the discussion, and I will be reading, studying, working with you and your organization on both the civil and the criminal aspects of asset forfeiture.

Mr. EDWARDS. Mr. Conyers, you probably recall this, but I recall it very well. You were the first Member of Congress that invited me to address a committee of this body on the subject of forfeiture,

and that was before—that was in Government Operations several years ago—and so I deeply appreciate your concern.

I should point out, Mr. Chairman, that one thing that the Libretti decision did not address is the fact that criminal forfeiture, like civil forfeiture, has a history of being before juries, being tried before juries, in this country and in Great Britain, going back for centuries. So there is a lot to be discussed about the notion of taking juries out of the process when the government is taking property, whether it is under a criminal case or under a civil case.

Mr. MCCOLLUM. I thank you very much. Your points have been made extremely well. We look forward to your more detailed analysis in the coming weeks.

Mr. EDWARDS. Thank you all.

Mr. MCCOLLUM. Thank you. This hearing is adjourned.

[Whereupon, at 12:18 p.m. the Subcommittee adjourned.]



# **APPENDIXES**

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**SEPTEMBER 18, 1997**

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## APPENDIX 1.—LETTER FROM AMERICANS FOR TAX REFORM




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**AMERICANS FOR TAX REFORM**


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September 17, 1997

Grover C. Norquist  
President

Dear Chairman Hyde:

We, the undersigned, urge you to abandon any further consideration of H.R. 1965 and instead refocus your efforts on civil asset forfeiture reform, H.R. 1835. As originally introduced by you and other Members of Congress, H.R. 1835 is a bi-partisan proposal which will provide substantive, and critically needed, reform. Among its strongest provisions are those which clearly protect, or clarify, existing Constitutional rights. This legislation:

- Places the burden of proof on the government instead of the owner of seized property and requires the government to prove its case by clearly convincing evidence;
- Provides court-appointed counsel to persons who cannot afford to hire a lawyer to fight the government over forfeiture, with fees to be paid out of the Asset Forfeiture Fund, thereby avoiding the necessity of additional funding for this proposal;
- Eliminates the requirement that the claimant post a "cost bond" equal to 10% of the value of the seized property to be allowed to contest the forfeiture in court and prohibits the forfeiture of an innocent owner's interest in property under any civil forfeiture statute;
- Allows for the immediate release of seized property in many circumstances, pending final determination of the forfeiture action. Additionally, it provides a right to the owner of the seized property to sue the federal government for negligence in the handling or storage of their property if the property is not ultimately forfeited.

On the other hand, H.R. 1965 does nothing to correct the abuses of the current system. In fact, as written, H.R. 1965 would make the current system subject to even more abuse. If H.R. 1965 were brought to the House floor for a vote, we would work to defeat it. We would also encourage any business, or person for that matter, to oppose H.R. 1965 because it would create a system that would encourage more government seizures under the civil assets forfeiture laws.

H.R. 1965 is worse than no bill at all. Specifically, it includes the following especially unacceptable provisions insisted upon by the government seizing agencies:

- Allows the government a special Summary Judgment rule not enjoyed by any other litigant in any other cases -- encouraging agencies to "seize now, fish later," to seize and hold private property without probable cause, while the government uses depositions and interrogatories, as well as requests for production of documents, to

1320 18<sup>th</sup> STREET NW, SUITE 200, WASHINGTON DC 20036  
PHONE: 202/785-0266 FAX: 202/785-0261

"justify" its seizure and after-the-fact filing of a complaint. Imposes costly pre-trial discovery burdens on the innocent private property owner.

- Defines "proceeds" of any crime, including complex regulatory "crimes," so broadly as to include the "gross receipts" of an offense, without any allowance for the cost of legitimate goods and services provided by the offender (e.g., the otherwise innocent merchant). The only relief provided is in an unduly limited number of "fraud" cases.
- Unduly constricts the definition of "innocent owner" or third party, to merely purchasers of goods and services, so that banks and other innocent, bona fide sellers of goods and services will be excluded from protection.
- Restricts the appointment of counsel for indigent claimants to cases meeting Star Chamber procedural requirements anathema to American law. The claimant requesting court-appointed counsel must submit to wide-open cross-examination by the federal prosecutor — into anything, including the merits of the case — before any appointment can take place.

H.R. 1835 is solid legislation which anyone who has followed the many abuses, such as those which were detailed in the hearing you held on this issue before the Judiciary Committee earlier this year should support. On the other hand, with all due respect, H.R. 1965 is bad legislation and represents an even greater threat than exists under current law. We urge you to bring H.R. 1835 to the House floor where we are confident it will easily earn enough votes for passage.

Sincerely,

Name:

Organization:

Rep. for Choice

James V. D. Zoy

Rep. Poling Oh.

Christy Bellish

Institute for Justice

B. J. ...  
First ...

Richard ...  
THE MADISON PROJECT

Paul M. Wagner  
Coalition For America

William H. Rouse  
NATIONAL CONSERVATIVE UNION

ETB (anon)  
HEALTH AND JUSTICE

Amy Moritz Ridenour  
INSTITUTIONAL CENTER FOR PUBLIC POLICY RESEARCH

Joseph M. Phillips  
NATH RIPLE ASSOC. INSTITUTE FOR LEGISLATIVE ACTIONS

James J. ...  
Assoc. of Confused Taxpayers  
Morton M. Blackwell, chairman  
Conservative Leadership PAC

Kristen (On Onagre)  
Eagle Forum

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APPENDIX 2.—MATERIAL SUBMITTED BY J. DAVID POBJECKY, P.A.,  
WINTER HAVEN, FL

J. DAVID POBJECKY, P.A.  
700 AVENUE C SW  
PO DRAWER 7323  
WINTER HAVEN, FLORIDA 33883-7323

MAY 21 1987

J. DAVID POBJECKY  
BOARD CERTIFIED TAX LAWYER  
ALSO LICENSED IN TEXAS

AREA CODE 941  
PHONE 384-0603  
FAX ON REQUEST

May 15, 1987

Charles Canady  
U.S. House of Representatives  
129 Kentucky Avenue  
Lakeland, Florida 33801

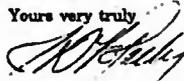
Dear Congressman Canady,

Enclosed is a letter I was requested to draft for Diana Schacht. She requested me to simplify the forfeiture matter and the auspices that we might be called to testify in an up and coming hearing of reforming forfeiture laws. I think my clients story illustrates that "unbridled power" can and does create "unbridled abuse". In other words absolute power can create abuse "absolutely". In the interim, my client has not even recovered cost money let alone reimbursement of fees. There is no provision in our law for damages inflicted.

If you or Congressman Hyde would be so gracious to allow me and/or a member of the family to discuss this matter, it will be greatly appreciated. We feel that our government just does not care.

Thank you for your time and consideration in this matter.

Yours very truly



J. David Pobjecky, P.A.

I have included an additional copy of the letter for Congressman Hyde's review.

LAW OFFICE  
**J. DAVID POBJECKY, P.A.**  
 706 AVENUE G, S.W.  
 P.O. DRAWER 7323  
 WINTER HAVEN, FLORIDA 33909-7323

J. DAVID POBJECKY  
 BOARD CERTIFIED TAX LAWYER  
 ALSO LICENSED IN TEXAS

AREA CODE 941  
 PHONE 284-9602  
 FAX ON REQUEST

Ms. Diana Schacht  
 Deputy Staff Director-Counsel  
 Congress of the United States  
 House of Representatives  
 Committee On The Judiciary  
 2138 Rayburn House Office Building  
 Washington, D.C. 20510-6216

Re: Proposal Amendments identified as "Civil Asset Forfeiture Reform Act."

Dear Ms. Schacht:

I have reviewed the proposal for the "Civil Asset Forfeiture Reform Act" amending Section 861 of Title 18, United States Code, along with Mr. Phillip E. Kuhn, my co-counsel in U.S.A. v. S.J.&W Ranch INC. As you are aware, we represented S.J.&W, INC. in a forfeiture proceeding heard before the Honorable William Hoeveler of the Federal District Court for the Southern District of Florida, Miami, Florida. The case began in 1988 and the forfeiture portion concluded on May 5, 1994 with a verdict favorable to S.J.&W, INC. The favorable judgement was entered on June 27, 1994. The decision can be found in 852 F. Supp.1013. We then filed a Motion for Attorney fees under the Equal Access to Justice Act, (EAJA). Along with the EAJA motion, a motion was filed for sanctions against the government and an action for damages resulting from economic losses to the corporation and its shareholders as a direct result of the seizure. Needless to say, since the "king can do no wrong" our action for damages was summarily dismissed. We concluded a seven day hearing on the attorney fee request on June 26, 1995 and are currently awaiting for a decision on the attorney fees and sanctions motions.

This case arose when the U.S. Attorney instituted a forfeiture action on approximately 7,000 acres of ranch land in Glades County, Florida which has belonged to the S.J.&W family for over fifty (50) years. This seizure was the largest forfeiture action to date. Upon the "arrest" of the land, based on the weakest of evidence, the U.S. Attorney immediately disclosed in a prearranged press conference that he was taking the "drug war to the drug smuggler's turf." This and other statements were widely circulated in the South Florida region by both print and the electronic media. As a result, these statements have become a source of severe embarrassment to the law-abiding S.J.&W family. The emotional pain, the fear of losing such large acreage and working cattle ranch, the uncertainty generally associated with litigation and the economical cost was substantial and devastating. Mildred Jones, the matriarch of S.J.&W, suffered stress-induced diabetes, congestive heart failure, and unbearable mental pain and suffering. Tony Wiersma, daughter of Roger and Mildred Jones, had to live for six years wondering whether she and/or her husband, Bill, would be arrested and wrongfully charged with a crime. In the interim, their young, twin daughters spent their formative years in an atmosphere of fear, anguish and hopelessness in which they were surrounded by nightly discussions in which the family attempted to disprove a case

Page 2

that lacked a minimal foundation and attempted to prove the negative, "WE ARE INNOCENT!!!" (Note, attached is a copy of an extraction from the diary of one of the young twin daughters. It was found by her parents on the day they left for the final hearing in October, 1993.) Moreover, Donald Jones, the son and shareholder was forced to endure the degradation of his sister and mother while encompassed in a realm of complete loss and powerlessness.

The seizure of the SJ&W property commenced on September 13, 1988, two and one-half years after a plane crashed on the Seminole Indian Reservation which shares a common border with SJ&W and other, privately, owned ranches. The seizure was unannounced and came as the ultimate surprise to the unwary shareholders, Mildred Jones, Tony Wierama, and Donald Jones. The government did not even seek to go on the land prior to the seizure to investigate the alleged, clandestine airstrip. Both law enforcement officers involved in the seizure acknowledged they never asked for permission to go on the land and one of them ironically stated that it was because he did not feel he had "probable cause." After the seizure, in 1988, the government did not go on the land until September 1993, approximately one month before the final hearing in October of 1993. At this hearing, Officer King stated that after the seizure he did not request permission because the topographical condition had obviously changed between February of 1986, the date of the crash, and September 1988, the date of the forfeiture and seizure.

The affidavits used for the "ex parte" seizure was fraught with errors. For example, the two law officers placed the alleged strip in different locations and then proceeded to seize another parcel of SJ&W land consisting of two thousand four hundred (2,400) acres that was not even geographically attached. The seizure of SJ&W was based on the hearsay evidence of a jailed drug smuggler, Larry Fernandez, a renowned perjurer, and a man named Buddy Platt who happened to mentioned the word "Scarborough" during a questionable interrogation by the two law officers, affiants for this seizure. Buddy Platt subsequently recanted his statements, under oath, in subsequent court proceedings prior to the seizure. (Note, Scarborough was Mildred Jones's maiden name and what the ranch was called prior and after the incorporation of SJ&W in 1979.)

To this day we have not been able to determine the exact location of the alleged airstrip. Their record shows that Officers Herne and King have never agree to a common location. As a matter of fact, Mr. Fernandez named another ranch as the site of the strip in his taped statement to the two law officers in 1986. This was not disclosed to the Court during its initial "ex parte" seizure or in subsequent affidavits for securing a summary judgment as to probable cause for forfeiture. Ironically, the government lost all physical and tangible evidence such as the map used in one of Larry Fernandez's taped statements, in 1986, where he specifically pointed out yet another site for the strip. (Note, one of the Law Officers even recognized the site pointed out on the missing map as belonging to the Beck family and even acknowledged that the Beck property had an airstrip in which complaints had been previously lodged by an adjacent land owner as to suspicious night traffic.)

In 1991 both the government and SJ&W sought summary judgments. The government's judgement was granted and the landowners were denied as "innocent owners" based on the fact that the government said they needed more time for discovery. SJ&W

Page 3

took the depositions of the two law officers involved and refuted their affidavits used in the seizure and summary judgement proceedings. (Note, the two law enforcement officers both stated they had no evidence against the shareholders, spouses, etc. as to refute the "innocent owner" defense.)

SJ&W sought and received a "Franka Hearing" which was held in March of 1993 for two days. In late July of 1993, the court reversed itself on its previous summary judgement for the government as to the forfeiture and set a final hearing for early October of 1993. After eight years of procrastination, the government conducted its first real discovery with a deluge of requests. (Note, discovery prior to this date merely consisted of canned interrogatories and requests to produce which were attached to the initial forfeiture complaint.) Therefore, they managed to keep us, the SJ&W attorneys, submerged until the final hearing in an attempt to minimize our preparation time.

The government commenced their final hearing by completely changing their story. They secured the services of "so-called" experts to reconstruct the accident scene and give opinions as to whether a plane could land on the designated clandestine airstrip. Ironically, this testimony contradicted the government's own NISTB experts who investigated the accident immediately upon discovery thereof in February of 1986. These experts were paid prime fees at the taxpayer's expense while their investigation consisted of making analyses eight years after the crash. The government also recreated the crime by testifying that the alleged smugglers came in through an alleged wire-gap gate at the back of the property. To this day, the wire gate has not been found. However, it was earlier sworn to that they had entered through a front gate which was supposedly wooden. (Note, testimony showed that this did not even exist at the time of the crash and had been replaced by a metal gate.) Larry Fernandez conducted a report in late August of 1993 and now, miraculously, recalls seeing Bill Wierama at the alleged strip even though at three (3) earlier times, the first in 1986, he thought the person was someone else and failed to identify Mr. Wierama. The government made numerous innuendoes striving to link SJ&W with having a clandestine airstrip via a blatant abuse of hearsay, double hearsay, and triple hearsay evidence. These statements supposedly emanated from drug smugglers, Columbian farmers, even dead people. Agent King testified by reading verbatim from a script disguised as his notes. (Note, the "script" and transcript are exhibits in the proceeding.) Finally, the government in its closing argument stated that all the shareholders were innocent but that Bill Wierama, a nonshareholder, was greedy and secreted his ill gotten gain from his wife. The government concluded that she was forced back to teaching and therefore some of her earnings went to pay off Federal Estate Tax installment obligations by which the corporation benefitted. Monies, drugs, or even convictions were never found or made against the alleged culprits in the SJ&W matter. Besides hearsay, the only thing that was linked to drugs were some metal grommets which were allegedly lost by law enforcement. (Note, The airplanes crashed and burned one (1) mile inside the Seminole Indian Reservation. Twenty soil and ash samples were tested for cocaine residue; of which none was found. This lead Judge Heeverler, during the March hearing, to ask whether or not a crime had been committed.)

In the memorandum opinion of May 5, 1994, the Court recognized the weakness of the government's case. The personal and financial consequences of this arbitrary and unjustified forfeiture decision by the United States is directly attributable to the lack of judicial supervision and intervention at the initial stages of the proceeding. The burden of

Page 4

proof in the "probable cause" - "innocent owner" formula creates the distinctive possibility of instances of economic injustice.

Despite the saga of S.J.&W which continues to thrive today, my clients feel blessed that they were successful in the veneration of the land. However, the family will never recover their good names without an official apology from the government. Furthermore, they were economically harmed because they were unable to improve their land from 1988 until 1994, since they may have destroyed exculpatory evidence or lost the ranch itself through a miscarriage of justice. They are now faced with selling a parcel of land to pay off their debts incurred in fighting the government while paying Federal Estate Taxes at the same time. Remember, retention of the right to remain on the land does not contain the full rights of ownership which include mortgaging, selling, improving, etc. Our clients became, as a matter of law, mere tenants at will awaiting eviction due to the old law that a forfeiture relates back to the criminal act.

The U.S. Supreme Court addressed some of these concerns in the "Austin" trilogy of cases by declaring "private property" a fundamental liberty interest protected by the due process clause of the Fifth (5th) and Fourteenth (14th) Amendments of the Constitution of the United States. However, the greatest abuses need to be thwarted through legislation such as what is now pending. Hopefully this will be expanded to judicial forfeitures in the near future since no citizen of the United States should undergo what my clients had to and still endure.

With the unfolding of events in this case it has become obvious that hearsay evidence should only be permitted in a "Stephen King" horror story. The "clear and convincing" standard should correct that wrong. Congressman Hyde should be commended on using the "asset forfeiture fund" to address attorney fees and damages versus use of taxpayers dollars. This will ensure that someone higher up will ask the necessary questions while "cutting" a check.

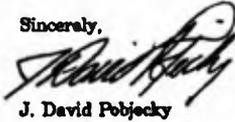
As a result of this experience, both Mr. Kuhn and I strongly believe that any forfeiture proceeding should be limited by those constitutional rights guaranteed in a civil if not a criminal trial, i.e., adequate notice, time to prepare, adequate discovery, effective assistance of counsel, compulsory process, cross-examination and a neutral forum. Thus, if it was not for the taking of depositions of the two law officers over a period of three days, we may not have prevailed. Also, having a seasoned judge such as Judge Hoeveler who granted a "Franks Hearing" in a civil forfeiture was truly a blessing if not a miracle.

In closing, I hope this fulfills your request. Eight years of ones life is difficult to summarize especially when considering the significance of the subject matter. It would be considered a true honor to attend the hearings or further brief you or the Congressmen. Hence, I would like to close that as a two tour combat veteran, I do not think our great country should ever trample individual rights and suppress freedoms in the name of a domestic "drug war." Thus, we will be happy to testify before the Committee regarding this severe injustice committed upon the honest and moral people of S.J.&W. Ranch, Inc. and their nightmarish forfeiture experience.

Page 5

Thank you for your time and cooperation in this matter.

Sincerely,

A handwritten signature in dark ink, appearing to read "J. David Pobjecky". The signature is written in a cursive style with a large, looped initial "J".

J. David Pobjecky

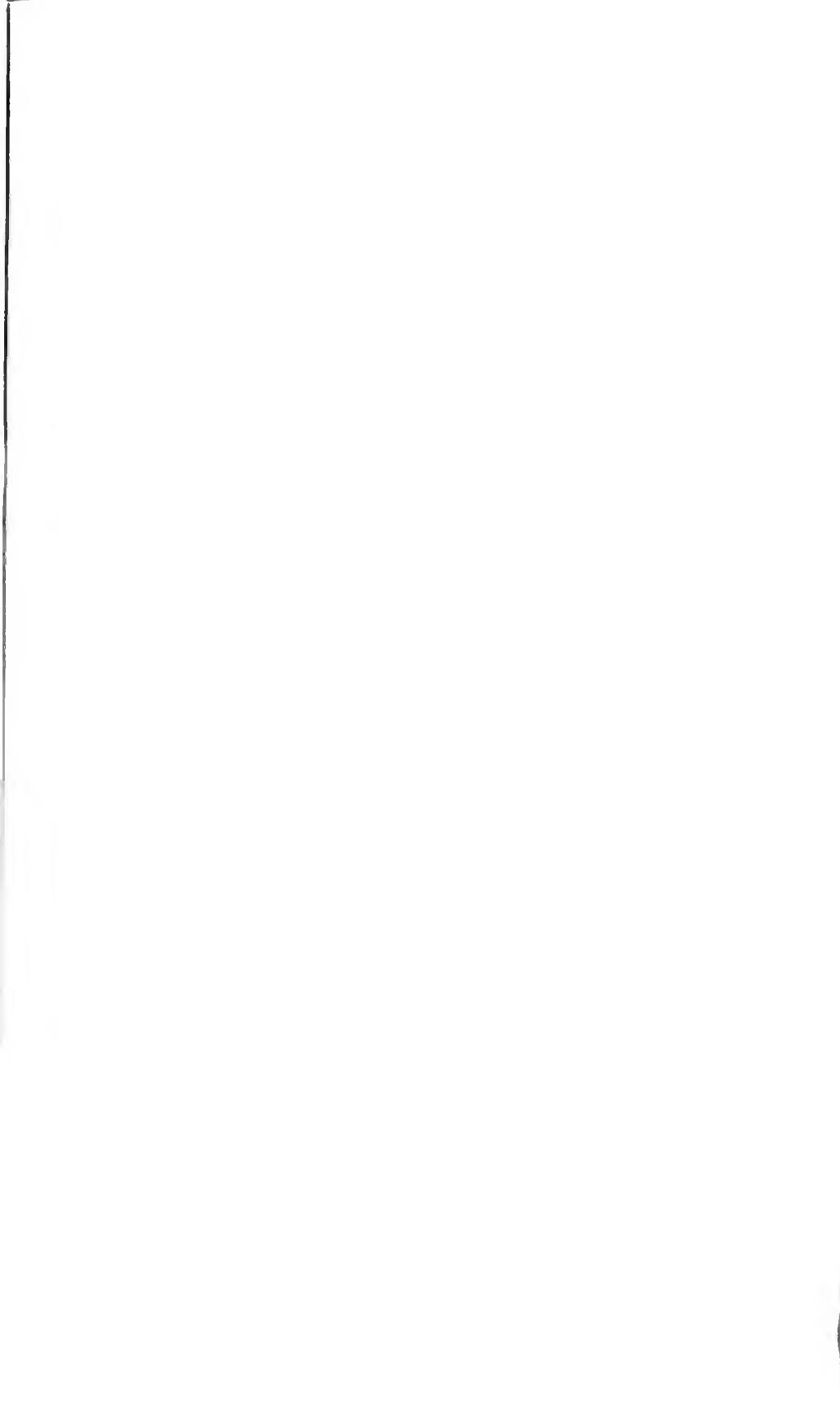
P.S. I have video tapes of evidence from the deposition of Officer King in which he stated that Larry Fernandez is a liar. He also admitted to placing false statements in the aforementioned affidavits.

cc: Congressman Henry Hyde  
Congressman Charles Canady

Today September 13 1993 marks  
 5<sup>th</sup> Anniversary of the horriblest  
 day in my life. I can remember it  
 clearly even though I was only  
 six years old. Early that morning  
 I woke up to hear my mom crying. I go to  
 find out what is wrong and I  
 found Mom and Dad both crying  
 in the kitchen. I was going to find  
 out what was wrong but then  
 I decided to just listen to there  
 conversation while hiding in the  
 living room. That's when I found  
 out about the meanest man in  
 the world. Dexter announce on  
 national television on something like  
 that that he had found the biggest  
 drug smugglers in Florida and  
 he said that it was my family  
 and I knew it wasn't true  
 but I didn't think much about  
 it then because I was only  
 in first grade. As the years pro-  
 gressed I got more involved and  
 interested in this. About a weeks  
 ago I really started listening

to the adults talk about the lawsuit and it really irritates me. I know there's no reason to be worried because all the evidence clearly shows that we could not have done this and all we want is the stupid government to give us our law back and pay us for the thousands of dollars we spent on attorney fees. Yet every night I have nightmares about Mom and Dad going to jail etc. The government is so cruel and mean they just want to get money and make innocent people like us miserable and unhappy. Personally they have done a good job so far of making my life miserable and unhappy and I am only in sixth grade.

Anonymous









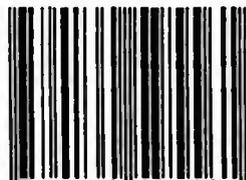


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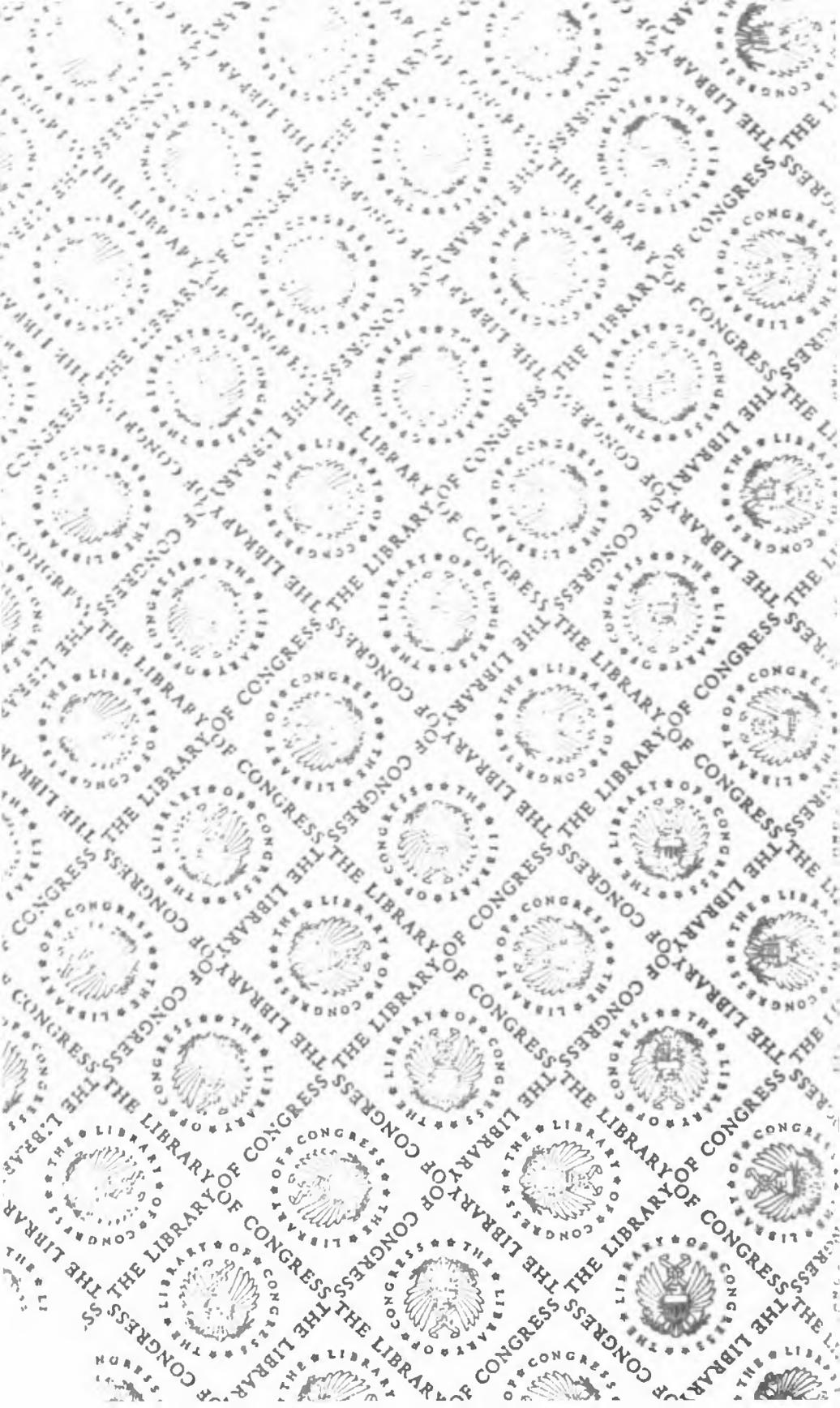


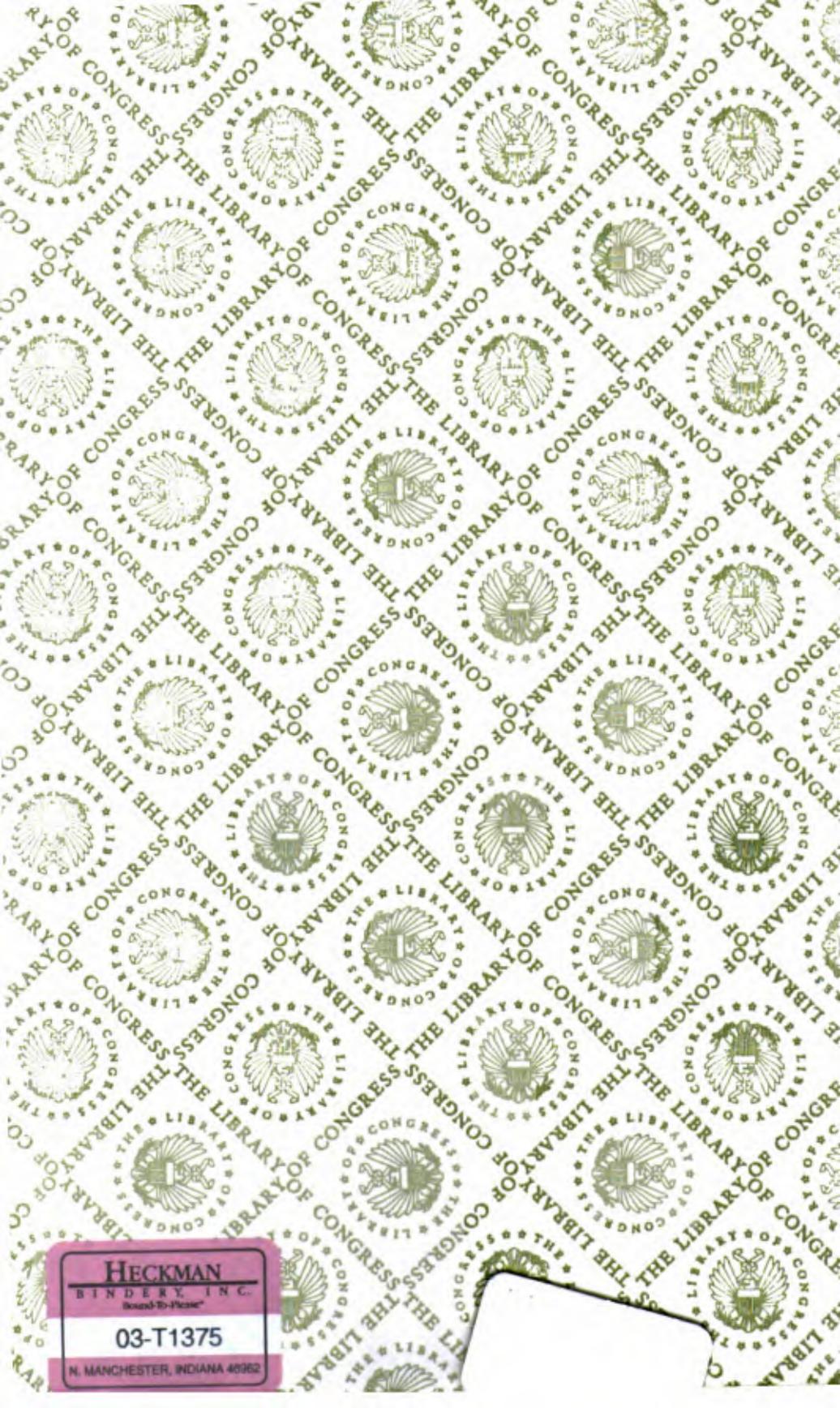
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